Estate Planning & The Farm: Top Tips and Practice Pointers

Mid-South Agricultural and Environmental Law Conference

The primary purpose of good estate planning is to preserve family relationships.

I. Farming is Big Business

A. Price of Land – The price of farm land has increased dramatically in the United States, particularly over the last 3-4 years.
   1. Partly driven by inflation.
   2. Partly driven by the outbreak of the war in Ukraine.
   3. Increased amounts of land came on the market at the end of 2021 due to concerns about possible tax law changes when President Biden came into office, along with the lure of higher prices.
   4. Investors have also come into the market for land, seeing farmland as a safe, long-term investment and a hedge against inflation.

B. Price of Equipment
   1. New equipment prices have continued to increase due to a lack of availability and general profitability of the farmer.
   2. Used equipment prices have increased dramatically based on the same factors driving the price increase of new equipment.

C. Cost of Inputs
   1. Crop Chemicals
   2. Seed
   3. Fertilizer
   4. Fuel
   5. Repairs
   6. Custom Work
   7. Labor
   8. Land Rental Rates

D. Farm Programs, Crop Insurance, Commodity Marketing

E. Many Farm Clients are very savvy
   1. College Education – Many farmers are college-educated, particularly the younger generation coming into farming.
   2. Ongoing Education

F. May need more sophisticated estate planning techniques.
   1. The days of a simple Will are over.

2. Clients are more educated about the possibilities in estate planning. Many know they want to avoid probate and know there are techniques available to reduce both their capital gains tax exposure and their estate tax exposure.
3. With the increase in the value of the farming operation, practitioners need to incorporate sophisticated estate planning techniques to help clients achieve their goals.

II. Farming is a Way of Life

A. Most farmers view their farming operation as a way of life that they would like to pass on to the next generation.
B. Many farmers have inherited land from previous generations and they see themselves as caretakers of the land for a period of time.
C. It can be heart-breaking for farmers if the next generation is not interested in farming. Therefore, they tend to do everything they can to ensure the farming operation continues.

III. The Land is Important!

A. Land may have been in the family for many generations.
B. Consolidation in Farming. Farm land is a finite resource and as farms consolidate and get bigger, the demand for farm land increases.
C. Land is always UNIQUE. Each parcel of land must be evaluated based on its particular characteristics such as:
    1. Fertility
    2. Tillable vs. Pasture vs. Timber vs. "Waste"
    3. Total Acreage
    4. Location
    5. Accessibility
    6. Need for Improvements

IV. Special Considerations when Estate Planning for Farmers:

A. Co-Ownership of Land
    1. I tend to discourage the co-ownership of land when possible during the estate planning process.
    2. In my experience, it is a rare situation where co-owners can get along and continue to operate a farm together.
    3. If the co-owners cannot get along, the land often ends up getting sold, frequently after a protracted legal battle.
    4. Planning to divide the land makes planning harder for the senior generation.
    5. However, it tends to end up with a better outcome for the estate plan and family relationships.

6. There are different ways to compute the relative value of land: cash flow versus appraised value.
7. Clients may want to do a "rough division" (with less emphasis on values) or may want to have a mechanism in the estate plan for making the values equal.

B. "FAIR is not always EQUAL"
   1. This can be a tricky discussion. Everyone involved in the discussion has different reasons to use this statement.
   2. Consider if the on-farm heir has been under-compensated for his labor and contributions.
      a. From the perspective of the senior generation
      b. From the perspective of the on-farm heir
   3. Consider giving the on-farm heir a "bonus"
      a. Equipment
      b. Specific parcel of land
      c. "Grand Central Station
      d. Livestock Facilities
      e. Grain Facilities
      f. Discount to Purchase

C. Rights of Refusal and Rights to Purchase
   1. Particularly on the real estate, I like to incorporate Rights of Refusal and/or Rights to Purchase.
   2. I prefer to base the purchase price on a current fair market value as determined by appraisal.
      a. May want to incorporate a discount
      b. If you incorporate a discount, you should also incorporate a method for recovering the premium within a certain period of time in order to avoid "flipping."
   3. It can be problematic to include a set price.
   4. You should include a method for determining the Fair Market Value
   5. You may want to allow the purchasers to buy the real estate over a period of time (but consider a short period with specific terms).

D. Right to Rent
   1. You may want to give the on-farm heir the right to rent any real estate that will not be given to them.
   2. Could be either a crop-share arrangement or cash rent arrangement.
   3. You should include a method for determining the rental rate.

E. Trustees
   1. Consider a Special Farming Trustee
   2. Family Members
   3. Corporate Trustee
      a. Give ability to hire a farm manager
      b. Farm manager may be one of the beneficiaries

F. Lifetime Trusts
   1. PURPOSE: Protection of Beneficiaries
   2. Protect from Creditors
   3. Protect from Ex-Spouses
   4. Reduce or Eliminate Estate Tax for Beneficiaries
   5. Flexibility vs. Control
   6. Also called: Heritage Trusts, Dynasty Trusts, GST Trusts

G. Planning with Life Insurance
   1. Consider Irrevocable Life Insurance Trust
   2. Can provide liquidity
   3. Unlikely to be an equalizer

V. Taxes: Where are We and Where are We Going?

A. Federal Estate and Gift Tax
   1. The current exemption for each person is $13.61 Million.
   2. This number is actually based on a $10 Million exemption, increased by inflation.
   3. The combined exemption for a husband and wife is more than $27 Million.
   4. The estate tax rate above exemption is phased in for the first $1 Million and then is 40%.

Taxable Amount	Estate Tax Rate	What Your Estate Would Pay
$0–$10,000	18%	—$0 base tax —18% on taxable amount
$10,001–$20,000	20%	—$1,800 base tax —20% on taxable amount
$20,001–$40,000	22%	—$3,800 base tax —22% on taxable amount
$40,001–$60,000	24%	—$8,200 base tax —24% on taxable amount

$60,001–$80,000	26%	—$13,000 base tax —26% on taxable amount
$80,001–$100,000	28%	—$18,200 base tax —28% on taxable amount
$100,001—$150,000	30%	—$23,800 base tax —30% on taxable amount
$150,001–$250,000	32%	—$38,800 base tax —32% on taxable amount
$250,001–$500,000	34%	—$70,800 base tax —34% on taxable amount
$500,001–$750,000	37%	—$155,800 base tax —37% on taxable amount
$750,001–$1,000,000	39%	—$248,300 base tax —39% on taxable amount
$1,000,000+	40%	—$345,800 base tax —40% on taxable amount

5. The gifts can be given during life, at death, or a combination of both.
6. **The current estate tax exemption sunsets on January 1, 2026.**

B. Where is the Federal Estate and Gift Tax Headed?
- The direction of the Federal Estate and Gift Tax depends on the 2024 Elections.
- Congress may extend the current exemption levels. We have never had a decrease in the exemption amount during the history of the estate tax regime.
- Congress may also allow the current high exemption to sunset at the end of 2025 and fall back to half of the amount of the current exemption.
- When President Biden first came into office, there were concerns that any changes would be made retroactive. This is still a concern.
- You must also factor in the impact of inflation on the increase or decrease in the estate tax exemption.

C. Large Gift Opportunity
   1. There may be an opportunity to make a large lifetime gift before the estate tax exemption goes down.
   2. In order to take advantage of this opportunity, the gift must be larger than the potentially lower estate tax exemption. Otherwise, you have not accomplished anything with the large gift.
   3. You should consider only using one spouses' exemption.
   4. Because we don't yet know what will happen with the election, it may be wise to put clients in a position to make a large gift very quickly.
   5. Utilizing entities to make the gift will allow you to take advantage of discounts for lack of marketability and lack of control.
   6. You should also consider incorporating "Dynasty Trusts into the plan to make a large gift.
   7. The downside of making a large gift is the lack of a stepped-up basis if you make a gift during the lifetime of the client.

D. Capital Gains Tax
   1. **Basis:** the value of the asset at the time you bought it or received it by inheritance.
   2. **Appreciation**: rise in value of an asset from receipt to disposition
   3. **Stepped-up Basis**: if asset is transferred at death, recipients receive a basis of the value of the asset at the date of death.
   4. **Transferred Basis**: if asset is transferred during life, recipients receive the previous owner's basis in the asset.
   5. **It matters because you pay capital gains tax on the difference between the basis and sales price of an asset**.

BASIS: Example
- Buy a farm in 1980 for $100,000. The farm is now worth $500,000.
- If I **SELL** the farm during my lifetime: I owe capital gains tax on $400,000
- If I **GIFT** the farm to my children during my **lifetime**: I do not owe capital gains tax, but my children will owe capital gains tax on the difference between $100,000 and what they sell it for if/when they sell farm
- If I **GIVE** the farm to my children at my **death**: my children will have a basis of $500,000 in the farm. If children sell the farm, will not owe capital gains tax

E. Where is the Capital Gains Tax Headed?
   1. The capital gains tax rate will most likely increase in the near future.
   2. There was some discussion when President Biden took office that they would either eliminate stepped-up basis or tax unrealized capital gains at death.
      a. Proposed Exemptions: $1M plus primary residence (up to $500,000)
      b. Exemption for Farms that Stay in the Family

VI. Government Programs

A. Administered by the FSA (Farm Service Agency) or NRCS (Natural Resource Conservation Service) - both are agencies of the United States Department of Agriculture

B. Types of Government Programs
   1. ARC – Agricultural Risk Coverage
   2. PLC – Price Loss Coverage
      a. Both ARC and PLC will have "base acres" – acres which have a history of growing certain crops (corn, soybeans)
      b. Will also have a certain yield assigned to them
   3. Disaster Relief - USDA may declare certain counties "disaster areas" and farmers may apply for payments.
   4. CRP – Conservation Reserve Program
      a. Government pays the farmer "rent" to take the land out of production.
      b. Contract usually between 10-15 years
   5. Conservation Security Program
      a. Administered by NRCS
      b. Government pays the farmer a certain amount of money to conduct certain conservation practices.

C. General Rules
   1. Can be for landowners or tenants
   2. Must be "actively engaged in farming"
      a. Crop-Share – for landowners
      b. Significant contribution of labor, management, capital, equipment and/or land
   3. Left-hand contributions: capital, equipment and/or land
   4. Right-hand contributions: labor and/or management
   5. Adjusted Gross Income Rule
      a. Not eligible if average adjusted gross income for previous 3 years is more than $900,000
      b. Husband and Wife each get $900,000
      c. Put in place by the 2018 Farm Bill

D. Payment Limits
   1. ARC and PLC - $125,000/person
   2. CRP - $50,000/person
   3. CSP - $40,000/person
   4. Disaster Payments - $70,000 - $100,000/person

5. An ENTITY is 1 person except for a **General Partnership**

E. Planning for Government Programs
   1. **You don't want to reduce eligibility for farm payments by placing them in an entity – Corporation, LLC, joint trust, etc.**
   2. Exception: General Partnership

Example 1
- Husband and Wife own farmland jointly
- If they own jointly in their individual names or in a general partnership, husband and wife are each considered 1 person
- If they transfer the land to a joint trust – the trust qualifies as ***1 person***
- If they transfer the land to an LLC or corporation – the entity qualifies as ***1 person***

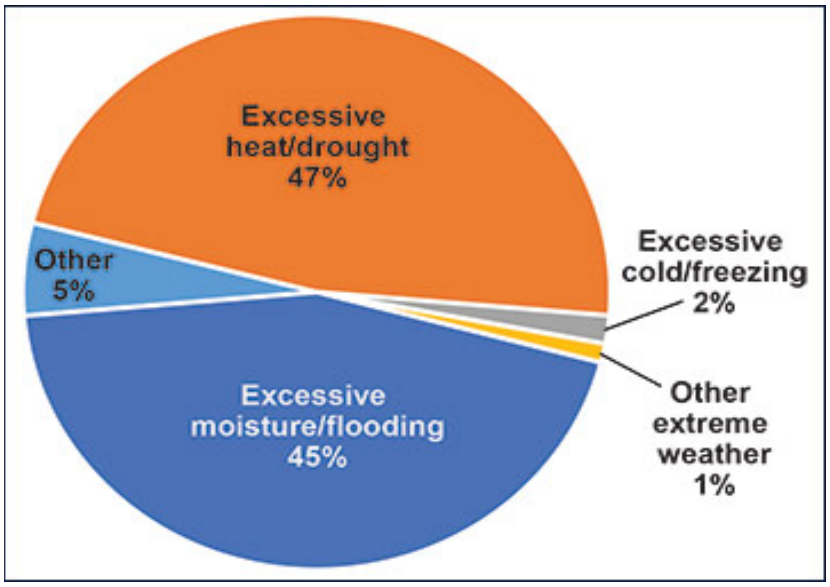
Example 2
- 2 Brothers and 1 Sister own farmland jointly that they want to enroll in CRP
- Each have a $50,000 payment limitation = $150,000 total
- If they transfer the land to an LLC or corporation – the entity qualifies as ***1 person***
  - ***Only qualify for $50,000***

Example 3
- 2 Brothers farm together and want to enroll in CSP
- If have general partnership – each qualify for up to $40,000 payment ($80,000 total)
- If have a corporation or LLC – only qualify for one payment of $40,000

3. **Layer entities under a general partnership -** Each spouse or partner has a separate trust or LLC that is a partner in a general partnership

VII. Crop Insurance

A. What is Crop Insurance?
   1. Protects Farmers Against:
      a. Natural Disasters – Drought, Flood, Tornado
      b. Poor Harvests
      c. Crop Loss
   2. Different Events
   3. Different Crops (Corn, Soybeans, Wheat, etc.)
   4. Revenue Policy - pays out based on the amount of revenue that the farmer loses because of a certain event
      a. Based on Previous Yields



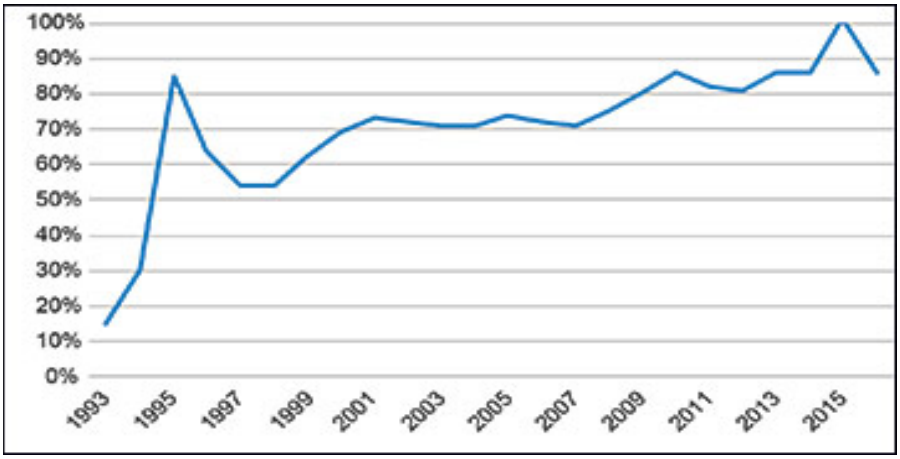
*Source: University of Missouri Extension

5. The Risk Management Agency of the USDA administers the Federal Crop Insurance Corporation
6. Private companies sell and service all federal crop insurance products.
7. RMA develops and approves the premium rates, administers subsidies, approves and supports products, and reinsures these private companies.

B. Planning for Crop Insurance
   1. May want to segregate high-risk land from other land to reduce the overall cost of crop insurance
   2. Create multiple LLCs to lease the land
   3. This can adjust from year-to-year

C. Increase in Crop Insurance

1. The percentage of Missouri cropland insured has steadily increased since the mid-1990s



Fourth Amendment and Agriculture: Warrantless Access to Agricultural and Private Rural Lands

Robert Frommer and Joshua Windham

Introduction – Institute for Justice (10 minutes)

- We're a national non-profit public-interest law firm that litigates to defend constitutional rights, including property rights, free speech, and economic liberty. We do what's called strategic litigation, meaning we bring cases designed to move the law in a more pro-freedom direction over time. The goal (and our clients share this goal) is not just to help one person, but to set legal precedent that will help millions of people.
- Even before we started doing more Fourth Amendment work, we've had a long history of helping farmers push back on government abuse
    - In *DeVillier v. Texas*, 601 U.S. 285 (2024), IJ represented a Texas cattle rancher named Richie DeVillier **[Slide]** after the State of Texas built a highway barrier that flooded his land. The Fifth Amendment allows the government to take property for public use—as Texas did when it flooded Richie's land—but only if the government pays "just compensation." Texas hadn't paid Richie—it just flooded his land, land his family had worked for generations, and left him to deal with the consequences. The question in the case was whether Richie could sue Texas to seek that compensation, or whether he needed the Texas legislature's permission to do so. A couple months ago, the U.S. Supreme Court held that Richie had a right to sue Texas under Texas law—even without a statute—and allowed Richie's lawsuit to move forward. **[Opinion attached]**
    - In *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017), IJ represented Ocheessee Creamery, a small dairy farm in Florida owned by Mary Lou Wesselhoeft **[Slide]** after the Florida Department of Agriculture banned them from advertising their all-natural skim milk as . . . "skim milk" because she wanted to sell it as pure milk without additives. I'm not joking: Florida banned Mary Lou from calling her skim milk "skim milk" because she refused to add artificial ingredients back into it after skimming the fat off. In 2017, the Eleventh Circuit held that Florida's ban violated the First Amendment—farmers are allowed to truthfully describe their own products. That's free speech. **[Opinion attached]**

- These are just a couple examples, but today we want to focus a bit more on the Fourth Amendment and how abusive searches and seizures affect rural landowners.

Fourth Amendment – Private Land (30 minutes)

- And we thought it would be useful to start with a quick primer on the Fourth Amendment, just to set the stage. The Fourth Amendment protects your right to be secure from unreasonable searches and seizures. Generally speaking, that means the government has to get a warrant based on probable cause before it searches or seize your property. If you go back and look at the historical events that inspired the Fourth Amendment, it was a response to what were called "general warrants." You can think of a general warrant like a blank check for a government official to search and seize property. They didn't require probable cause, they didn't require a specific description of the property to be searched or seized, and they didn't limit the scope of the search. They gave officials unfettered discretion to decide all of that for themselves. The Fourth Amendment was adopted, in large part, secure our property from these kinds of discretionary searches.
- The problem is, courts have invented all kinds of exceptions and loopholes that expose Americans to abusive searches and seizures. So, a few years ago, we started our Fourth Amendment Project **[Slide]** to start closing some of those loopholes. And we'd like to cover a few of those here—some we're already working on, and some that we're hoping to work more on.
    - Open fields doctrine
        - [Josh will tell the story of how he learned about the open fields doctrine using the *Rainwaters* case] **[Slide]**
        - What is the open fields doctrine? Simply put, it holds that all private land beyond the curtilage (the tiny ring of land around your home) receives zero Fourth Amendment protection. As a result, government officials can invade your land at will, roam around as they please, and spy on you—all without a warrant, probable cause, or any other limits. The open fields doctrine is essentially a general warrant for private land.
        - The U.S. Supreme Court announced the open fields doctrine exactly 100 years ago in *Hester v. United States* **[Opinion attached]**. We think that doctrine is wrong—and if you're interested in learning why, Josh wrote a law review article about it that's forthcoming in the GMU Law

Review **[Article attached]**. But the doctrine is pretty entrenched as a matter of federal Fourth Amendment law. So we've taken a long-range approach. We're using state constitutions to push back on the doctrine at the state level, with the hopes of creating a domino effect that will one day convince SCOTUS to revisit the issue.

- [Discuss *Rainwaters*, *Highlander*, *Punxsutawney Hunting Club*, *Manuel* cases, including the recent *Rainwaters*] **[Slides for each] [Opinion attached]**

- Drone surveillance
  - Another issue related to the open fields is aerial surveillance. Unlike open fields, which is about physical entry onto private land, the aerial surveillance problem is rooted in the Supreme Court's distorted conception of the term "search" in the Fourth Amendment.
  - The Fourth Amendment forbids "unreasonable searches." But the reasonableness requirement—what most people think of as the warrant requirement—only kicks in if the government has conducted a "search" in the first place. The Supreme Court has given two definitions: (1) a physical information-gathering intrusion, and (2) a violation of a reasonable expectation of privacy. Applying that logic, the Court has upheld warrantless aerial surveillance as falling outside the definition of "search." *See California v. Ciraolo*, 476 U.S. 207 (1986). **[Opinion attached]** In our view, the Court is reading the term "search" far too narrowly.
  - [Explain our proposed ordinary meaning test—a search is a purposeful investigative act directed at you or your property] **[Tuggle amicus brief attached]**
  - [Rob will discuss *Maxon* case, and how the Michigan Court of Appeals dealt with these issues, before the Michigan Supreme Court vacated the decision and ultimately dodged the issue entirely]

- Closely regulated industries
  - A final issue we've worked on is something called the "closely regulated industries" exception to the warrant requirement. The idea here, according to the Supreme Court, is that some businesses are so "closely" or

"pervasively" regulated that the owners of these businesses can't reasonably expect privacy. The exception allows warrantless inspections of businesses if (1) the business is closely regulated, and (2) three criteria are met: (a) the inspections are part of a regulatory scheme that furthers an important governmental interest, (b) warrantless inspections are necessary to further that interest, and (c) the regulatory scheme provides a fair substitute for a warrant by placing limits on the timing, frequency, duration, and scope of searches.

- [Josh will discuss *Patel* case and how lower courts are ignoring the limits the Supreme Court has placed on the exception by reading "closely regulated" and the various factors too loosely **[Opinion attached]**
- [Josh will discuss the *Bennett* case and how our client defeated warrantless taxidermy shop inspections there]

- There are also issues we haven't directly litigated, but that we're interested in learning more about.
    - One issue related to the open fields issue is the warrantless seizure of personal property on private land. This has come up in *Highlander* case—indeed, the warrantless seizure of game cameras is a common problem—but we have reason to think it's more widespread. It often comes up in the context of livestock seizures, for example. [Josh will briefly discuss the cattle seizure struck down in *Hopkins v. Nichols* 37 F.4th 1110 (6th Cir. 2022)] **[Opinion attached]**
    - Another issue that lies at the intersection of open fields and closely regulated industries is warrantless farm and crop inspections. We're <u>very interested</u> in filing a case about this. The problem is this: Most states have statutes authorizing Department of Agriculture officials to enter farms without a warrant to inspect plants and crops, and to conduct soil or water samples. We think these schemes violate the Fourth Amendment: They give state officials unfettered discretion to enter farms, roam around crops, and even take samples without any limits on their power.

<u>Future Efforts to Secure Private Land</u> (5 minutes)

- Our goal at IJ is to close these loopholes. In our view, private land isn't a constitutional stepchild—it's some of the oldest, most essential property we own. It's baked into our history as Americans, provides a

way of life and a source of income for millions of people, and gives us a place to carve out a degree of privacy and autonomy for ourselves in this world. At IJ, we want to protect it. And that means, more than anything, fixing some of the major distortions in Fourth Amendment law we've talked about:

    - Restoring the ordinary meaning of the term "search" so that aerial surveillance isn't exempt from the Fourth Amendment
    - Overruling the open fields doctrine so that private land isn't subject to unfettered physical intrusions and seizures of personal property
    - Establishing that people don't give up their privacy rights when they open a business on their land—whether a taxidermy shop, a farm, or any other kind of economic use

- But to do all this, we need your help. One reason we were so excited to come to this conference was that we wanted to meet more people in the agricultural community. We need to know the regulatory problems you're facing so that we can focus our cases on problems that affect real people.
- *So, if you or somebody you know has dealt with the kinds of abuses we've talked about today, or anything similar, please come talk to us! We'd love to see if there's something we can do to help.*

Question and Answer Session (15 minutes)

Links to materials - Dropbox folder with Cases and Articles

The Open Fields Doctrine Is Wrong

Joshua Windham[*]

Abstract. This year marks the centennial of the Fourth Amendment "open fields" doctrine. That doctrine holds that the vast majority of private land in the United States receives zero Fourth Amendment protection—and thus government officials can enter any land they please and conduct unfettered surveillance. The Supreme Court has given two main justifications for the doctrine: the Fourth Amendment's text does not mention land, and nobody can reasonably expect privacy on their land. This Article will argue that neither justification holds up. Even if "open" land deserves no Fourth Amendment protection, a contextual reading of the text and a proper application of the privacy test show that "closed" land—land we use and mark as private—deserves protection from arbitrary searches. The open fields doctrine should be overruled.

[*] Attorney and Elfie Gallun Fellow in Freedom and the Constitution, Institute for Justice. This Article reflects my personal views and not necessarily those of the Institute for Justice. Thanks to the Institute for Justice for the opportunity, to our donors for the resources, to our clients for the inspiration, and to my colleague Robert Frommer for the brainstorming.

Introduction

Exactly a century ago, the Supreme Court held that the vast majority of private lands in the country—what it called "open fields"—receive no Fourth Amendment protection. That's true even if the lands are "closed" to the public by private use and markings that, under state trespass law, would be sufficient to exclude intruders. As a result, officials at every level can invade our land without a warrant or probable cause, roam around as they please, and even (say some courts) place cameras on the land to continue spying after they leave—and the Fourth Amendment has nothing to say.

That is wrong. The Supreme Court has given two main justifications for the open fields doctrine. In 1924, the Court gave a textual one: The Fourth Amendment protects "persons, houses, papers, and effects," but not land.[1] In 1984, the Court gave a privacy justification: Under *Katz*, the Amendment protects "reasonable expectations of privacy," and it's never reasonable to expect privacy on land beyond the curtilage (the tiny ring of land around the home).[2] While there may be reasons to question the Court's narrow reading of "houses" and effects,"[3] and the validity of the *Katz* test,[4] this Article doesn't fight those premises. Rather, I argue that the Court's textual and privacy analyses were wrong on their own terms.[5]

First, I tackle the textual argument. The Court's core error was that it failed to read the Fourth Amendment's "persons, houses, papers, and

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[1] Hester v. United States, 265 U.S. 57 (1924).

[2] Oliver v. United States, 466 U.S. 170 (1984).

[3] Specifically, I'm skeptical that "houses" means only four walls, a roof, and curtilage, and that "effects" means only personal property. *See Oliver*, 466 U.S. at 176–77, 180 & n.7. As for houses, at the founding, nine in 10 Americans lived off the land and ran "household factor[ies]" that integrated domestic and farm life in a way that "mobilized the entire family." BRUCE LAURIE, ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA 16–17 (1997). And there are, of course, myriad "houses" (warehouses, storehouses, public houses) that are not dwellings. So it seems plausible that "houses" is broader than the Euclidian concept that strikes our modern eyes. As for "effects," while some founding-era sources defined it to mean personal property, courts sometimes used it more broadly. *See, e.g.*, Hogan v. Jackson (1775) 98 Eng. Rep. 1096, 1099 (KB) (reading "effects" in a will to mean "worldly substance" or "all a man's property"); Ferguson v. Zepp, 8 F. Cas. 1154, 1155 (C.C.E.D. Pa. 1827) (No. 4,742) (same). This Article takes no position on the true meaning of these terms. The point is simply that these terms may warrant more reflection than the Court has given them.

[4] *See* William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 & n.7 (2016) (noting common critiques that "[t]he reasonable expectation of privacy concept has . . . serious defects, including its ambiguous meaning, it subjective analysis, its unpredictable application, its unsuitability for judicial administration, and its potential circularity").

[5] I'm not the first to critique the open fields doctrine. *See, e.g.*, Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 21–22 (1986) ("a severe threat to liberty" and "indefensible as a matter of precedent, history and common sense"); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 130–31 (2002) ("permits police to engage in what is criminal misconduct"); Elizabeth Kingston, *Keeping Up With* Jones*: The Need to Abandon the Open Fields Doctrine*, 52 CRIM. L. BULLETIN 1392 (2016) ("illogical considering existing case law"); Graeme Minchin, *The Incredible Shrinking Fourth Amendment*, 12 BEIJING L. REV. 813, 825–27 (2021) ("at odds with both constitutional rights and property law" and arose "out of thin air").

effects" language in context. It cherry-picked five of the Amendment's 54 words-ignoring the common law, historical, and textual context in which those words arise-and assumed they exhaust its meaning. But they don't. Just as the First Amendment's text banning "Congress" from abridging "freedom of speech" doesn't exhaust its protections against censorship, the Fourth Amendment's "persons, houses, papers" language doesn't exhaust its protections from arbitrary searches. Taking the full context into account, "closed" land-land people use and mark as private -deserves Fourth Amendment protection.

Second, 1 tackle the privacy argument and reach the same conclusion from a different angle. Even if people who never use or mark their land lack a reasonable expectation of privacy, the open fields doctrine goes far beyond that. It holds that people never deserve privacy on land outside the curtilage-regardless of how they use or mark it. That's a mistake. People who use their land and take the steps required by state law to exclude intruders can reasonably expect privacy from intruders. Nor is there any good reason why curtilage sometimes deserves privacy but the land beyond it never does. The open fields doctrine should be overruled.

1. Summary of the Open Fields Doctrine

Before we can assess the open fields doctrine, we need to know how it works and how the Supreme Court has justified it. To preview, the open fields doctrine allows officials to invade the vast majority of private land in this country, and the Supreme Court has given two main reasons why: land does not appear on the Fourth Amendment's list of "persons, houses, papers, and effects," and it's never reasonable to expect privacy on land. After laying this groundwork, l'll show that neither justification holds up.

A. *The Open Fields Doctrine*

The Fourth Amendment's opening words protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." This typically means officials must get a warrant before searching private property.[6] Requiring a warrant-approval from a neutral magistrate that both certifies the official has probable cause and limits the scope of the search-ensures that private property is not "secure only in the discretion of [government] officers."[7]

The open fields doctrine holds that private land beyond the curtilage receives none of these protections. No warrant, no probable cause, and no other limits on the timing, frequency, or duration of searches. ln the

[6] Kentucky v. King, 563 U.S. 452, 459 (20n).
[7] Johnson v. United States, 333 U.S. ro, 14 (1948).

Supreme Court's words, land has "no Fourth Amendment significance," so officials can invade it whenever and however they please.[8] Applying that logic, courts have upheld not only warrantless entries but even the warrantless installation of cameras on private land.[9]

Worse, the open fields doctrine covers the overwhelming majority of private land in the country. The Supreme Court has held that it applies to land that is "neither 'open' nor a 'field'" and despite any "steps [taken] to protect privacy."[10] In other words, it's a categorical rule. As the Sixth Circuit recently put it, "th[e] doctrine does not turn on the nuances of a particular case; the rather typical presence of fences, closed or locked gates, and 'No Trespassing' signs on an otherwise open field therefore has no constitutional import."n

Of course, the curtilage remains protected. But that's an extremely marginal issue. The Institute for Justice recently published a study that used public datasets and mapping software to measure the amount of private land that would qualify as "open fields" under current doctrine. Even assuming the curtilage extends out roo feet from every structure in the country-a generous assumption-only about 4% of all private land could even possibly qualify as curtilage.[12] The remaining 96%- about r.2 billion acres-are unprotected open fields.

B. *The Textual Justiflcation*

The Supreme Court announced the open fields doctrine in *Hester v. United States.*[13] There, federal officers got a tip that Hester was keeping moonshine at his father's farm.[14] The Supreme Court wrote shockingly little about the property, but the record shows that there was a house, a fence about 50-75 yards from the house, and a grove and a barn beyond the fence.[15] Without a warrant, the officers entered the grove, "concealed themselves," jumped the fence, saw Hester hand over a jug, and arrested

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[8] United States v. Jones, 565 U.S. 400, 4n (2012).

[9] *See, e.g.,* United States v. Vankesteren, 553 F.3d 286, 291 (4th Cir. 2009) (upholding warrantless placement of trail camera on private land); Spann v. Carter, 648 F. App'x 586, 587-88 (6th Cir. 2016) (unpublished) (same); State v. Brannon, 2015-Ohio-1488,, 32 (unpublished) (same).

[w] Oliver, 466 U.S. at 180 n.II, 182; *see also* 1 WAYNER. LAFAVE, SEARCH AND SEIZURE§ 2.4(a) (6th ed. Mar. 2024 update) ("In applying the *Hester* doctrine over the years, lower courts have applied the open fields characterization to virtually any lands not falling within the curtilage.").

"Hopkins v. Nichols, 37 F.4th mo, m8 (6th Cir. 2022) (internal quotation marks and brackets omitted).

"Joshua Windham & David Warren, Good *Fences?* Good *Luck,* REGULATION, Spring 2024, at ro-14, https://www.cato.org/regulation/spring-2024/good-fences-good-luck.

[13] 265 U.S. 57 (1924).

[14] *Hester,* 265 U.S. at 57-58.

[15] Tro.f Record, *Hester,* 265 U.S. 57 (No. 243), at 15-16, 19; *see also* Saltzburg, *supra* note 5, at 8 n.32 (discussing "facts not found in the opinion" based on a review of "the entire record that was before the Supreme Court").

him.[16] Hester moved to suppress the officers' testimony as the fruits of an unreasonable search.[17]

But the Supreme Court upheld the search. In all of two sentences, Justice Holmes declared that private land beyond the curtilage receives zero Fourth Amendment protection: "[I]t is enough to say that ... the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 BL Comm. 223, 225, 226."[18] In other words, *Hester* looked at just five of the Fourth Amendment's 54 words and reasoned: *Land is not listed, so land is not protected.*

Hester's narrow textualist approach was in step with the times. Just four years later, the Court held that tapping Roy Olmstead's phone lines to catch him selling liquor did not implicate the Fourth Amendment.[19] The Court cited *Hester* for the rule that the Amendment protects only what it lists, and reasoned that "[t]he language of the amendment cannot be extended and expanded to include telephone wires."[20] *Olmstead* was later overruled-yet *Hester* is alive and well.

C. *The Privacy Justification*

Four justices dissented in *Olmstead,* sowing the seeds of its demise. Justice Butler, joined by Justice Stone, thought the majority had erred by cabining the Fourth Amendment to the "literal meaning of the words" rather than using "the rule of liberal construction that has always been applied to provisions of the Constitution safeguarding personal rights."[21] Justice Brandeis rejected the majority's "unduly literal construction" of the text.[22] And Justice Holmes-the man who wrote Hester-panned the majority for "sticking too closely to the words of [the] law where those words impart a policy that goes beyond them."[23]

The *Olmstead* dissenters' more liberal approach prevailed in *Katz v. United States.*[24] There, the Supreme Court held that police conducted a "search" when they attached a recording device to the outside of a public phone booth to spy on Katz's private phone call.[25] The Court rejected the

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[16] *Hester,* 265 U.S. at 58; Tr. of Record, *Hester,* 265 U.S. 57 (No. 243), at 16.

[17] *Hester,* 265 U.S. at 58.

[18] *Id.* at 59.

[19] Olmstead v. United States, 277 U.S. 438, 455-57, 466 (1928), *overruled by* Katz v. United States, 389 U.S. 347, 352-53 (1967).

[20] *Olmstead,* 277 U.S. at 464-65 (citing, in part, *Hester,* 265 U.S. 57).

[21] *Id.* at 487-88 (Butler,)., dissenting); *id.* at 488 (Stone,)., dissenting) ("I agree also with ... Mr. Justice Butler so far as it deals with the merits.").

[22] *Id.* at 476 (Brandeis, J., dissenting).

[23] *Id.* at 469 (Holmes,)., dissenting).

[24] 389 U.S. 347 (1967).

[25] *Katz,* 389 U.S. at 352.

"narrow view" that the Fourth Amendment is merely a list of "protected area[s]," reasoning that it "protects people" "from unreasonable searches" "[w]herever [they] may be."[26]

Katz brought about a sea change in Fourth Amendment law. Unlike *Hester* and *Olmstead*, which asked whether officials had invaded a listed item ("persons, houses, papers, [or] effects"), *Katz* asked whether officials had "violated the privacy upon which [a person] justifiably relied"—an inquiry that turned, at least in part, on the difference between "[w]hat a person knowingly exposes to the public" and "what he seeks to preserve as private."[27] Or, as Justice Harlan's later-adopted concurrence explained, the Fourth Amendment protects "reasonable expectation[s] of privacy."[28]

After *Katz*, there was an open question about *Hester*'s validity. While the issue loomed in *Katz*—the government cited *Hester* and Katz argued it was "wrong"—the Court did not resolve it.[29] So lawyers and scholars, armed with a new test, started arguing that landowners could establish a reasonable expectation of privacy by taking lawful steps—fences, signs, etc.—to exclude intruders.[30] These arguments were so successful that, by the early 1980s, six federal circuits and most state supreme courts had "rejected [*Hester*'s] per se rule" (*land is never protected*) in favor of *Katz*'s more fact-specific inquiry (*land is sometimes protected*).[31]

But the Supreme Court ended all that in *United States v. Oliver*.[32] Similar to *Hester*, police got an anonymous tip that Oliver was growing marijuana on his farm.[33] Without a warrant, they entered the farm, drove past a house to a locked gate posted with a "no trespassing" sign, walked past that gate, heard somebody shout "No hunting is allowed," and kept

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[26] *Id.* at 350–53, 359.

[27] *Id.* at 351–52.

[28] *Id.* at 360 (Harlan, J., concurring); Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's "reasonable expectation of privacy" test).

[29] Tr. of Argument, *Katz*, 389 U.S. 347, at 9:00–9:10 (Katz's lawyer arguing "*Hester* is wrong."), 13:44–54 (Katz's lawyer distinguishing *Hester*), 21:56–22:06 (Katz's lawyer arguing "the *Hester* case has got to go"), 30:29–43 (government's lawyer relying on *Hester*), 37:40–47 (same).

[30] *See, e.g.*, Saltzburg, *supra* note 5, at 18, 22 (arguing that since "*Katz* generally permits a person to control property and to deny public access in order to keep it private," the Fourth Amendment should apply when "[p]rivate land [is] marked in a fashion to render entry thereon clearly against the wishes of the owner or person in control").

[31] At least according to one report. *See* United States v. Oliver, 686 F.2d 356, 361, 367–69 (6th Cir. 1982) (en banc) (Keith, J., dissenting) (collecting cases), *aff'd*, 466 U.S. 170 (1984).

[32] 466 U.S. 170 (1984).

[33] *Oliver*, 466 U.S. at 173–74. *Oliver* was consolidated with a similar case, *Maine v. Thornton* (No. 82-1273), which was on appeal from the Maine Supreme Court's decision that Thornton had established a reasonable expectation of privacy on his land by making efforts to exclude intruders. *Oliver*, 466 U.S. at 174–75 (citing State v. Thornton, 453 A.2d 489 (Me. 1982)); *see also* Bound by Oath, *Mr. Thornton's Woods*, INSTITUTE FOR JUSTICE (Dec. 8, 2023), https://ij.org/podcasts/bound-by-oath/mr-thorntons-woods-season-3-ep-1/ (exploring Mr. Thornton's story and interviewing him on his land).

on walking until they reached a fenced marijuana field over a mile from Oliver's house.[34]

The Court upheld the warrantless search.[35] It began by reaffirming that "the rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment," noting that open fields are neither "houses" nor "effects" because "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property."[36] After reaffirming *Hester,* the Court turned to *Katz.*

The Court held that Oliver's "asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"[37] The Court gave three reasons: First, "[t]here is no societal interest" in limiting "government interference or surveillance" on land. Second, fences and signs, unlike the walls of a home, don't prevent people from seeing land from the ground or air. Third, the common law treated curtilage as part of the home, which "implies ... no expectation of privacy legitimately attaches to open fields."i[8]

Since *Oliver,* the Court has returned to a "property rights baseline" that treats physical intrusions as Fourth Amendment searches.[39] In doing so, though, the Court has stressed that *Hester* remains good law. In 2012, the Court wrote that "an open field, unlike the curtilage of a home ... is not one of those protected areas enumerated in the [text]."[40] And in 2013, the Court wrote that open fields are not protected because they are "not enumerated in the ... text."[4,] Because *Hester* and every major open fields case since has started with the text, that is where my critique will start.

IL Response to the Textual Argument

The textual argument says that private land is not protected because it is "not enumerated in the [Fourth] Amendment's text."[42] The problem with this argument is that it fails to read the text in context. It isolates five of the Fourth Amendment's 54 words ("persons, houses, papers, and effects") and reads them as narrowly as possible, dropping the context in which those words arise. But context is crucial to meaning. Taking the full

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[34] *Oliver,* 466 U.S. at 173-74.

[35] *Id.* at 181, 184. In the Court's view, the entry was a "'search,' but not one 'in the constitutional sense.'" United States v. Jones, 565 U.S. 400, 4n n.8 (2012) (quoting *Oliver,* 466 U.S. at 170).

[36] *Oliver,* 466 U.S. at 176-77 & n.7 (citing Doe v. Dring (1814) ros Eng. Rep. 447, 449 (KB), and 2 WILLIAM BLACKSTONE, COMMENTARIES "16, "384, "385).

[1,] *Oliver,* 466 U.S. at 179.

[38] *Id.* at 179-80 (citing United States v. Van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981); United States v. Williams, 581 F.2d 451,453 (5th Cir. 1978); Care v. United States, 231 F.2d 22, 25 (roth Cir.), *cert. denied,* 351 U.S. 932 (1956)).

[39] Florida v. Jardines, 569 U.S. 1, 5 (2013) (citing *Jones,* 565 U.S. at 406 n.3).

[40] *Jones,* 565 U.S. at 4n (citing *Hester,* 265 U.S. at 59 (1924), and *Oliver,* 466 U.S. at 176-77).

[4,] Jardines, 569 U.S. at 6 (citing *Hester,* 265 U.S. 57).

[4,] *Id.*

common law, historical, and textual context into account, the most reasonable inference to draw from the text is that "closed" land-land we use and mark as private-deserves protection from arbitrary searches.

A. *Meaning Requires Context*

Textual meaning requires context. Consider: My wife teaches fourth grade. At the beginning of every year, she gathers her students and asks them to come up with a list of classroom rules that will help promote a productive learning environment. Then she posts-or promulgates-the rules on the wall for everybody to see. One rule that shows up every year is "Keep your hands to yourself."

How should students read this rule? lf everything they need to know can be found in the dictionary definitions of those five words, then the correct reading is: *Don't touch anybody with your hands.* But that would produce some pretty odd results. Sam couldn't high-five or shake hands with Tom. Odder still, Sam could kick or throw things at Tom because, after all, the rule's text refers only to hands.

That's plainly wrong. lf Sam kicked Tom, he would be punished. And rightly so! We know that because context reveals a more sensible way to read the rule. The point of adopting the classroom rules, all agreed at the outset, was to promote a productive learning environment. Given that context, reading "Keep your hands to yourself' to mean *High-fives are banned and kicking is okay,* would defeat the point.

The better reading is: *Don't physically disrupt your classmates.* The phrase "Keep your hands to yourself' evinces-but does not exhaust-the conduct that won't be allowed in the classroom. lt provides a clear example of what *not* to do and leaves students to generalize, analogize, and infer from there. Kicking isn't mentioned, but it's forbidden.

Context plays the same role in legal interpretation. As Justice Barrett recently wrote, "the meaning of a word depends on the circumstances in which it is used. To strip a word from its context is to strip that word of its meaning."[43] Sometimes, context can clarify semantic meaning (think of business norms clarifying contractual terms). Other times, semantic meaning is clear but context can clarify the inferences we ought to draw from the words (think of implied statutory preemption).

And context is equally important when reading constitutional text. Unlike statutes-easily revised solutions to the concrete policy problems of the day-constitutional provisions set the terms of the social contract, enshrine individual rights, and place limits on government power meant

[43] Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett,]., concurring) (citation omitted); *see also* Pulsifer v. United States, 144 S. Ct. 718, 730-31 (2024) (similar point about importance of reading text in context).

to stand the test of time. By their very nature-a nature statutes do not share-constitutional provisions sweep broadly.

As Chief Justice Marshall wrote in *McCulloch v. Maryland* (1819), a constitution that tried to spell out its whole practical meaning

> would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.... Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.[44]

The Constitution does not and cannot say everything it means. But we can often *infer* meaning in particular cases from what it *does* say.

On this much, even jurists with opposing philosophies agree. Justice Antonin Scalia, an originalist, believed that "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation-though not an interpretation that the language will not bear."[45] And Justice Thurgood Marshall, a living constitutionalist, believed that the Bill of Rights "was designed, not to prescribe with 'precision' ... but to identify ... fundamental human libert[ies]," and thus we should "strive, when interpreting these seminal constitutional provisions, to effectuate their purposes."[46]

Both Scalia and Marshall, notably, pointed to First Amendment law as an example of how this context-sensitive approach works in action.[47] Back to Scalia:

> Take, for example, the provision of the First Amendment that forbids abridgement of "the freedom of speech, or of the press." That phrase does not list the foll range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction.[48]

Marshall made the same point: The phrase "freedom of speech" literally refers only to verbal utterances. "Yet, to give effect to the purpose of the [First Amendment], we have applied it to conduct designed to convey a message."[49]

Just think of all the non-verbal acts the Court has protected under the umbrella "freedom of speech." Marching in Nazi clothes? Protected. Nude dancing? Protected. Flag burning? Protected. Funding or refusing to fund

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44 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

41 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997) (citing *McCulloch,* 17 U.S. (4 Wheat.) at 407).

46 *Oliver,* 466 U.S. at 186-87 (Marshall,]., dissenting).

47 Scalia, *supra* note 45, at 37-38; *Oliver,* 466 U.S. at 187 n.5 (Marshall,]., dissenting).

48 Scalia, *supra* note 45, at 37-38.

49 *Oliver,* 466 U.S. at 187 n.5 (Marshall,]., dissenting) (citing Edwards v. South Carolina, 372 U.S. 229 (1963)).

political advocacy? Protected. Listening to obscenity? Protected. Saying nothing at am Protected.[50]

Why are all these things protected? Because dictionaries don't tell us everything we need to know about the First Amendment.51 Like all Bill of Rights provisions, it embodies "broad principles."[52] So the Court doesn't just seize on the narrowest possible definition of "speech"-as *Hester* did with "houses" and *Oliver* did with "effects"-and stop there. Rather, the Court strives for "the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[53] And that means securing "rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[54]

Look at a famous example: *West Virginia State Board* of *Education v.* Barnette.[55] The plaintiffs there challenged a law that required students to recite the pledge and salute the flag, arguing that the First Amendment secured "a right of self-determination in matters that touch individual opinion."[56] Of course, the text does not mention any of that. But speech is about "communicating ideas," and without "freedom of the mind," free speech would mean nothing.[57] So there must be a broader "sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control."[58] With that deeper liberty in mind, the Court held that forcing a student to "declare a belief' "not in his mind" violates the First Amendment.[59]

The Fourth Amendment is entitled to the same broad construction. Indeed, one of the first major Fourth Amendment cases applied "the rule that constitutional provisions for the security of person and property

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[50] Nat'! Socialist Party of Am. v. Viii. of Skokie, 432 U.S. 43, 44 (1977) (per curiam) (marching in Nazi clothes); City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (dancing without clothes); Texas v. Johnson, 491 U.S. 397,406 (1989) (burning the flag); Citizens United v. Fed. Election Comm'n, 558 U.S. 3ro, 339 (20ro) (ti.mdingpolitical speech); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878, 893-94 (2018) (refusing to fund political speech); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (listening to obscene speech); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (saying nothing).

[5,] Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596, 604 (1982) ("[W]e have long eschewed any 'narrow, literal conception' of the Amendment's terms "(quoting NAACP v. Button, 371 U.S. 415,430 (1963)). The principle of broad construction applies to first amendment text beyond the phrase "freedom of speech." *See, e.g.,* Time, Inc. v. Hill, 385 U.S. 374,389 (1967) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society.").

[5,] *Globe Newspaper* Co., 457 U.S. at 604.

[53] Bridges v. California, 314 U.S. 252, 263 (1941).

[54] *Globe Newspaper,* 457 U.S. at 604.

[55] 319 U.S. 624 (1943).

[56] *Barnette,* 319 U.S. at 627-28, 631.

[57] *Id.* at 632, 637.

[58] *Id.* at 642. As the Court later put it: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley,* 394 U.S. at 565.

[59] *Barnette,* 319 U.S. at 631, 634, 642.

should be liberally construed" because "[a] close and literal construction deprives them of half their efficacy."[60] The *Olmstead* dissenters cited this rule too. As Justice Butler wrote, "[t]his court has always construed the Constitution in light of the principles upon which it was founded," so the Fourth Amendment must be read to "safeguard[] against all evils that are like and equivalent to those embraced within the ordinary meaning of its words_"6,

Which raises the question: Are arbitrary searches of land "evils that are like and equivalent" to those listed in the Fourth Amendment's plain text? Yes they are. But to see why, we need to weigh the Amendment's full context. What property was secure, and insecure, at the founding? What kind of power was the Amendment adopted to constrain? What does the text around "persons, houses, papers, and effects" say about the Amendment's purpose? We'll turn to these questions now, starting with a point *Hester* raised: the common law.

B. *Common Law Trespass*

Reading *Hester,* one gets the sense that the common law protected only the home from invasions, but not the land beyond the home: "the distinction between the [open fields] and the house is as old as the common law. 4 BL Comm. 223, 225, 226."[62] In later cases, the Court cites the same part of Blackstone's *Commentaries* for the idea that only "the area immediately surrounding a dwelling house"-"not the neighboring open fields"-would have received "the same" common law protection as "the house."[63]

Just one problem: The Court's analysis relies solely on a part of the *Commentaries* about "BURGLARY, or nocturnal housebreaking," in a chapter on "Offences Against the Habitations oflndividuals."[64] This is not a fair use of the common law.[65] Obviously, a discussion of burglary will focus on the home. But if we want to understand how the Fourth

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[60] Boyd v. United States, n6 U.S. 616, 635 (1886); *see also* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory,* 48 STAN. L. REV. 555, 574-77 (1996) (noting *Boyd* "announced that [the Supreme Court] would interpret constitutional provisions protecting individual liberty expansively in order to enforce the values embodied in them; it would not be bound by restrictive canons of statutory construction").

[6'] *Olmstead,* 277 U.S. at 487-88 (Butler,)., dissenting); *id.* at 476-79 (Brandeis,)., dissenting) (applying *Boyd* principle).

[fo] *Hester,* 265 U.S. at 59 (1924) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES "'223, "'225, "'226).

[63] United States v. Dunn, 480 U.S. 294,300 & n.3 (1987); *see also Oliver,* 466 U.S. at 180.

[64] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES "'220, "'223.

[65] *See* Saltzburg, *supra* note 5, at 16 ("[T]he *[Hester]* Court neglected to mention that Blackstone described the curtilage for purposes of defining the crime ofburglary."); State v. Dixson, 766 P.2d ro15, ro22-23 (Or. 1988) ("We question Justice Holmes' reading of this section of Blackstone's treatise. In the chapter of Blackstone's *Commentaries* cited by the Supreme Court, Blackstone discussed ... burglary ..... ").

Amendment's context informs the open fields issue, we need to know whether the common law protected land.

It did. At common law, it was illegal to trespass on private land.[66] As Blackstone himself explained in a chapter "On Trespass":

> Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close*; the words of the writ of trespass commanding the defendant to show cause, *quare clausum querentis fregit* [why he broke the close]. For every man's land is in the eye of the law enclosed and set apart from his neighbor's: and that either by a visible material fence, as one field is divided from another or by a hedge; or, by an ideal, invisible boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.[67]

Blackstone says this again and again: "[a trespass] signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property"; "the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression"; "the law of England . . . has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong."[68]

Common law trespass liability even extended to officials who acted without lawful authority.[69] The English cases widely understood to have inspired the founding generation's disdain for arbitrary searches were trespass cases that awarded damages against the officers.[70] While those cases all challenged home entries, one of them—*Entick v. Carrington*, which the Supreme Court has called a "monument of English freedom"[71] —reiterated Blackstone's point that the common law forbade trespassing on private land:

> By the laws of England, every invasion of property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.[72]

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[66] *See, e.g.*, MATTHEW HALE, ANALYSIS OF THE LAW, *109 (describing common law action for "[t]respass by breaking any man's ground, hedges, [etc.], by the party (trespasser) himself, or by his command, or by his cattle, [etc.]") (cleaned up).

[67] 3 WILLIAM BLACKSTONE, COMMENTARIES *209–10.

[68] *Id.* at *209.

[69] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624–26, 661–62 (1999) ("At common law, a search or arrest was presumed an unlawful trespass unless 'justified.'").

[70] *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1196 (2016) (discussing "[t]hree influential cases [that] laid the groundwork for the Founders' rejection of general warrants: *Entick v Carrington* in 1765, *Wilkes v Wood* in 1763, and *Leach v Money* in 1765" (footnotes omitted)).

[71] *Jones*, 565 U.S. at 405 (quoting *Boyd*, 116 U.S. 626).

[72] Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (CP 1765).

Professor Brian Sawers has defended the open fields doctrine on the ground that "Blackstone's doctrine was not accepted in the American colonies."[73] According to Sawers, "trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from open land."[74] But the problem with the open fields doctrine—despite its name—is not that it allows invasions of land the owner has left *open to the public*, but that it allows invasions of land the owner has *closed to the public*.

The history Sawers points to draws this very distinction. He observes that "[t]he common law of England gave the landowner an unqualified right to exclude people and required fencing livestock in. By statute, the colonials reversed the English rule, invariably within a few years of settlement."[75] This shift hardly shows that early Americans rejected the core of English trespass law: "entry on another man's ground without a lawful authority."[76] Instead, it shows that early Americans *preserved* and *adapted* trespass law to suit their novel circumstances.[77] They wanted to settle, but in a way that retained the "absolute rights of Englishmen."[78]

The early American shift to a "fence out" system, moreover, reflected a worldview that tied property rights to cultivation. John Locke famously wrote that property rights arise when a person "hath mixed" the "*Labour* of his Body . . . and the *Work* of his Hands" with "the State that Nature hath provided."[79] Blackstone agreed that "the idea of a more permanent property in the soil" arose from the need to cultivate wild land—for who

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[73] Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 GA. ST. U. L. REV. 471, 492 (2015).

[74] *Id.* at 490.

[75] Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 675 (2011); *see also* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 550 (1996) ("A wave of early nineteenth-century state statutes . . . appeared to reject the English 'fence-in' rule in favor of a new 'free-range' standard, which allowed stock to roam freely over private land without creating trespass liability.").

[76] 3 WILLIAM BLACKSTONE, COMMENTARIES *209.

[77] *See* Buford v. Houtz, 133 U.S. 320, 328 (1890) (observing that "[n]early all the states in early days had what was called the 'Fence Law,'" which specified how to exclude intruders); McKee v. Gratz, 260 U.S. 127, 136 (1922) ("The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of *unenclosed and uncultivated land* in many parts at least of this country. *Over these* it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it." (emphasis added)); Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 904 (2019) (describing how colonial New Haven, Connecticut, enacted "a rigorous set of regulations govern[ing] the erection and maintenance of fences" to ensure property boundaries were marked, and even employed "one of the oldest government officials on the American continent . . . the fence-viewer . . . charged with inspecting fences to ensure they remained in good order" (cleaned up)).

[78] *See* SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS (1772) ("The absolute Rights of Englishmen, and all freemen in or out of Civil Society, are principally, personal security[,] personal liberty[,] and private property."); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1763) (declaring "[t]he end of government . . . is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty, and property"); *see also* 1 WILLIAM BLACKSTONE, *COMMENTARIES* *129 (listing among "the rights of the people of England" "the right of personal security, the right of personal liberty, and the right of private property").

[79] JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 27 (1690).

would toil "if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour?"[80]

Locke and Blackstone were part of a broader intellectual movement that saw the right to exclude as key, but "[p]ossession—occupancy, use or labor" as the "fountainhead of property."[81] The founding generation embraced this view.[82] Which makes sense. In 1791, life happened on the land.[83] As John Dickinson wrote before the revolution: "This continent is a country of planters, farmers, and fisherman . . . ."[84] And as Justice Story recalled after: "The country was a wilderness, and the universal policy was, to procure its cultivation and improvement."[85]

The bottom line is that even if "trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from *open land*,"[86] that's beside the point. Early Americans cherished both cultivation and the right to exclude, and their "fence out" system was an expression of those values. At the time the Fourth Amendment was adopted, a person who invaded fenced land—whether Washington's Mount Vernon or a frontier farm—was a trespasser. Yet it's precisely those *closed lands* that the open fields doctrine exposes to arbitrary searches.[87]

C. *No Arbitrary Searches*

A contextual reading of the Fourth Amendment also requires asking what sort of power it was meant to constrain. In First Amendment cases,

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[80] 2 WILLIAM BLACKSTONE, COMMENTARIES *7; *see also id.* at *9 (explaining that property is "originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use," where it will remain until he "abandon[s] it").

[81] Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 379–403 (2003); *see also id.* at 405 ("Possession—understood as occupancy, use or labor—thus took its central place in the common-law rules concerning property."). On the topic of "possession," it's notable that several state constitutions before and after the fourth amendment's ratification protected a right to be secure in "possessions"—a term that, at the time, was widely understood to refer to land. *See* James C. Phillips, *A Corpus Linguistics Analysis of "Possessions" in American English, 1760–1776*, CHAP. L. REV. (forthcoming 2024) (manuscript at 1, 11–20 & n.1) (study showing that when Americans used the term "possessions" from 1760–1776, they were likely or clearly referring to land 86% of the time), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4668264; *see also* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protections Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 190–210 (1988) (similar argument).

[82] Mossoff, *supra* note 81, at 404.

[83] LAURIE, *supra* note 3, at 16.

[84] JOHN DICKINSON, LETTERS OF A PENNSYLVANIA FARMER (1767), Letter II, at 21.

[85] Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 145 (1829); *see* Sprankling, *supra* note 75, at 521–56 (giving examples of how "early American property law opinions justify the modification of traditional rules as necessary to adapt English law to American wilderness conditions" (footnote omitted)).

[86] Sawers, *Original Misunderstandings*, *supra* note 73, at 490 (emphasis added).

[87] While I've used Sawers as somewhat of a foil for my perspective, it's possible we'd agree on how all the major open fields cases should have been resolved. *Hester*, *Oliver*, and *Dunn* upheld entries of fenced farms. Given Sawers's focus on unfenced and unimproved land, I don't read him as defending the categorical open fields doctrine embodied in these decisions, but rather a narrower version that applies only to *open* lands.

the Court often notes that censorship of individual expression and ideas is anathema to a free society. The founding generation did not want to live in a society where the government holds that kind of power. Can we identify a similar category of power the Fourth Amendment was adopted to limit?

History helps here. While it can't answer every interpretive question, the Fourth Amendment's "formative history" can still shed light on its "enduring purpose."[88] And, happily, for all the debate over its meaning, there's a remarkably "common consensus" that the Fourth Amendment was adopted to address "the evil of arbitrary government rummaging in people's lives."[89] It reflects a deep "[h]ostility to conferring discretionary search authority on common officers."[90]

The classic discretionary searches were carried out under English general warrants and colonial writs of assistance in famous controversies like *Paxton's Case* (1761), *Wilkes v. Wood* (1763), and *Entick v. Carrington* (1765).[91] The common law, with few exceptions, required officials to have a specific warrant—one issued by a judge, based on probable cause, and that limited the scope of the search—before invading private property.[92] General warrants violated these norms by granting discretionary power "to search unspecified places or to seize unspecified persons."[93]

Thus, when Massachusetts lawyer James Otis challenged the use of broad writs of assistance to search homes and warehouses for smuggled goods in *Paxton's Case*, he "complained that the general writ was 'a power that places the liberty of every man in the hands of every petty officer,' that it allowed officers 'to enter our houses when they please,' that it was an instrument of 'arbitrary power,' that it transformed officers into 'tyrant[s],' that it '[delegated] vast powers,' and that it failed even to impose the usual safeguard of requiring the officer to file a 'return' with the issuing court."[94]

While Otis lost *Paxton's Case*, the principle that officials should not wield discretionary power prevailed in *Wilkes* and *Entick*. Both cases arose after Lord Halifax issued general warrants for officers to search for

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[88] M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 906–07 (2010).

[89] Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 316–17 & n.189 (2016) (collecting cases and articles); *see also* Emily Berman, *Individualized Suspicion in the Age of Big Data*, 105 IOWA L. REV. 463, 479 n.69 (2020) (same).

[90] Davies, *supra* note 69, at 576–83.

[91] Friedman & Stein, *supra* note 89, at 315–16; Donohue, *supra* note 70, at 1196–1207, 1243–52.

[92] Donohue, *supra* note 70, at 1220, 1235.

[93] Michael, *supra* note 88, at 909; *see also* Davies, *supra* note 69, at 578–80 & nn.74–78 (explaining how leading common law authorities including Coke, Hale, Hawkins, and Blackstone rejected the idea that ordinary officers could wield discretionary search power).

[94] Davies, *supra* note 69, at 580–81 & n.81 (citing 2 LEGAL PAPERS OF JOHN ADAMS 140–43 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); *see also* Donohue, *supra* note 70, at 1244–52 (explaining facts of *Paxton's Case*).

the authors of papers critical of the Crown.[95] In *Wilkes,* the officers used that vast power to "ransack[] houses and printing shops in their searches, arrest[] forty-nine persons (including the pamphlet's author, Parliament member John Wilkes), and seize[] incriminating papers-all under a single general warrant."[96] In *Entick,* the officers used "force and arms" to break into Entick's house, rooms, chests, and drawers, and to pore over his private papers.[97]

Wilkes and Entick sued the officers for trespass and won damages.[98] Chief Justice Pratt, echoing Otis, rejected the general warrants because they gave the officers far too much discretion. In *Wilkes,* Pratt explained that "a discretionary power given to messengers to search wherever their suspicions may chance to fall …. may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[99] Pratt struck a similar note in *Entick,* rejecting the idea that officers may search wherever they please "whenever the secretary of state shall think fit to charge, or even to suspect, a person."[100]

Part of what made the searches in *Paxton's Case, Wilkes,* and *Entick* so odious was that, unlike modern police, founding-era officers lacked inherent search power. "Proactive criminal law enforcement had not yet developed by the framing of the Bill of Rights."[101] Criminal investigation was instead a reactive process. A complainant would swear out an oath to a justice of the peace, who would decide "whether to activate the criminal justice apparatus for making arrests and searches" by issuing a warrant for an officer to track down the suspect.[102] The warrant was crucial, both to provide "binding instructions" and "to indemnify the constable against trespass claims."[103]

None of this context suggests that the Fourth Amendment tolerates discretionary searches of private land. Rather, the founding generation's disdain for arbitrary searches makes it far more likely that the point of listing "persons, houses, papers, and effects"-the property at risk in *Paxton's Case, Wilkes,* and *Entick-was* to stop discretionary searches before they spread. In the same way the First Amendment lists "freedom of speech," even though it protects a broader range of expression. In the same way "Keep your hands to yourself' calls out the paradigm case of classroom punching, even though it also forbids kicking. The reason to

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[95] Michael, *supra* note 88, at 909-ro.
[96] *Id.* at 9ro.
[97] *Id.* at 9ro-rr.
[98] *Id.*
[99] Wilkes v. Wood, 19 How St Tr n53, n67 (CP 1763).
[wo] Entick v. Carrington, 19 How. St. Tr. ro29, ro66 (CP 1765).
[w,] Davies, *supra* note 69, at 620-24.
[w,] *Id.* at 623-24.
[w3] *Id.* at 624.

list some property was not to *exhaust,* but to *evince,* the arbitrary search power that officials should never be allowed wield.[104]

D. *The Complete Text*

Last, a contextual reading of the Fourth Amendment requires taking its whole text into account. *Hester* failed to do that. lt cherry-picked five of the Amendment's 54 words, ignoring prefatory text about the right "to be secure," text in the warrant clause about "the place to be searched," and the rule of construction that applies to all Bill of Rights provisions: the Ninth Amendment. All three points undercut *Hester*.

Start with the Fourth Amendment's first clause. Contrary to *Hester,* it does not protect only "persons, houses, papers and effects."[105] Rather, it protects *"the right of the people to be secure* in their persons, houses, papers, and effects."[106] That's a real difference. While it's clear the right "to be secure" covers the right to exclude, there's more to it.[107] Security has a broader meaning akin to freedom from threats, danger, or fear-a kind of assurance against intrusions.[108] To the founding generation, the looming threat of arbitrary searches was as much a problem as actual intrusions.[109]

Imagine a small family farm. There's a house at the center, farming throughout, and a perimeter fence. *Hester* says we only care about the house. The Fourth Amendment, though, says we should also care about the farmer's broader right "to be secure in [his] ... house[]." Surely if officers raided the farm without a warrant, posted up around the house, watched it for hours, and then placed cameras around the farm so they could continue spying after they left, that would threaten the farmer's security in his home.

The point of the right "to be secure" is that we shouldn't have to tremble in our homes or live in fear that the government will invade our persons, papers, or effects. Private land contains everything the Fourth Amendment protects. And for millions of Americans, fences and signs are how we keep strangers away from those things. Just as moats secure castles from invasion, private land secures our "persons, houses, papers,

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[104] One last analogy may help drive the point home. Suppose your kitchen floor floods. You see that your sink is leaking and hire a plumber to fix it. The plumber fixes the sink, but while doing so, spots a leaky pipe in the kitchen. Presumably, ifhe left without fixing the pipe, you"d be upset. Why? Because it doesn't matter where the water is coming from-you just don't want it on your floor. I'm making the same point about the fourth amendment. "Persons, houses, papers, effects" : arbitrary searches:: "Come fix my sink" : water on your kitchen floor.

[105] Hester v. United States, 265 U.S. 57, 59 (1924).

[106] U.S. CONST. amend. IV (emphasis added).

[107] Luke M. Milligan, *The Forgotten Right to Be Secure,* 65 HASTINGS L.J. 713, 734-50 (2014).

[108] *Id.* at 738-41.

[109] *Id.;* David H. Gans, *"We Do Not* Want *to Be Hunted": The Right to Be Secure* and Our *Constitutional Story* of Race and *Policing,* rr COLUM. J. RACE & L. 239, 250-59 (2021).

and effects" from arbitrary searches. By skipping past the term "secure," *Hester* discounted all that.

Or look at the Fourth Amendment's second clause. After the phrase *Hester* cites, the Amendment adds: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."no Again, founding-era officers lacked inherent search power and could typically only invade property with a warrant. By setting the bar for valid *warrants,* the founding generation was effectively dictating the requirements for valid *searches.m*

And here's the kicker: The warrant clause, which begins with "and"-implying more protection-requires a specific description of"the place to be searched." At the founding, "place" was a broad term that meant "a particular portion of space."m What is fenced land if not a "place"? The use of a term that plainly includes land at the heart of a clause designed to do much of the Fourth Amendment's lifting provides yet another clue that land deserves protection. Yet here too, *Hester* is silent.

Last, *Hester's* literalism suggests that a rule of construction-if one exists-should inform how we read the Fourth Amendment. Statutes, contracts, and the other legal documents often indicate how they should be read. And so does the Bill of Rights. The Ninth Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."n[3] Of course, there are lively debates about what that means.n[4] My point isn't to stake out a position in that debate.

Rather, my point is that *Hester's* approach-a hyper-literal reading of the text-requires reading the Ninth Amendment literally too. And if we do, then it's clear the Fourth Amendment's list of "persons, houses, papers, and effects" must "not be construed to deny or disparage other rights retained by the people"-including the historical right to exclude

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no U.S. CONST. amend. IV.

m *See* Davies, *supra* note 69, at 554 ("At common law, controlling the warrant did control the ofi1cer for all practical purposes."); Gans, *supra* note ro9, at 261-62 (collecting writings from Madison, St. George Tucker, and William Rawle to the effect that the fourth amendment required specific warrants for searches).

m *See,* e.g., SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) ("Particular portion of space"); JOHN ASH, 2 THE NEW AND COMPLETE ENGLISH DICTIONARY (1775) ("a particular portion of space");)AMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792) ("that part of space which any body possesses"); JOHNWALKER, A CRITICAL PRONOUNCING DICTIONARY (2d ed. 1797) ("Particular portion of space"); NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("A particular portion of space, occupied or intended to be occupied by any person or thing, and considered as the space where a person or thing does or may rest or has rested, as distinct from space in general."); *see also* McCabe, *supra* note 81, at 214-15 (agreeing "place" includes land).

ni U.S. CONST. amend. IX.

n4 *See* ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 98-ro5 (2023) (summarizing debate).

intruders.n[5] *Hester* can't it have both ways. Either we should read the text literally, in which case the Ninth Amendment says not to treat the Fourth Amendment as exhaustive, or we should read the text in context, in which case closed land deserves protection from arbitrary searches.

E. *Summary*

Hester was wrong to treat the phrase "persons, houses, papers, and effects" as an exhaustive list of what the Fourth Amendment protects. Three context clues show why: First, at common law, private land was secure from trespass, and early Americans preserved that rule with a "fence out" system. Second, at the founding, officials needed a specific warrant to search property. Discretionary searches, where they arose, were odious. Third, the whole text-the first clause's right "to be secure," the second clause's requirement that warrants describe "the place to be searched," and the Ninth Amendment's command not to the treat the "enumeration" of rights as exhaustive, all undermine *Hester's* literalism. Taking all these context clues together, the most reasonable inference to draw from the text is that closed land deserves protection from arbitrary searches.n[6]

111. Response to the Privacy Argument

The open fields doctrine is separately wrong under current doctrine if private land-at least in some cases-can satisfy the *Katz* privacy test. Under *Katz,* officials conduct a "search" when they intrude on something a person seeks to keep private and society would deem that expectation reasonable.n[7] I take no issue with the idea that, when a person makes no effort to exclude intruders, his land fails the *Katz* test.n[8] But *Oliver* went further. It held that any "expectation of privacy in open fields"-even if those fields are closed to the public-"is not an expectation that 'society

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[5] *cf:* Akhil Reed Amar, Heller, *HLR,* and *Holistic Legal Reasoning,* 122 HARV. L. REV. 145, 174-75 (2008) (arguing that even if the plain text of the Second Amendment does not include a personal right to keep arms for self-defense, reading that text together with the Ninth Amendment-which "was designed to reassure the American public that the fundamental rights that they believed they already had would not be lost merely because some of these rights were explicitly enumerated or because others were narrowly worded"-separately justifies the result in *Heller).*

[6] To borrow a phrase, arbitrary searches of fenced land are "like and equivalent to those [evils] embraced within the ordinary meaning of [the fourth amendment's] words." *Olmstead,* 277 U.S. at 487-88 (Butler,]., dissenting).

[7] *Katz,* 389 U.S. at 360 (Harlan,]., concurring) (articulating "reasonable expectation of privacy" test); *Smith,* 442 U.S. at 740 (adopting Justice Harlan's test).

[8] *See Oliver,* 466 U.S. at 193-94 (Marshall,]., dissenting) ("If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials.").

recognizes as reasonable."'n[9] That was mistaken, and marching through *Oliver's* privacy analysis shows why.

A. *Intimate Activities*

Oliver's first point is that, unlike a home, "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."[120] Every word of this is incorrect.

First, because people use different property in different ways, privacy necessarily shields distinct activities in distinct places. The mere fact that people use their land for distinct purposes than they use their home -even assuming those uses share little in common-does not make it illegitimate to expect privacy on land. The home may be where privacy expectations are highest, but it's not where they end.

Second, people engage in all sorts of intimate activities on their land. Several of my clients are landowners. I've heard them testify about how they've used their land to raise their children, to take quiet walks with their spouse, to find solitude in nature, to hunt or fish, to camp or have sex, etc. These are common activities that occur on private land across the country every day.m If privacy doesn't cover them, I don't know what privacy is for.

Third, the Court treats it as obvious that "the cultivation of crops" deserves no privacy. But that's far from obvious. At the founding, nine in ro Americans lived off the land.[122] They farmed and operated "household factories" that integrated domestic life and outdoor labor in a way that "mobilized the entire family."[123] That is, farming has long been a family enterprise. And it's one that requires autonomy and long-range focus-which requires privacy. Under *Katz,* we can reasonably expect privacy in office buildings and in cars on public roads. Why not when farming on our land?[124]

"9 *Id.* at 179.

no *Id.*

m *See id.* at 192 (Marshall,]., dissenting) ("Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refoge for wildlife, where flora and fauna are protected from human intervention of any kind." (footnotes omitted)).

m LAURIE, *supra* note 3, at 16.

ni *Id.*

"4 *Oliver,* 466 U.S. at 192 n.14 (Marshall,]., dissenting) ("We accord constitutional protection to businesses conducted in office buildings ... ; it is not apparent why businesses conducted in fields

Fourth, even if "there is no social interest" in securing privacy on land-a big if-the Court has never weighed privacy by its social utility. Nor should it. The point of the right to exclude is that the landowner (like any other property owner) gets to choose who enters and when. lf a landowner forbids entry with a fence or signs, we can assume he regards his activities as private. Every state has a trespass statute-the modern descendants of founding-era fence statutes-that empowers landowners to exclude intruders.[125] lt defies logic to say that "society" has no interest in respecting landowners' privacy when they take every step required by state law to preserve their privacy.

B. No *Public Access*

Oliver's next point is that "as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. lt is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas."[126] The Court is knocking down strawmen here.

The Court may be correct that land is often publicly accessible-but that's only because there is a lot of public and undeveloped private land in this country. The fact that my neighbors keep their doors open and allow public access to their homes does not mean 1 deserve no privacy in mine. Likewise, the fact that other people leave their land open to the public does not make it unreasonable for me to expect privacy on mine -especially when 1 take all the steps required under state law to exclude intruders.

Indeed, more recently, the Court has held that state "property law" reflects the expectations "recognized and permitted by society."[127] And existing data bear this out when it comes to closed land. ln a 20n study, 66.5% of respondents said that posting "no trespassing" signs on land creates a reasonable expectation of privacy.[128] ln a 1993 study, similarly, respondents said that searching fenced and posted cornfields was more

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that are not open to the public are less deserving of the benefit of the Fourth Amendment." (citation omitted)).

"5 *Compare,* e.g., 18 Pa. C.S. *§* 3503(b)(1) (empowering landowners to exclude intruders verbally or with fences or visible signs), *with* Br. for Plaintiffs-Appellants, *Punxsutawney Hunting Club v. Pennsylvania* Game *Commission* (23 WAP 2023) (case pending in the Pennsylvania Supreme Court), https://ij.org/wp-content/uploads/2021/12/Briet for-Appellants_lnternal-Correction.pdf; at 65 (App. 6) (collecting fencing statutes adopted in Pennsylvania from 1700-1905).

"6 *Oliver,* 466 U.S. at 179.

"7 Byrd v. United States, 584 U.S. 395,405 (2018).

"8 Henry F. Fradella et al., *Quantifying* Katz: *Empirically Measuring "Reasonable Expectations* of *Privacy" in the Fourth Amendment Context,* 38 AM. J. CRIM. L. 289, 354 (2orr).

intrusive than a search of a newspaper office, a pat-down, an inspection of plumbing and wiring in a home, and the use of a beeper to track a car.[129]

Moreover, the Court's claim that fences and "no trespassing" signs don't prevent the public from "viewing open fields" is false and misses the point. If fences and signs do their jobs, people will not see the areas they could otherwise only see by entering. Indeed, that was true in every major open fields case-including *Oliver-where* officers had to enter closed land and prowl around until they found something. As for the Court's point about viewing, the open fields doctrine has never been about mere visual observation-it's about physical intrusions.

C. *The Curtilage Mistake*

Oliver's last point is that the common law treated curtilage as part of the home, which "implies that no expectation of privacy legitimately attaches to open fields."[130] This is a non sequitur. Whether the common law treated curtilage as part of the home does not tell us anything about whether it's reasonable, under *Katz,* for a person to expect privacy on his land. Indeed, *Katz* did not mention the common law at all. The question is whether a privacy expectation is reasonable-and surely a person who prays, or has sex, or holds an intimate conversation expects and deserves privacy whether she does these things in her fenced yard (curtilage) or in her fenced woods (open fields).

To the extent the common law matters under *Katz,* it would seem to matter only for the purpose of deciding whether society has historically deemed a privacy expectation reasonable. But if that's how it works, then *Oliver's* fixation on curtilage falls short. Just as the common law forbade *burglary* of the home and its curtilage, the common law forbade *trespass* onto land-a point Blackstone makes in the very section on which *Oliver* relies.[131] At common law, it was entirely reasonable to expect that people would not trespass on your land. And if people violated that expectation, you could sue them. All of that remains true today.[132]

Oliver's only other reason for drawing the line at curtilage is that a "case-by-case approach" would require "police officers ... to guess before

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[129] Christopher Slobogin & Joseph E. Schumacher, Reasonable *Expectations* of *Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look* at *"Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737-38 (1993).

[130] *Oliver,* 466 U.S. at 180 (citing United States v. Van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981); United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978); Care v. United States, 231 F.2d 22, 25 (roth Cir.), *cert. denied,* 351 U.S. 932 (1956)).

[131] *See* 4 WILLIAM BIACKST0NE, COMMENTARIES "'226 (distinguishing "burglary" from "clausum fregit [breaking the close] ... by leaping over ideal invisible boundaries, may constitute a civil trespass").

[132] *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("[O]ne who owns or lawfolly possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude.").

every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy."[133] But just three years later, the Court adopted a four-factor curtilage test that requires officers to guess whether land is sufficiently secluded or used in ways that deserve privacy.[134] If officers are capable of applying these esoteric factors, it's hard to grasp why they would struggle to recognize "such unequivocal and universally understood manifestations of a landowner's desire for privacy" as fences and signs.[135]

D. *Summary*

Oliver's arguments for why we can never reasonably expect privacy on land lack merit. Now, as at the founding, people engage in countless deeply private activities on their land, and it's reasonable for people to expect that those activities will remain private when they take the steps required by state law to exclude intruders. Nor is there any principled reason why, if land around the home sometimes deserves privacy, land beyond that point never deserves it. The courts that held-after *Katz* but before *Oliver-that* private land can sometimes meet the *Katz* test got it right. The Supreme Court was wrong to hold otherwise.

Conclusion

Neither the textual nor the privacy justification for the open fields doctrine holds up. Taking the Fourth Amendment's full common law, historical, and textual context into account, *Hester* was wrong to read the text as a blank check for officials to invade our land whenever and however they please. And *Oliver* was wrong that it's never reasonable to expect privacy on our land. Under either analysis, closed land-land we use and mark as private-deserves protection. The Fourth Amendment was adopted to make us "secure" from arbitrary searches. The open fields doctrine reflects "an impoverished vision of that fundamental right."[136] One hundred years is enough.

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[133] *Oliver,* 466 U.S. at 181.

[134] *Dunn,* 480 U.S. at 3or; *see also id.* at 3ro (Brennan,]., dissenting) ("The [*Oliver]* Court expressly refused to do a case-by-case analysis to ascertain whether, on occasion, an individual's expectation of privacy in a certain activity in an open field should be protected.").

[135] *Oliver,* 466 U.S. at 194-95 (Marshall,]., dissenting).

[136] ***Id.*** at 197.

The Deal with Dicamba: Court Vacates Over-the-Top Registration

Brigit Rollins

On February 6, 2024, a federal court in Arizona issued a ruling directing the Environmental Protection Agency ("EPA") to vacate the 2020 registrations allowing over-the-top use of three dicamba-based pesticides, XtendiMax, Engenia, and Tavium. This marks the second time a court has ordered EPA to vacate a dicamba registration, following a ruling from the Ninth Circuit Court of Appeals which overturned the then-current over-the-top dicamba registration in June 2020. While the decision from the Arizona court relies on different legal arguments than the Ninth Circuit's 2020 decision, the outcome is the same. Following the ruling, EPA has issued an order that will enable farmers to use existing stocks of dicamba directly onto crops during the 2024 growing season, but only if the pesticides were "labeled, packaged, and released for shipment" prior to February 6. After 2024, it is unclear whether dicamba will be available for over-the-top use going forward.

Background

The herbicide known as dicamba has been used since the 1960s to target broadleaf plants. In recent years, dicamba has been used to combat weeds that have grown resistant to glyphosate including palmer amaranth, commonly known as pigweed. Prior to 2016, dicamba was primarily used as a pre-emergent, applied to the ground in late winter or early spring before any crops were planted. Dicamba is known for being highly volatile, meaning that it will evaporate into the air and travel off-target. This volatility is the reason why dicamba was historically used as a pre-emergent. However, in late 2016, EPA issued its first ever registration allowing dicamba to be used directly onto crops for the 2017 and 2018 growing seasons. The registration was granted to new, low-volatility forms of dicamba that were intended to be used on soybean and cotton seeds that were genetically modified to be resistant to dicamba.

The decision to approve over-the-top use of dicamba was highly controversial and quickly subject to legal challenge. Environmental plaintiffs filed a lawsuit against EPA claiming that the registration decision violated both the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and the Endangered Species Act ("ESA"). While the lawsuit challenging the 2016 registration was ultimately dismissed by the court after the registration expired, the plaintiffs quickly refiled to challenge the 2018 dicamba registration which EPA had issued to reapprove over-the-top use for another two years. In their challenge to the 2018 registration, the plaintiffs once again claimed that EPA had violated FIFRA and the ESA by failing to ensure that the registration decision met the standards of either statute. Ultimately, the plaintiffs were successful in their challenge and the Ninth Circuit issued a decision directing EPA to vacate the over-the-top dicamba registration for three dicamba-based products, XtendiMax, Engenia, and FeXapan. The decision was issued in June 2020, leaving many farmers with questions and uncertainty in the middle of the growing season. To learn more about the Ninth Circuit's decision, click here.

Following the Ninth Circuit's 2020 decision, EPA issued a Notice of Cancellation to formally cancel the 2018 dicamba registration. However, months later, EPA issued a new registration re-approving over-the-top use of dicamba for the 2021-2025 growing seasons. The new registration included additional use restrictions that EPA believed would resolve the issues the Ninth Circuit

found with the 2018 registration. Once again, the same environmental plaintiffs that challenged the 2016 and 2018 registrations filed suit to challenge the 2020 registration. While the plaintiffs raised the same claims in their latest lawsuit as they had in the previous two challenges, it was the novel arguments made against the 2020 registration decision that ultimately swayed the court.

The Court's Decision

The plaintiffs in ***Ctr. for Biological Diversity v. U.S. Envtl. Agency*, No. 4:20-cv-00555 (D. Ariz. Feb. 6, 2024)** raised various legal challenges against the 2020 over-the-top dicamba registration, claiming that the decision violated FIFRA and the ESA. The plaintiffs also raised procedural challenges, alleging that EPA had failed to follow mandatory notice-and-comment procedure when issuing the registration. Ultimately, the court agreed with the plaintiffs on the procedural arguments and vacated the registration without ever reaching the FIFRA and ESA claims. For an in-depth look at all the arguments raised by the plaintiffs in *Ctr. for Biological Diversity v. U.S. Envtl. Agency*, click here.

In their complaint, the plaintiffs argued that the 2020 over-the-top registration of XtendiMax, Engenia, and Tavium violated mandatory FIFRA notice-and-comment requirements. Specifically, the plaintiffs claimed that by issuing the 2020 registration decision without a period of public comment, EPA had violated FIFRA procedures for issuing a new use of a pesticide, and FIFRA procedures for "uncancelling" a pesticide use that had been formally cancelled.

Under FIFRA, EPA is directed to "publish in the Federal Register, […] a notice of each application for registration of any pesticide if it contains any new active ingredient or *if it would entail a changed use pattern*. The notice shall provide 30 days in which any Federal agency or any other interested person may comment." 7 U.S.C. § 136a(c)(4), (emphasis added). In other words, FIFRA allows EPA to register a changed or new use of an already-registered pesticide after a 30-day period of public comment. In this context, a "new use" is defined as "any additional use pattern that would result in a significant increase in the level of exposure, or a change in the route of exposure, to the active ingredient of man or other organisms." 40 C.F.R. § 152.3. The plaintiffs in *Ctr. for Biological Diversity v. U.S. Envtl. Agency* argued that the 2020 over-the-top dicamba registration was a "new use" registration because at the time it was issued, over-the-top use was not approved for dicamba due to EPA's formal cancellation order. Because the 2020 registration was issued without a period of public comment, the plaintiffs claim that the decision violates FIFRA's process for registering a new use.

In response, EPA claimed that the 2020 registrations were not new use registrations approved under section 136a(c)(4) of FIFRA, but were instead approved under a different FIFRA provision colloquially referred to as the "me-too" provision. Under this "me-too" provision, EPA may register or amend registration of a pesticide which is "identical or substantially similar in composition and labeling to a currently-registered pesticide […] or that would differ in composition and labeling from such currently-registered pesticide only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment[.]" 7 U.S.C. § 136a(c)(3)(B). Under FIFRA, "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and

environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). Before a pesticide may be registered for use under FIFRA, EPA must determine that when used as intended, the pesticide will not cause any unreasonable adverse effects on the environment. FIFRA's "me-too" registration allows EPA to register a pesticide product, or amend an already registered pesticide label, so long as the new product or amended label is "substantially similar" to a currently registered pesticide and the new product or amended label would not "significantly increase" the risk of unreasonable adverse effects to the environment. EPA argued that the 2020 over-the-top registrations were "me-too" registrations because the Ninth Circuit's decision directed EPA to cancel over-the-top use of XtendiMax, Engenia, and FeXapan. Tavium, though registered for over-the-top use in 2019 for the 2020 growing season, was not included in the Ninth Circuit's decision. EPA claims that the 2020 re-registration of XtendiMax and Engenia were "me-too" registrations because the products were substantially similar to Tavium. Unlike "new use" registrations, "me-too" registrations do not have a notice-and-comment requirement.

Ultimately, the court agreed with the plaintiffs that the 2020 registrations of over-the-top use for XtendiMax and Engenia were "new use" registrations that were subject to notice-and-comment requirements. Crucial to the court's decision was the fact that Tavium itself had been approved for over-the-top use as a "me-too" registration. The 2019 Tavium registration was made pursuant to FIFRA's "me-too" provisions based on the already-registered over-the-top dicamba products XtendiMax and Engenia. According to the court, "EPA erred when it relied on the Tavium 2019 registration, which was premised on these vacated and cancelled XtendiMax and Engenia registrations." The court determined that the 2020 registrations met the definition of "new use" and that EPA should have followed the notice-and-comment requirements for a "new use" registration.

Along with concluding that EPA failed to provide the required notice-and-comment period for registering a new use of a pesticide, the court also concluded that EPA violated FIFRA's requirement to provide a period of notice-and-comment when re-approving a cancelled pesticide use. According to FIFRA's implementing regulations, if EPA would like to re-approve a pesticide registration that "has been finally cancelled or suspended," then the agency must allow "notice and hearing opportunities." 40 C.F.R. § 160.130. The plaintiffs argued that because EPA's 2020 registration decision re-approved a use that had been formally cancelled without a period of public notice and comment, the registration decision violated FIFRA. The court agreed with the plaintiffs, finding that EPA had twice violated FIFRA's procedural mandates by failing to provide the notice-and-comment period required to registering a new use of a pesticide and to re-approve a cancelled use. For those reasons, the court overturned the 2020 over-the-top registrations of XtendiMax, Engenia, and Tavium. Following that decision, there are no dicamba products with an approved over-the-top use for the 2024 growing season.

Going Forward

On February 14, EPA issued an order to allow existing stocks of XtendiMax, Engenia, and Tavium directly onto crops so long as the pesticides were "labeled, packaged, and released for shipment" prior to the February 6 court decision. The existing stocks order was welcomed by members of the agricultural industry who were concerned that farmers who had already purchased dicamba products for the 2024 growing season would be unable to use what they had

already purchased. The order also provides instructions for how to dispose of unwanted or unused dicamba products.

While the existing stocks order helps to clarify requirements for the upcoming growing season, it is unclear what the fate of over-the-top use of dicamba will be going forward. Currently, it is unknown whether EPA will appeal the court's decision, or how successful such an appeal would be. The district of Arizona is part of the Ninth Circuit, so any appeal would bring the question of over-the-top dicamba registration back before a court that has previously vacated a similar registration. It is also unknown whether EPA will look to re-register over-the-top use of dicamba, or what steps the agency would need to take to produce a registration capable of withstanding judicial scrutiny.

At the moment, farmers and pesticide applicators who had intended to make over-the-top applications of dicamba during the 2024 growing season have more questions than answers.

EPA Proposes Vulnerable Species Pilot Project

Brigit Rollins

One June 22, 2023, the Environmental Protection Agency ("EPA") released a draft white paper for its Vulnerable Species Pilot Project ("VSPP"), a central component of the agency's new policy approach to meeting its Endangered Species Act ("ESA") responsibilities when carrying out actions under the Federal Insecticide, Rodenticide, and Fungicide Act ("FIFRA"). While the draft white paper was released earlier this year, the EPA began developing the VSPP in 2021 and announced the program in 2022. The primary purpose of the VSPP is to add new restrictions to pesticide labels in order to limit exposure to species that EPA has found are highly sensitive to pesticides. Although the program has yet to be fully implemented, it is expected that the VSPP will lead to increased restrictions on pesticide applications, and possibly even prohibit applications in some areas all together.

Background

According to the ESA, whenever a federal agency takes an agency action, the agency must consult with either the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") (collectively, "the Services") to ensure that the action will not jeopardize a species listed as threatened or endangered under the ESA. 16 U.S.C. § 1536(a)(2). In this context, an agency action is any activity that a federal agency has "authorized, funded, or carried out[.]" 50 C.F.R. § 402.02. Meanwhile, "jeopardy" refers to an action that is reasonably expected to appreciably reduce the likelihood of the survival of a listed species. 50 C.F.R. § 402.02.

Whenever a federal agency takes an agency action, it must determine whether that action "may affect" a species listed under the ESA. 50 C.F.R. § 402.14. The "may affect" standard is considered a relatively low threshold to clear as it includes any possible impacts the proposed agency action may have on a listed species. If the agency reaches a "may affect" finding, it will then reach out to the Services to determine whether the action is "likely to adversely affect" or

"not likely to adversely affect" a listed species. This is considered the first step of the consultation process, often referred to as informal consultation. If the agency reaches a "not likely to adversely affect" finding and the consulting Service agrees, then the consultation process is at an end and the agency may proceed with its action. 50 C.F.R. § 402.14(m)(3). However, if the agency finds that its proposed action is "likely to adversely affect" a listed species, then the agency must initiate formal consultation with the Services. 50 C.F.R. § 402.14. The formal consultation process requires the consulting Service to thoroughly examine the expected impacts the proposed agency action will have on listed species, and culminates in the development of a document known as a Biological Opinion or BiOp. 50 C.F.R. § 402.14(m)(1). Among other things, the BiOp will contain the consulting Service's determination as to whether the proposed agency action will result in jeopardy to a listed species. 50 C.F.R. § 402.14(h)(1)(iv). If the consulting Service finds that the agency action is likely to result in jeopardy, the BiOp will contain recommended mitigation measures that the agency can adopt to reduce or eliminate the likelihood of jeopardy. 50 C.F.R. § 402.14(h)(2).

EPA is the federal agency responsible for administering FIFRA. In that capacity, EPA takes numerous agency actions every year. Such actions include registering a new pesticide product for use, modifying an already registered pesticide to allow for a new use or new labeling instructions, re-registering a pesticide product, and carrying out pesticide registration review. For each of these activities, FIFRA requires EPA to determine that the action will not cause "unreasonable adverse effects on the environment." 7 U.S.C. §§ 136a(a), (c)(5)(C), (7)(A). FIFRA defines "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). Unlike the ESA's "may affect" standard which is a simple yes/no test, the "unreasonable adverse effects" standard is a balancing test that requires EPA to weigh both the costs and benefits of using a pesticide before making a final decision.

While each of the actions EPA takes under FIFRA are recognized as agency actions subject to ESA consultation, until recently EPA has primarily only engaged in ESA consultation when registering new pesticide active ingredients. For all other actions, EPA has relied on FIFRA's "unreasonable adverse effects" standard. This practice has led to a wave of lawsuits, mostly resulting in wins for environmental plaintiffs. Currently, EPA believes that completing all of the ESA consultations for FIFRA actions that are subject to court ordered deadlines would take the agency until at least the 2040s. In an effort to more efficiently meet its ESA obligations, while also crafting pesticide labels more likely to hold up under judicial review, EPA has developed its new ESA-FIFRA Policy.

Vulnerable Species Pilot Program

EPA's new policy for satisfying its ESA responsibilities while carrying out agency actions under FIFRA employs two primary strategies. In a work plan published by EPA in April 2022, and a subsequent update published the following November, EPA outlined the two basic approaches the agency would pursue in an attempt to bring existing pesticide labels into ESA compliance. The first strategy involves dividing registered pesticides into similar groups – herbicides, insecticides, and rodenticides – and then identifying and implementing early mitigation measures

intended to reduce the impacts those groups of pesticides have on listed species. Currently, EPA is focusing on creating mitigation measures for herbicides. To learn more about this first strategy and what steps EPA has taken so far, click here.

The second strategy EPA has developed as part of its new policy is the VSPP. Under this approach, EPA will identify threatened and endangered species that are considered highly vulnerable to pesticide use, and develop mitigation measures designed specifically to protect those species from pesticide exposure. While the VSPP is still in the process of development, a draft plan issued by EPA earlier this year outlines how the agency intends the program to function.

In the draft plan, EPA identified twenty-seven species that serve as the "initial set" of pilot species addressed by the VSPP. According to EPA, these species are considered particularly sensitive to pesticides due to a combination of factors such as small population sizes, limited geographic ranges, and overall general susceptibility to environmental stressors. EPA claims that these species have a higher likelihood of receiving a "jeopardy" determination in future ESA consultations on FIFRA actions. In effort to reduce the possibility of future jeopardy determinations, EPA intends to use the VSPP to introduce "early" mitigation measures across multiple registered pesticides to protect the pilot species. These mitigations will take the form of additional restrictions on pesticide application.

Under the VSPP, EPA is proposing two broad categories of early mitigation measures – avoidance and minimization. Each mitigation is intended to apply broadly to conventional pesticides that are applied outdoors. As the name suggests, avoidance mitigation would involve prohibiting pesticide applications in certain areas, specifically those areas where one of the pilot species is most likely to occur. To identify these areas, EPA is relying on "species-specific location information," primarily the species range and habitat description provided by FWS. For areas subject to avoidance mitigations, all pesticide applications would be prohibited unless the applicator coordinated with FWS at least three months prior to the application.

The other category of mitigation measures identified under the VSPP focuses on minimizing pesticide exposure to the twenty-seven pilot species through additional restrictions on pesticide applications that are designed to minimize pesticide spray drift, runoff, and erosion. Spray drift mitigation measures identified in the draft plan include additional buffer requirements, and prohibitions of certain application methods or droplet sizes. Proposed runoff and erosion mitigation measures include prohibitions on applications when the soil is saturated or when rain is in the forecast, and the requirement of certain land use practices designed to reduce both runoff and erosion such as contour farming, cover cropping, or grassed waterways. When any additional land use practices are required, EPA intends to allow farmers and applicators flexibility in choosing which methods to apply, noting that farmers are the most knowledgeable about the characteristics of their fields.

All of the mitigation measures identified under the VSPP, whether avoidance or minimization, will be geographically specific and based on the areas where the pilot species are located. Because of that, EPA intends to incorporate all VSPP mitigation measures into the applicable pesticide labels through bulletins rather than directly into the general label. All such bulletins

will be available through EPA's website Bulletins Live! Two, and any pesticide label that contains a VSPP bulletin will include language directing the applicator to visit the website. Each bulletin will include a description of the relevant mitigation measures and the geographic area where the restrictions apply.

Going Forward

When the draft plan for the VSPP was published in June, a 45-day public comment period was provided. According to EPA, the draft plan received more than 10,000 comments. In November 2023, EPA published a brief update to the VSPP addressing the categories of comments EPA received and outlining modifications EPA plans to make to the VSPP going forward. According to EPA, one of the main themes that emerged in comments on the VSPP draft plan focused on how EPA would identify the geographic areas where VSPP mitigation measures would apply. In response to concerns that EPA would take an overly broad approach, the agency states that it plans to refine the process by which those areas are identified by relying on species habitat maps over habitat descriptions and limiting areas with VSPP restrictions to only include locations that are most important for species conservation. Other modifications EPA intends to make based on the comments it received on the draft plan include clarifying potential exemptions to the VSPP, revisiting how vulnerable species are identified and selected, and developing a consistent approach for the strategies used to reduce pesticide exposure to listed species.

Currently, it is unclear when the VSPP will be fully implemented. In the June draft plan, EPA noted that it would spend the next eighteen months developing mitigation bulletins for the initial set of twenty-seven pilot species and begin posting the bulletins to the Bulletins Live! Two website when they become available. EPA also stated its intention to expand the VSPP to other vulnerable species, although currently the number of species included in the program remains at twenty-seven.

Ultimately, many questions remain as to whether the VSPP satisfies either EPA's ESA or FIFRA responsibilities. It is unclear whether the early mitigations proposed by the VSPP satisfy the ESA's consultation requirements, or meet FIFRA's "unreasonable adverse effects" standards. EPA has stated that it expects to provide further updates to the VSPP by fall 2024. The NALC will continue to follow the VSPP as the program develops.

EPA Draft Herbicide Strategy Open for Comment

Brigit Rollins

October 22, 2023, is the last day to submit comments on the Environmental Protection Agency's ("EPA") Draft Herbicide Strategy Framework to Reduce Exposure of Federally Listed Endangered and Threatened Species and Designated Critical Habitats from the Use of Conventional Agricultural Herbicides ("Draft Herbicide Strategy"). The document is one component of EPA's new policy on how to satisfy its responsibilities under the Endangered Species Act ("ESA") when carrying out actions pursuant to the Federal Insecticide, Fungicide, Rodenticide Act ("FIFRA"). The policy shift comes in part as the result of multiple lawsuits that

have been filed against EPA over the past several years by environmental groups claiming that EPA violated the ESA by failing to engage in mandatory consultation when carrying out FIFRA actions. Although the policy is still under development, the Draft Herbicide Strategy is expected to be finalized in 2024.

Endangered Species Act

The U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the Services") are responsible for administering the ESA. The Services work to identify species at risk of extinction and then list those species as either "threatened" or "endangered" under the ESA. Once a species is listed, it receives ESA protection. However, the Services are not the only federal agencies tasked with carrying out the ESA. All federal agencies are required to further the purposes and aims of the ESA by consulting with the Services any time they carry out an agency action to ensure that the action will not jeopardize the existence of listed species. 16 U.S.C. § 1536(a)(2).

Under the ESA, an agency action is defined as any activity that a federal agency has "authorized, funded, or carried out[.]" 16 U.S.C. § 1536(a)(2). Examples of activities that would be considered agency actions under the ESA include the promulgation of regulations; granting a license, contract, lease, or permit; or actions that directly or indirectly cause modification to the environment. 50 C.F.R. § 402.02. When a federal agency carries out an agency action, the ESA requires that agency to determine whether the action "may affect" any threatened or endangered species. 50 C.F.R. § 402.14. In general, this is regarded as a very low threshold to clear. According to FWS, a "may affect" finding is appropriate when the proposed action may have consequences to any protected species. If a federal agency finds that its action "may affect" a species listed under the ESA, its next step is to reach out to the Services to determine whether the proposed agency action is likely to adversely affect any listed species. If the action is likely to adversely affect a listed species, then the agency carrying out the proposed action (known as the "action agency") will initiate formal consultation with the Services.

During formal consultation, the Services will prepare a document known as a Biological Opinion or "BiOp." 50 C.F.R. § 402.14(e). The goal of formal consultation is to ensure that the proposed agency action will not jeopardize the continued existence of a listed species. 16 U.S.C. § 1536(a)(2). The ESA defines "jeopardy" as "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. If the Services find that a proposed agency action will result in jeopardy, then the BiOp will contain a selection of mitigation measures or alternative proposals that will meet the intended purpose of the proposed agency action while avoiding the likelihood of jeopardy. 50 C.F.R. § 402.02. From there, it is up to the action agency to decide how to proceed.

While there are a handful of exceptions to the ESA's consultation requirements, the United States Supreme Court affirmed in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), that all "actions in which there is discretionary Federal involvement or control" are subject to ESA consultation.

Federal Insecticide, Rodenticide, and Fungicide Act

FIFRA is the primary federal statute regulating the sale and use of pesticide products in the United States. EPA is responsible for administering FIFRA and carrying out numerous agency actions pursuant to the statute.

Under FIFRA, no pesticide product may be legally sold or used in the United States until the EPA has registered a label for that product. 7 U.S.C. § 136a(a). To register a label, EPA must determine that use of the pesticide according to its label instructions will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). FIFRA defines "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). Unlike the ESA "may affect" standard which serves as a yes/no threshold, FIFRA's "unreasonable adverse effects" standard is a balancing test that requires EPA to weigh all expected impacts of registering the pesticide.

Along with registering new pesticide labels, FIFRA directs EPA to review all registered pesticides once every fifteen years. The registration review process can take multiple years, and may involve issuing an interim decision prior to a final decision. Additionally, EPA may take a variety of other actions under FIFRA such as adding a new use to a previously registered pesticide label, or granting an emergency use. Each of these actions is recognized as an agency action for purposes of the ESA, and is therefore subject to ESA consultation. However, up until recently, EPA has primarily only conducted ESA consultation when registering new pesticide active ingredients. For all other actions, EPA relied on FIFRA's "unreasonable adverse effects" standard. This policy ultimately resulted in numerous lawsuits.

Recent Lawsuits

Over the last several years, EPA has been subject to various lawsuits filed by different environmental groups alleging that EPA has violated the ESA by failing to engage in ESA consultation when taking agency actions under FIFRA. In some cases, such as *Ctr. for Food Safety v. U.S. Envt'l Protection Agency*, No. 1:23-cv-01633 (D. D.C., June 6, 2023), which was filed earlier this year, the plaintiffs challenge the registration of a pesticide without prior ESA consultation. More information on that case is available here. In other cases, such as *Nat. Res. Def. Council v. U.S. Envt'l Prot. Agency*, No. 20-70787 (9th Cir. 2020) and *Rural Coal. v. U.S. Envt'l Prot. Agency*, No. 20-70801 (9th Cir. 2020), the plaintiffs challenged registration review decisions that were issued without consultation. More information on both of those cases is available here. Still other cases, like *Farmworker Ass'n of FL v. Envtl. Protection Agency*, No. 21-1079 (D.C. Cir. 2021) have involved challenges to EPA actions that amend a registered pesticide label by adding a new use without ESA consultation on that specific use. Information on that case is available here.

Many of these cases have ended in court decisions favorable to the plaintiffs. In *Farmworker Ass'n of FL v. Envtl. Protection Agency*, the court found that EPA had failed to undergo ESA consultation when it amended the label for the pesticide aldicarb to allow for use on orange and grapefruit trees in Florida to combat citrus greening disease. There, the court vacated the label

and sent it back to EPA for further ESA review. Without the label in place, aldicarb was unavailable for use on citrus trees. In *Ctr. for Food Safety v. Regan*, No. 19-72109 (9th Cir. 2022), the court found that EPA had unlawfully registered the pesticide sulfoxaflor without undergoing ESA consultation. While the court chose to leave the registration in place, it remanded the decision to EPA with a court-ordered timeline to complete consultation. The full decision is available here.

Currently, EPA claims that completing all the ESA consultations for pesticides that are currently subject to court decisions or on-going litigation would take the agency at least until the 2040s and would represent only 5% of EPA's ESA obligations. In an effort to more efficiently meet its ESA obligations and craft stronger pesticide labels, EPA has developed its new ESA-FIFRA policy.

Draft Herbicide Strategy

EPA's new policy on how to meet its ESA obligations while taking agency action under FIFRA contains a variety of different strategies. In a work plan published by EPA in April 2022, and a subsequent update published the following November, EPA outlined two overall strategies that it would pursue in an effort to bring existing pesticide labels into ESA compliance. The first strategy involves breaking out registered pesticides into similar groups – herbicides, insecticides, and rodenticides – and then identifying and implementing early ESA mitigation measures for those groups. The second strategy involves identifying threatened and endangered species that are considered highly vulnerable to pesticides, and developing mitigation measures to protect those species from pesticide exposure. While several of these approaches are still in the planning stage, EPA has made its Draft Herbicide Strategy available for public comment, and expects to finalize and begin implementing this part of its ESA-FIFRA policy in 2024.

Under the Draft Herbicide Strategy, EPA has identified two primary categories of mitigation measures that it expects to include on herbicide labels. The first category of mitigation measures will be targeted at reducing pesticide spray drift, while the second category will focus on reducing pesticide runoff and erosion. According to EPA, these are two of the most common ways that threatened and endangered species are exposed to herbicides. Reducing exposure is expected to reduce the likelihood that future ESA consultations will result in a finding that FIFRA actions will jeopardize the existence of listed species.

The Draft Herbicide Strategy identifies buffers in the form of windbreaks or hedgerows, hooded sprayers, and application rate reductions as mitigation measures to reduce spray drift. To reduce runoff and erosion, the Draft Herbicide Strategy identified a variety of mitigation measures, including restrictions on applications if rain is in the forecast; restrictions based on field characteristics such as soil make up and field slope; methods of application; in-field management activities designed to reduce runoff such as mulch amendment or terrace farming; management activities adjacent to sprayed fields such as establishing a buffer strip; and other activities aimed at increasing water retention. For the mitigation measures for runoff and erosion, EPA is also proposing a point-based system designed to give farmers more control over which measures to implement. Each of the previously mentioned mitigation measures would be assigned a point value based on how effective the measure is at reducing runoff or erosion. Pesticide labels will

identify how many points are necessary for the pesticide's intended use. From there, farmers can implement the mitigation measures that work best for them to achieve the number of points needed to apply the pesticide. Importantly, the Draft Herbicide Strategy notes that activities farmers are already taking to reduce runoff or erosion may be used to satisfy the point system. Currently, EPA does not appear to be recommending a similar system for implementing spray drift mitigation measures.

According to the Draft Herbicide Strategy, the proposed mitigation measures will be incorporated into pesticide labels in two primary ways. Mitigation measures that EPA finds are necessary across the contiguous 48 states will be directly included as part of the pesticide label. However, some mitigation measures are only needed in specific geographic areas. For those measures, EPA expects to increase its use of the website Bulletins Live Two ("BLT"). BLT is a website run by EPA that provides geographic-specific updates to pesticide labels. For example, if EPA determines that mitigation measures are needed to reduce runoff of a particular pesticide in the Pacific Northwest region of the country to prevent exposure to listed species only found in that area, instead of adding additional language to the pesticide label, it would direct applicators to check the BLT website. There, EPA would have language addressing geographic-specific restrictions. According to the Draft Herbicide Strategy, EPA intends to make greater use of BLT as it begins implementing its new policy, and will include additional language on pesticide labels directing applicators to check BLT prior to application.

Going Forward

The Draft Herbicide Strategy represents only one aspect of EPA's new ESA-FIFRA policy. As roll out and implementation of this policy continues, farmers and pesticide applicators can expect to see additional application restrictions included on pesticide labels. As previously mentioned, some of the restrictions will be included in the labels themselves, while others will be available on the BLT website. It is currently unclear how quickly these label changes will be made. EPA's work plans and the Draft Herbicide Strategy suggest that these mitigation measures will be incorporated into labels as they come before EPA for registration and registration review.

The comment period on the Draft Herbicide Strategy will close on October 22, 2023 with a final draft expected next year. EPA also intends to release a draft of its insecticide strategy in 2024, along with drafts of the strategies aimed at protecting vulnerable species. While it is still too early to know what the ultimate outcome of this new policy will be, the Draft Herbicide Strategy offers an informative look at what is to come.

Plaintiffs & Pesticides: Failure to Warn Claims in Pesticide Litigation

Brigit Rollins

Of all the claims that plaintiffs typically raise in pesticide injury lawsuits, failure to warn is currently the claim that is most likely to impact pesticide litigation going forward. Plaintiffs filing pesticide injury lawsuits almost always bring failure to warn claims. Such claims have been raised in lawsuits concerning glyphosate, chlorpyrifos, and paraquat by plaintiffs who claim

that the defendants failed to warn consumers about the risks of using their products. In response, defendants have argued that plaintiffs should not have been allowed to raise failure to warn claims because such claims are preempted by federal law. While courts have so far been split on whether failure to warn claims are preempted, one lawsuit has been appealed to the United States Supreme Court. If the Court decides to hear the case, its decision could potentially impact thousands of on-going pesticide injury lawsuits.

What is Failure to Warn?

Failure to warn is a type of civil tort that is frequently raised in products liability cases. Unlike negligence and design defect, the two other claims that have so far been covered in this series, failure to warn does not argue that a product has physical faults. Instead, a plaintiff typically raises failure to warn claims to allege that a product manufacturer failed to provide adequate warnings or instructions about the safe use of a product.

In order to succeed on a failure to warn claim, a plaintiff must prove two things. First, the plaintiff must show that the manufacturer did not adequately warn consumers about a particular risk. Second, the plaintiff must show that the risk was either known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time the product was manufactured and distributed. Essentially, the manufacturer must have either known or been able to easily discover the risk, failed to warn consumers, and that failure caused the plaintiff to become injured.

Failure to Warn in Pesticide Lawsuits & Initial Treatment by Courts

Failure to warn claims have become commonplace in pesticide injury lawsuits. In ***Hardeman v. Monsanto Co.*, No. 4:16-cv-00525 (N.D. Cal.)**, one of the first lawsuits alleging that use of glyphosate caused the plaintiff to develop non-Hodgkin's lymphoma, the plaintiff argued that his injuries were in part caused by the defendant's failure to include proper warning labels on its products. The plaintiff claimed that at the time the defendant was manufacturing its glyphosate-based pesticide Roundup, it either knew or should have known that exposure to the pesticide could cause consumers to develop cancer. By failing to add a cancer warning to the Roundup label, the plaintiff argues that the defendant's products were rendered unreasonably dangerous and defective. Plaintiffs in other glyphosate lawsuits, such as ***In re: Roundup Products Liability Litigation*, No. 3:16-md-02741 (N.D. Cal.)**, raised nearly identical failure to warn claims. There, the plaintiffs noted that the warnings the defendant did provide were inadequate to warn consumers about the potential carcinogenic risks. Failure to warn claims are a standard part of glyphosate lawsuits.

Failure to warn claims filed in other pesticide lawsuits follow similar patterns. In the chlorpyrifos-related lawsuits ***Avila v. Corteva Inc.*, No. 20C-0311 (Cal. Sup. Ct.)**, and ***Calderon de Cerda v. Corteva Inc.*, No. 20C-0250 (Cal. Sup. Ct.)**, the plaintiffs argue that the defendant knew or should have known that its product could cause neurological injuries to infants and children. They claim that the defendant made its product unsafe for use by failing to include appropriate warnings. Similarly, the plaintiff in ***Hoffman v. Syngenta Crop Protection, LLC*, No. 17-L-517 (Ill. Cir. Ct.)**, argued that the defendant's product was unreasonably dangerous

because consumers were not warned that exposure to the pesticide paraquat could cause users to develop Parkinson's disease.

Like the other claims previously discussed in this series, courts have so far had a mixed response to failure to warn claims. Although thousands of plaintiffs have filed lawsuits in recent years alleging that exposure to a particular pesticide caused them to develop an injury, currently only a handful of these cases have gone to trial. All of those cases have involved glyphosate. The first three pesticide injury cases that went before a jury all resulted in favorable rulings for the plaintiffs. Juries for *Hardeman v. Monsanto Co.*, ***Pilliod v. Monsanto Co.*, No. RG17862702 (Cal. Sup. Ct.)**, and ***Johnson v. Monsanto Co.*, No. CGC-16-550128 (Cal. Sup. Ct.)** all found that the plaintiffs successfully argued their failure to warn claims. However, in both ***Stephens v. Monsanto Co.*, No. CGC-20-585764 (Cal. Sup. Ct.)**, and ***Clark v. Monsanto Co.*, No. 20STCV46616 (Cal. Sup. Ct.)**, the juries found that plaintiffs had failed to prove that their injuries were the result of the defendant's failure to warn about the risk of using their product.

Failure to Warn & Federal Preemption

In response to failure to warn claims, defendants in pesticide injury lawsuits argue that such claims should be dismissed because they are preempted by federal law. On appeal, courts have differed on whether failure to warn claims are preempted. The question is now on appeal to the United States Supreme Court. If the Court decides to hear the case, a ruling would have the potential to alter the landscape of pesticide injury litigation.

The German pharmaceutical company Bayer bought Monsanto Corporation ("Monsanto") in 2018. At that time, Bayer took over as defendant for Monsanto in all of its currently on-going pesticide lawsuits. When the juries in *Hardeman v. Monsanto Co.*, *Pilliod v. Monsanto Co.*, and *Johnson v. Monsanto Co.* returned verdicts that were favorable to the plaintiff, Bayer appealed. Among other things, Bayer argued that the failure to warn claims filed by the plaintiffs should have been dismissed before trial because they are preempted by federal law.

Preemption is a legal doctrine that refers to the idea that a "higher" form of government will displace the authority of a "lower" form of government when the two conflict. When federal and state law conflict, federal law will preempt state law because it is a "higher" form of government. Bayer has argued that the state law failure to warn claims raised by plaintiffs in pesticide injury lawsuits are preempted by labeling requirements in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

FIFRA is the primary federal statute regulating pesticide use in the United States. Under FIFRA, a pesticide may not be legally sold or used until it has been registered by the Environmental Protection Agency ("EPA") and has an approved label. The label contains all necessary instructions and warnings needed to use the pesticide safely and effectively.

In order to register a pesticide under FIFRA, EPA must make a finding that using the pesticide according to its label will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). FIFRA goes on to define "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account economic, social, and

environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). Violating a registered pesticide label is considered a violation of FIFRA. While FIFRA does grant states the authority to "regulate the sale or use of any federally registered pesticide," it also prohibits states from adopting "any requirements for labeling or packaging in addition to or different from" those required under FIFRA. 7 U.S.C. § 136v(a), (b). In other words, while states may adopt state requirements affecting pesticide sale and usage, they may not adopt regulations that would change the text of a registered pesticide label.

Bayer argues that the plaintiffs' state law failure to warn claims are preempted by FIFRA because in order to avoid liability under those claims, Bayer would need to affix a cancer warning to the label or packaging of the glyphosate it sells in states where it has been sued. Doing so would amount to a state law imposing a label requirement that is either in addition to or different from the federally registered label for Roundup which does not contain a cancer warning. Because requiring such a warning would be a violation of FIFRA, Bayer argues that failure to warn claims should always be dismissed in pesticide injury lawsuits.

The plaintiffs have argued that the failure to warn claims are not preempted by FIFRA because of the statute's prohibitions against misbranding. Under FIFRA, it is unlawful to sell or distribute any pesticide that is "misbranded." 7 U.S.C. § 136j(a)(1)(E). A pesticide is considered misbranded if "the labeling does not contain a warning or caution statement which may be necessary […] to protect health and the environment[.]" 7 U.S.C. § 136(q)(1)(G). The plaintiffs assert that their failure to warn claims are not preempted by FIFRA because if a pesticide manufacturer failed to warn consumers about the health risks of using their pesticides, then the pesticide was misbranded and should not have been sold without a proper warning. According to the plaintiffs, the failure to warn claims are "parallel" with FIFRA's misbranding prohibitions. This means that if the defendant has violated its state law failure to warn requirements than it has also violated the FIFRA misbranding requirements. Because the claims are parallel, failure to warn cannot be preempted by FIFRA.

Courts have been split over this issue. In *Stephens v. Monsanto Co.*, a California state court agreed with the defendant that the plaintiff's failure to warn claims were preempted by FIFRA and dismissed the claims before trial. However, both the Ninth Circuit Court of Appeals, and another California state court agreed with the plaintiffs that their failure to warn claims were not preempted because the claims were parallel to FIFRA's prohibition on misbranding. Bayer has appealed the Ninth Circuit's ruling to the United States Supreme Court. Should the Supreme Court take up the case, a ruling could have consequences for thousands of on-going pesticide injury lawsuits, as well as any pesticide injury lawsuits filed in the future. Failure to warn claims have become commonplace in pesticide injury litigation. If the Supreme Court finds that those claims are preempted by FIFRA, it could change the landscape of pesticide litigation.

UPDATE 6/22/2022: The Supreme Court has officially determined that it will not hear review in *Hardeman v. Monsanto*. This means that the Ninth Circuit's decision finding that the plaintiff's state law failure to warn claims are not preempted by FIFRA will stand. Although this is the end of the road for the *Hardeman v. Monsanto* lawsuit, it is possible that this issue will come before the Supreme Court again. However, as of this update, plaintiffs throughout the United States may continue to file failure to warn claims when bringing pesticide injury lawsuits.

Conclusion

At the moment, it is unclear what the future of failure to warn claims in pesticide injury lawsuits will be, and how that future will impact other claims typically raised in such lawsuits. If the Supreme Court concludes that failure to warn claims are not preempted by FIFRA, then plaintiffs are likely to continue raising those claims in pesticide cases. If the Supreme Court finds that failure to warn claims are preempted by FIFRA, courts will likely dismiss those claims in on-going pesticide cases, and future plaintiffs will likely rely on other claims when filing lawsuits.

11TH ANNUAL MID-SOUTH AGRICULTURAL AND ENVIRONMENTAL LAW CONFERENCE CLE

COURSE MATERIALS:

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"Navigating the NAD Appeals Process: What You Need to Know"

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Presentation and Materials by:
Danielle Lake, Esq.
Deputy Regional Director
NAD South

JUNE 8, 2024

OUTLINE OF CONTENTS

I. What/Who is OHA-NAD?

The Office of Hearings and Appeals (OHA) is an independent office within USDA's Office of the Secretary. It has three units: the National Appeals Division (NAD); the Office of Administrative Law Judges (OALJ); and the Office of the Judicial Officer (OJO). This training focuses solely on the NAD unit, which adjudicates appeals of adverse decisions from agencies over which Congress conferred it jurisdiction.

NAD is an administrative appeal branch of the U.S. Department of Agriculture with jurisdiction to hear certain appeals of decisions made by the Farm Service Agency (FSA); Natural Resources Conservation Service (NRCS), Federal Crop Insurance Corporation (FCIC), Risk Management Agency (RMA), Rural Business-Cooperative Service (RBS), and Rural Housing Service (RHS)/Rural Development (RD). Because Congress has mandated that all administrative remedies be exhausted prior to bringing an action against the Secretary of Agriculture, the U.S.D.A., or any agency, office, officer, or employee of the Department; in many circumstances, you must pursue an appeal with NAD to "exhaust" your administrative remedies prior to pursuing legal action against any of those agencies mentioned above.

II. NAD's Formation: Background and Framework

As part of the Department of Agriculture Reorganization Act of 1994, Congress created NAD to handle administrative appeals arising from decisions issued by specified agencies. *Pub. L. 103-354 (Oct. 13, 1994); 108 Stat. 3178; 7 U.S.C. § 6992.* FSA, NRCS, FCIC, and RD are specifically included in the statutory list of agencies for which the National Appeals Division will hear appeals. *Id.; 7 U.S.C. § 6992.*

In that same Act, Congress mandated the exhaustion of remedies. *7 U.S.C. § 6912(e)*. *But see Dawson Farms LLC v. Farm Service Agency*, 504 F.3d 592, 602-606 (5th Cir. 2007) (The Fifth Circuit joins with the Eighth and Ninth Circuits holding that *7 U.S.C. § 6912(e)* is not jurisdictional but a codification of judicial doctrine of exhaustion of remedies (i.e. jurisprudential)). In 1996, Congress created the Risk Management Agency (RMA) whose tasks include supervising the FCIC and administering all aspects of all programs under the Federal Crop Insurance Act. *7 U.S.C. § 6933*. RMA is included in the regulatory list of agencies subject to appeal review by NAD. *7 C.F.R. § 11.1 (defining "Agency")*.

Determinations of the NAD Director, both on the merits and regarding whether an issue is appealable, are administratively final. *7 U.S.C. §§ 6992(d), 6998(b).* Further, if Director review of a NAD Administrative Judge's[1] determination is not requested within thirty calendar days of the issue date, that determination becomes administratively final. *7 U.S.C. §§ 6997(d), 6998(a)(1); see also Bartlett v. U.S. Dept. of Agriculture*, 716 F.3d 464, 473 (8th Cir. 2013).

III. NAD's Jurisdiction, A Quick Primer

In simple terms, NAD has jurisdiction to hear appeals of adverse decisions issued to participants by one of the statutorily/regulatorily enumerated agencies. So, who is a participant and what is an adverse decision?

A participant is defined by regulation as an "individual or entity whose right to participate in or receive a payment, loan, loan guarantee, or other benefit in accordance with any program of an agency to which the regulations in this part

[1] The regulations refer to National Appeals Division Hearing Officers. 7 C.F.R. § 11.1 et seq. The NAD Director changed the Hearing Officer title to Administrative Judge in December 2014. Any reference in this document to Administrative Judge(s) is intended to mean the same as the term "Hearing Officer" used in the regulations at 7 C.F.R. Part 11.

apply is affected by a decision of such agency." 7 U.S.C. § 6992; 7 C.F.R. 11.1 (defining "Participant"). Thus, a participant would most often be a producer, borrower, or, in the instance of crop insurance, an insured.

An adverse decision is defined as "an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant." *Id.*; 7 C.F.R. 11.1 (defining "Adverse Decision"). The definition also includes the agency's denial of equitable relief or failure to issue a decision or otherwise act on a request within prescribed timeframes or a reasonable time.

Reading the definitions together, NAD has jurisdiction to hear appeals from individuals or entities adversely affected by one of the enumerated agencies when that individual's right to participate in a program or receive a payment, loan, loan guarantee, or other benefit in connection with any program is stymied. Thus, if a producer is denied the right to participate in a USDA program or receive a payment or benefit (within the confines of those USDA agencies listed in the previous section), NAD most likely has jurisdiction to hear that appeal.

Furthermore, the regulations governing each agency usually contain a subpart regarding appeal procedures. The regulations governing the Federal Crop Insurance Corporation are found at 7 C.F.R. Part 400. The appeal procedures are found in Subpart J. The regulations at 7 C.F.R. § 400.91 express a list of some of the types of crop insurance adverse decisions appealable to NAD. The regulations governing the Farm Service Agency are found in several different sections within Title 7. The general appeal regulations are found at 7 C.F.R. § 780. There are several other sections throughout Title 7 regarding appeals for FSA, NRCS, RD, and RMA.

As briefly noted above, the NAD Director has the authority to grant participants equitable relief. 7 U.S.C. § 6998; 7 C.F.R. § 11.9(e). That authority is confined to the limitations of 7 U.S.C. § 7996. *Id.* Thus, the NAD Director can grant equitable relief to participants who are not in compliance with the requirements of price or income support programs, production assistance programs, or market loan assistance programs. 7 U.S.C. § 7996(a)(2)(A). Specifically excluded from equitable relief are the crop insurance program and agricultural credit programs, the latter of which includes programs such as the Single-Family Housing Program. 7 U.S.C. § 7996(a)(2)(B).

IV. Crop Insurance: Limitation on NAD's Jurisdiction

Crop insurance cases represent one of the more expansive limits on NAD jurisdiction. A review of the basis for our jurisdiction and how crop insurance matters are handled illustrate the reason for this. NAD is authorized to hear appeals of adverse decisions issued to a participant **by** one of the enumerated agencies. With crop insurance, while FCIC and RMA (NAD jurisdiction agencies) are the government agencies over the program, they are not the primary point of contact for insureds. That role is reserved to the Approved Insurance Provider, defined at 7 U.S.C. § 1502 as a private insurance company *approved by FCIC "to provide insurance coverage to producers participating in the Federal crop insurance program…."* Thus, many of the decisions are made and issued by the AIP, not an agency such as FCIC or RMA under NAD's jurisdiction, and those decisions are therefore not appealable. Further, as is noted below, Congress also specifically limited NAD's jurisdiction with regard to crop insurance denials involving a failure to follow good farming practices.

- ***Insurance Company Decisions***

Generally, decisions issued by an Approved Insurance Provider are not appealable to NAD. FCIC nor RMA are involved in these determinations, and insurance companies are not agencies within the definition set forth in 7 C.F.R. § 11.1 (Agency). A review of the premium collection process illustrates the reasoning. The Approved Insurance Provider, per the Standard Reinsurance Agreement, is responsible for sending billing notices and statements directly to insureds. It is only when the insured fails to pay the amount due by the termination date that the Approved Insurance Provider must notify FCIC of the existence of the delinquent debt. 7 C.F.R. § 400.682(b). After notification, FCIC sends notice of the ineligible status to the producer. 7 C.F.R. § 400.682(c). In this process, only the notice of ineligible status would be appealable to the National Appeals Division because it is the only action taken by FCIC. *See* 7 U.S.C. § 6992 (Adverse decision).

The rare exception to this limitation is in a situation where the adverse decision is ultimately made by RMA but communicated to the participant by the insurance provider. In these cases, even though the letter the participant receives is issued by the insurance provider, NAD may take jurisdiction of the case based on an adverse decision issued by RMA to the insurance provider specific to a participant. *See* NAD Case Nos. 2012E000136 and 2013W000438R for instances in which NAD took

jurisdiction of crop insurance cases based on an Approved Insurance Provider letter issued to the producer.

- ***Claim Denials***

Pursuant to the Standard Reinsurance Agreement, the insurance provider adjusts claims, other than some large claims. The Standard Reinsurance Agreement governs the relationship between Approved Insurance Providers and FCIC. In Appendix I, Section IV, the Agreement provides that all insurance providers shall comply with FCIC's Large Claims Procedures. The Large Claims Procedures are found in the Large Claims Handbook (FCIC 14040). The Large Claims Handbook explains that in claims where the production loss or indemnity will likely exceed $500,000, the insurance provider must notify RMA. Large Claims Handbook, Part 4B. RMA will then determine whether the insurance provider will adjust the claim or whether RMA will get involved in the adjustment process. Large Claims Handbook, Part 4D-E. If RMA adjusts the claim, then the denial is an adverse decision within the definition found at 7 C.F.R. § 11.1(Adverse Decision). Otherwise, denial of a claim is a decision made by the insurance provider and, as stated above, generally not appealable to NAD. *But see* NAD Case No. 2012E000136 (involving denial of a claim by an AIP where NAD accepted jurisdiction).

- ***Good Farming Practices***

In 2000, Congress passed the Agricultural Risk Protection Act limiting NAD's jurisdiction over certain crop insurance denials. Pub. L. 106-224, (June 20, 2000); 114 Stat. 378; 7 U.S.C. §1508. Pursuant to 7 U.S.C. § 1508(a)(3)(A)(iii), crop insurance coverage does not cover losses caused by a failure to follow good farming practices. Moreover, a denial of a loss based on failure to follow good farming practices is no longer included in the definition of adverse decision. 7 U.S.C. §1508(a)(3)(B)(ii)(I).

V. Appealability Review

Sometimes, agencies inform participants that a decision is not appealable because it is not adverse to them individually but generally applicable to all similarly situated participants. The term "general applicability" is used throughout the regulations to describe a type of decision that is not appealable. In 7 C.F.R. § 400.91(e), the prohibition on appeal of generally applicable determinations is explained in this

manner, "[n]otwithstanding any other provision, this [subpart J] does not apply to any decision made by [RMA] that is generally applicable to all similarly situated program participants. Such decisions are also not appealable to NAD." In 7 C.F.R. § 780.5(a)(1), the regulations for Farm Service Agency state, "[d]ecisions that are not appealable under this part shall include the following: (1) Any general program provision or program policy or any statutory or regulatory requirement that is applicable to similarly situated participants…."

Congress specifically prescribed determinations of appealability to the Director of NAD. 7 U.S.C. § 6992(d). Because of this, after explaining that decisions regarding generally applicable matters are not appealable, the varied agency regulations usually contain a somewhat confusing additional sentence or section stating that the NAD Director determines appealability. This is exemplified in the remainder of the regulation at 7 C.F.R. § 400.91(e) cited above, which states, "[i]f the Agency determines that a decision is not appealable because it is a matter of general applicability, the participant must obtain a review by the Director of NAD … that the decision is not appealable before the participant may file suit against the Agency." 7 C.F.R. § 400.91(e); *see also* 7 C.F.R. § 780.5(c); 7 C.F.R. § 400.768(g) (regarding Final Agency Determinations). Only the NAD Director's determination of non-appealability, not that of the enumerated agencies under NAD jurisdiction, can constitute an exhaustion of remedies on this basis.

Thus, in certain instances participants are regulatorily required to obtain a determination from NAD regarding the appealability of an agency decision, but, in all instances, a participant may request an appealability determination. However, when NAD receives an appeal request of an agency decision that is not appealable, NAD will typically issue, of its own accord, an appealability determination. Redacted versions of appealability determinations are published on NAD's searchable website: go to https://www.usda.gov/oha/nad and click "Search NAD Determinations" on left side (see picture reference below).

www.usda.gov/oha/rules-and-procedures/guidance

Office of Hearings and Appeals
- Leadership
- Services
- Rules and Procedures
  - NAD Guidance, Regulations, and Statutes
  - OALJ/OJO Rules of Practice and Procedure
  - OALJ/OJO Statutes Administered
- National Appeals Division
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  - Outreach
  - Frequently Asked Appeal Questions (FAQs)
  - Contact NAD
- Office of Administrative Law Judges
- Office of the Judicial Officer

NAD Guidance

These guides outline the policies and procedures of the National Appeals Division (NAD). Actions of NAD are governed by regulations codified at Part 11 of Title 7 of the Code of Federal Regulations (7 C.F.R.). They set forth policy for NAD activities from appealability reviews through hearings and reconsiderations to Equal Access to Justice Act (EAJA) reviews. They also outline policies and procedures for employee conduct, managing the hearing process, preparing determinations, and ensuring the quality and consistency of correspondence and determinations.

Select one of the NAD documents below for more information.

- NAD Style Guide (PDF, 319 KB)
- NAD Hearing Guide (PDF, 232 KB)
- NAD Correspondence Manual (PDF, 527 KB)

Regulations

- Applicability of Equal Access to Justice Act - Federal Register 74 FR 57401, November 6, 2009
- NAD Rules of Procedure, Final Rule - Federal Register 64 FR 33367, June 23, 1999
- NAD Freedom of Information Act, Final Rule - Federal Register 63 FR 44773, August 21, 1998
- NAD Rules of Procedure, Interim Final Rule - Federal Register 60 FR 67298, December 29, 1995
- Code of Federal Regulations (C.F.R.)
- United States Code (U.S.C.)
- www.govinfo.gov

V. Commonly Appealed Decisions

It would be impossible to list all the different types of NAD appealable decisions here. However, I can describe some of the more common types of decisions for each agency. For FSA, some of the common adverse determinations NAD receives involve payment limitation and eligibility (7 C.F.R. §§ 795, 1400); loan denial (7 C.F.R. §§ 761.6, 780); and denial of indemnity and disaster program eligibility or payment *See generally* 7 C.F.R. § 760. Common NRCS adverse decisions often deal with the Environmental Quality Incentives Program (EQIP) (7 C.F.R. §§ 1466.30, 614, 780); wetland determinations (7 C.F.R. §§ 12.12, 614, 780); and enrollment program denials such as denials of enrollment in the Conservation Reserve Program (CRP) (7 C.F.R. §§ 1410.59, 614, 780). For RMA and FCIC, a few of the most common types of appealable crop insurance decisions, include the "Notice of Ineligibility" (7 C.F.R. § 400.682(e)); a denial of written agreement (7 C.F.R. § 457.8, para. 18(o); and large claim denial (7 C.F.R. § 457.8, para. 20). NAD also hears appeals of Final Agency Determinations and Interpretation of Procedures if they meet jurisdictional requirements. (7 C.F.R. § 457.8, para. 20 [FCIC Policies] (a)(1); 7 C.F.R. § 2457.8 para.

20 [Reinsured Policies] (a)(1)(iv); 7 C.F.R. § 400.768(g); NAD Case No. 2011S000634). Finally, the most common Rural Development adverse decisions involve the Single-Family Housing Program (7 C.F.R., Part 3550) and denials of grant program funds like the Value-Added Producer Grant (VAPG) (7 C.F.R. § 4284).

VI. After Requesting an Appeal

The appropriate NAD regional office will send a "Notice of Appeal" which assigns the case to a NAD Administrative Judge. The agency is provided 12 days to submit the Agency Record unless the date falls on a holiday or a date the government is closed, and the appellant is provided 17 days to submit evidence. The Administrative Judge will hold a prehearing conference call with the appellant and the agency before the hearing to identify all potential issues and prepare the parties for the hearing.

During the prehearing, the appeal parties should expect the Administrative Judge to do a number of things, including but not limited to the following:

- Determining whether there is mediation pending between the agency and the appellant, or if the appellant is in bankruptcy;
- Determining whether any third or interested parties should be identified;
- Verifying that a complete copy of the agency record has been provided to the appellant and to the administrative judge;
- Identifying and framing the matter(s) in dispute and the issue(s) to be resolved;
- Advising the parties concerning the nature of the evidence that may be presented at the hearing;
- Explaining the hearing process;
- Explaining how exhibits will be handled during the hearing;
- Requesting that the agency identify the regulations and statutes it believes to be applicable to the adverse decision;
- Encouraging stipulations to undisputed facts to expedite the hearing;

- Obtaining agreement among the parties as to the date, time, and location of the hearing; and
- Determining the need for translators, accommodations for those with disabilities, and other administrative matters.

An appellant has a right to a hearing within 45 days of NAD's receipt of a perfected appeal request, which means the 45-day period starts after the appeal request is deemed complete, i.e., perfected, by the regional office. Additionally, an appellant has the right to a hearing in his state of residence or at a location otherwise convenient to him, the agency, and NAD. 7 C.F.R. § 11.8(c). The appellant also has the right to choose the form of the hearing: in-person, by telephone, or a record review. 7 C.F.R. § 11.8(c)(5)(i); 7 C.F.R. § 11.6(b)(2).

The NAD Administrative Judge presides over the hearing and controls the proceeding in the manner most likely to obtain facts relevant to the matters at issue while maintaining order. There are generally four main parts to a NAD hearing:

1. **Housekeeping** – Administrative Judge will reconfirm issues, put parties under oath, explain hearing process;
2. **Opening statements** – each side gives a brief statement of its position, Administrative Judge enters Agency Record and exhibits, resolves any objections to documents;
3. **Evidence and testimony** – each side explains their case in detail by presenting testimony and documents, opportunity for questions and rebuttal, Administrative Judge may ask questions; and
4. **Closing** – opportunity for closing statements by parties and wrap up by Administrative Judge.

VII. Post-Appeal Hearing

The Administrative Judge has 30 days from the date the record closes to issue a determination in cases where the hearing was by telephone or in-person. In a record review, the Administrative Judge has 45 days from the date Appellant requests the record review to issue a determination. 7 C.F.R. § 11.8(f). The Agency head has 15 business days after the date it receives an appeal determination to request a Director review, but Appellant has 30 calendar days to request review. 7

C.F.R. § 11.9. Either party has 5 business days to respond to a Request for Director Review. *Id.*

- ***Director Review***

Requests for Director Review from Appellant or Third Party must be filed within 30 calendar days *after receipt* of the appeal determination. However, because the determinations are now uploaded to Box—NAD's electronic filing system the same day of issuance, with extremely limited exceptions, the thirty-day filing window starts immediately. The Director Review request may be mailed, faxed, or emailed to the regional office in your area **or** eFiled at http://usda-nad.entellitrak.com/efile. Individuals listed as Interested Parties who do not become Third Parties may not request Director Review. *See* https://www.usda.gov/oha/rules-and-procedures/guidance for a more thorough review of the applicable rules and procedures. If you have additional information you'd like considered on Director Review, it is best practice to file that information simultaneously with your request for Director Review.

Still have questions?? See our main page https://www.usda.gov/oha for more information as well as contact information for NAD's Ombudsmen, Jennifer Guerrieri; NAD Headquarters in DC; and the respective Regional Offices.

Artificial Intelligence in Law Practice: Navigating the Ethical Landscape

11th Annual Mid-South Agricultural and Environmental Law Conference
National Agricultural Law Center
Memphis, TN
June 2024

THE PROGRAM

Our inboxes are filled with news of artificial intelligence – its dangers, threats, promises, and possibilities. During this program, we will consider the practical uses for AI, generative and otherwise, in the delivery of legal services. Beginning with a demonstration and overview of categories of AI-powered legal tools, we'll discuss the possibilities for their use, as well as the ethical guardrails we must consider to best ensure client protection. We'll look at the states that have provided guidance on the use of generative AI and peek at what the future might hold.

The materials below are designed to provide an overview of these topics, including the current state ethics opinions and other guidance, relevant judicial orders on the use of AI, current articles related to AI in the delivery of legal services, and selected relevant law review articles.

PRESENTER BIOGRAPHY

Ellen Murphy teaches legal ethics, including Professional Responsibility courses for JD students and Unauthorized Practice of Law courses for other working professionals. A co-author on several legal ethics texts, Ellen is a member of the NC State Bar Ethics Committee, including the Subcommittee on AI and the Practice of Law, and a member of the ABA Standing Committee on Public Protection in the Provision of Legal Services. In addition, she is a subject-matter expert for the Multistate Professional Responsibility Exam.

A native of Benson, North Carolina, Ellen has a BS in Agribusiness and a Master of Education in Instructional Technology from NC State. She is currently getting an LLM in Agriculture and Food Law at the University of Arkansas (Fayetteville).

Prior to joining Wake Forest Law, Ellen was a United States federal appeals court clerk (The Honorable Frank J. Magill, 8th Circuit), a corporate lawyer at Smith Anderson in Raleigh, NC, and the Executive Director of the Massachusetts Lawyer Assistance Program. She is a 2002 graduate of Wake Forest Law, where she served as Editor in Chief of the law review.

MATERIALS

State Ethics Opinions and Other Guidance Materials

The State Bar of California Standing Committee on Professional Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*, available at: https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf (last visited April 13, 2024).

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New Jersey Supreme Court Committee on AI and the Courts, *Preliminary Guidelines on New Jersey Lawyers' Use of Artificial Intelligence* (January 25, 2024), available at: https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf

New York State Bar Association, *Report and Recommendations of the Task Force on Artificial Intelligence* (April 2024), available at: https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf

North Carolina State Bar, Proposed 2024 Formal Ethics Opinion 1 Use of Artificial Intelligence in a Law Practice, available at: https://www.ncbar.gov/for-lawyers/ethics/proposed-opinions/ (last visited April 13, 2024).

Virginia State Bar, *Guidance on Generative Artificial Intelligence,* available at: https://vsb.org/Site/Site/lawyers/ethics.aspx?hkey=bc8a99e2-7578-4e60-900f-45991d5c432b (last visited April 13, 2024).

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What is Artificial Intelligence (AI)?, via IBM, ibm.com/topics/artificial-intelligence (last visited April 13, 2024).

AI Terms for Legal Professionals: Understanding What Powers Legal Tech, LexisNexis (March 20, 2023), available at: lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech (last visited April 13, 2024).

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Selected Recent Law Review Articles

Murray, Michael D., *Artificial Intelligence and the Practice of Law Part 1: Lawyers Must be Professional and Responsible Supervisors of AI* (June 14, 2023), available at: https://ssrn.com/abstract=4478588

Perlman, Andrew, *The Legal Ethics of Generative AI* (February 22, 2024). Suffolk University Law Review, Forthcoming, available at: https://ssrn.com/abstract=4735389

Model Rules of PR Relevant to AI

Model 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.

Cmt [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.

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.

Cmt [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. ***

Cmt [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.

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.

The Legal Ethics of Generative AI

Andrew M. Perlman*

I. Introduction

The legal profession is notoriously conservative when it comes to change.[1] From email to outsourcing,[2] lawyers have been slow to embrace new methods and quick to point out potential problems, especially ethics-related concerns.

The legal profession's approach to generative artificial intelligence (generative AI) is following a similar pattern. Many lawyers have readily identified the legal ethics issues associated with generative AI,[3] often citing the New York lawyer who cut and pasted fictitious citations from ChatGPT into a federal court filing.[4] Some judges have gone so far as to issue standing orders requiring lawyers to reveal when they use generative AI or to ban the use of most kinds of artificial intelligence (AI) outright.[5] Bar associations are chiming in on the subject as well, though they have

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[1] *See generally* RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 1-15 (2d ed. 2017) (discussing the legal profession's slow adoption of new technologies).

[2] *See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op.* 99-413, at 11 n.40 (Mar. 10, 1999) (noting earlier ethics opinions that cautioned lawyers against the use of unencrypted email); ABA COMM'N. ON ETHICS 20/20, Report on Resolution 105(c), at 2 (2012) https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.pdf (last visited Feb. 19, 2024) (acknowledging that the Commission's proposals regarding outsourcing were controversial).

[3] LexisNexis, *Generative AI and the Legal Profession Survey Report* 8 (2023) https://www.lexisnexis.co.uk/pdf/generative-ai-and-the-legal-profession-report.pdf (finding that 87% of surveyed lawyers were significantly concerned about the ethical implication of generative AI); Matt Reynolds, *Majority of Lawyers Have no Immediate Plans to use Generative AI*, LexisNexis Survey Finds, ABA J. (Mar. 24, 2023) https://www.abajournal.com/web/article/survey-finds-majority-of-lawyers-have-no-immediate-plans-to-use-generative-ai [https://perma.cc/PN7P-YM7Y] (reporting that 60% of surveyed lawyers had no plans to use generative AI at that time).

[4] Mata v. Avianca, No. 22-cv-1461, 2023 U.S. Dist. LEXIS 108263, at *3 (S.D.N.Y. June 22, 2023) (sanctioning lawyers for filing "false and misleading statements to the Court").

[5] *See* Sara Merken, *Another US Judge Says Lawyers Must Disclose AI Use*, REUTERS (Feb. 24, 2023), https://www.reuters.com/legal/another-us-judge-says-lawyers-must-disclose-ai-use-2023-02-24/ [https://perma.cc/7Q2X-TS75?type=standar] (comparing standing orders issued by Judge Stephen Vaden and U.S. District Judge Brantley Starr); Cedra Mayfield, *Judicial Crackdown: 'This Is Why I Have a Standing Order on the Use of AI,'* ALM LAW.COM (July 27, 2023), https://www.law.com/2023/07/27/judicial-crackdown-this-is-why-i-have-a-standing-order-on-the-use-of-ai/ [https://perma.cc/325M-AJSA] (discussing generative AI standing orders issued by federal judges in four states); *infra* note 66 (listing standing orders on generative AI).

(so far) taken an admirably open-minded approach to the subject.[6]

Part II of this essay explains why the Model Rules of Professional Conduct (Model Rules) do not pose a regulatory barrier to lawyers' careful use of generative AI, just as the Model Rules did not ultimately prevent lawyers from adopting many now-ubiquitous technologies.[7] Drawing on my experience as the Chief Reporter of the ABA Commission on Ethics 20/20 (Ethics 20/20 Commission), which updated the Model Rules to address changes in technology, I explain how lawyers can use generative AI while satisfying their ethical obligations.[8] Although this essay does not cover every possible ethics issue that can arise or all of generative AI's law-related use cases, the overarching point is that lawyers can use these tools in many contexts if they employ appropriate safeguards and procedures.[9]

Part III describes some recent judicial standing orders on the subject and explains why they are ill-advised.[10]

The essay closes in Part IV with a potentially provocative claim: the careful use of generative AI is not only consistent with lawyers' ethical duties, but the duty of competence may eventually *require* lawyers' use of generative AI.[11] The technology is likely to become so important to the delivery of legal services that lawyers who fail to use it will be considered as incompetent as lawyers today who do not know how to use computers, email, or online legal research tools.

II. Model Rules Implicated by Lawyers' Use of Generative AI

Generative AI refers to technologies "that can generate high-quality text, images, and other content based on the data they were trained on."[12] The tools have the potential to reshape law practice,[13] but lawyers necessarily need to consider a number of ethics-related issues. Although the list below is not comprehensive, the

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[6] *See, e.g.* FL. Eth. Op. 24-1, 2024 WL 271230, at *1 (Fla. State Bar Ass'n. Jan 19., 2024) (identifying some of the ethical issues that lawyers need to address when using generative AI). Cal. State Bar Standing Comm. On Pro. Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law,* STATE BAR OF CAL. 1, 1 (Nov. 16, 2023), https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf [https://perma.cc/B3X4-FAEC] (same); N.J. COURTS, NOTICE TO THE BAR LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS 1-2 (2024), https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf [https://perma.cc/LK7V-KY2R] (same).

[7] *See infra* note 77 and accompanying text (discussing adoption of email).

[8] *See* N.J. COURTS, *supra* note 6, at 3-4 (making similar observation).

[9] *See infra* Part II (describing implicated Model Rules).

[10] *See infra* Part III (focusing on current standing orders).

[11] *See infra* Part IV (making the case for vision of the future).

[12] Kim Martineau, *What is Generative AI* (Apr. 20, 2023), https://research.ibm.com/blog/what-is-generative-AI (last visited Feb. 22, 2024).

[13] Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, 30 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2024).

primary takeaway is that the Model Rules offer a useful roadmap for the ethical use of generative AI.

A. The Duty of Confidentiality Under Model Rule 1.6

Lawyers have to address several confidentiality issues when inputting or uploading client-related information into a generative AI tool. These issues, however, are not especially novel.[14] For many years, lawyers have faced conceptually similar situations when using third-party, cloud-based technology, such as online document storage systems (e.g., Microsoft OneDrive or Dropbox) and email services (e.g., Gmail).[15] Lawyers have also had to navigate confidentiality issues when inputting information into third-party tools, such as when querying online legal research tools like Westlaw and Lexis. Just as lawyers can adopt appropriate safeguards when using these kinds of services, they can do so when using generative AI.

The Ethics 20/20 Commission proposed amendments to the Model Rules in order to help lawyers address these kinds of confidentiality concerns.[16] Model Rule 1.6(c), which was added in 2012, explains that "[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."[17] Comment 18 then refers lawyers to Model Rule 5.3, Comments 3-4 for guidance on how to comply with the duty when sharing information with third-parties outside the lawyer's firm.[18]

Rule 5.3, Comment 3 is especially instructive. It counsels a lawyer to make "reasonable efforts to ensure" that outside service providers act in ways that are compatible with the lawyer's professional obligations.[19] The scope of this obligation

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[14] *See* Fla. Bar Standing Comm. on Pro. Ethics, *supra* note 6, at *1 (reaching a similar conclusion).
[15] *See id.*; Andrew C. Budzinski, *Clinics, the Cloud, and Protecting Client Data in the Age of Remote Lawyering,* 29 CLINICAL L. REV. 201, 201-03 (2023) (weighing cloud storage and professional responsibility considerations). Because most client data is now electronic, "the ethical lawyer must protect that data under their duty of confidentiality, to safeguard client property, and to protect the attorney-client privilege and work-product doctrine." *See id.* at 202-03.
[16] *See* ABA COMM'N. ON ETHICS 20/20 (2012) https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on--ethics-20-20/ (last visited Feb. 19, 2024) (offering background and updates on Commission activities).
[17] *See* MODEL RULES OF PRO. CONDUCT r 1.6(c) (AM. BAR ASS'N 2020).
[18] *See* MODEL RULES OF PRO. CONDUCT r 1.6(c) cmt. [18] (AM. BAR ASS'N 2020) (referring readers to Model Rule 5.3, Comments 3-4); MODEL RULES OF PRO. CONDUCT r 5.3 cmt. [3]-[4] (AM. BAR ASS'N 2020) (commenting on how lawyers should obtain client consent before using third party nonlawyers).
[19] *See* MODEL RULES OF PRO. CONDUCT r 5.3 cmt. [3] (AM. BAR ASS'N 2020) (asserting standard). The Comment provides as follows:

> When using … services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer;

varies depending on the nature of the services involved, the terms of any arrangements concerning client information, and the "legal and ethical environments of the jurisdictions where the services are performed."[20] Put simply, lawyers can satisfy their confidentiality obligations when using generative AI tools (i.e., a "service outside the firm") as long as they "make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."[21]

This prescription means that, in the absence of informed client consent, lawyers should not insert or upload confidential information into most publicly available versions of generative AI services (like ChatGPT) because the companies operating those services typically have the right to review the prompts that are used.[22] The companies also can train their models on any information that a lawyer shares.[23]

In contrast, lawyers can satisfy their duty of confidentiality when using third-party generative AI tools by making reasonable efforts to ensure that the third parties do not access the prompts or train their models from those prompts. For example, OpenAI has a version of ChatGPT (ChatGPT Enterprise) that includes data protection procedures that likely satisfy a lawyer's duty of confidentiality.[24] In that case, the use of generative AI would be analogous to a lawyer's use of Microsoft OneDrive or a query on Westlaw or Lexis.

Other factors that lawyers need to consider include the reputation and location of the provider. For example, lawyers should be more wary of using a generative AI tool owned and operated in China versus one owned and operated in the United

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> the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

Id.

[20] *Id.* (describing multiple factors).

[21] *Id.*

[22] *See* David Canellos, *What to Know About Sharing Company Data with Generative AI*, FORBES (Aug. 10, 2023), https://www.forbes.com/sites/forbestechcouncil/2023/08/10/what-to-know-about-sharing-company-data-with-generative-ai/?sh=1ec0fff60229 [https://perma.cc/DZV5-DA2] (describing the dangers of using generative AI, including data leakage and exposing personally identifiable information); Michael Schade, *How Your Data is Used to Improve Model Performance*, OPENAI (2023), https://help.openai.com/en/articles/5722486-how-your-data-is-used-to-improve-model-performance (last visited Feb. 19, 2024) (explaining how the company uses consumer data). With regard to Open AI's Enterprise service, authorized employees are permitted to view stored inputs and outputs as are "specialized third-party contractors who are bound by confidentiality and security obligations." *See* OpenAI, *API Platform FAQ*, https://openai.com/enterprise-privacy [https://perma.cc/Y8VZ-KQWW] (describing OpenAI's policies regarding enterprise data).

[23] *See* Schade, *supra* note 22 (describing OpenAI training policies).

[24] *See* OpenAI, *supra* note 22 (highlighting ChatGPT Enterprise data protection procedures).

States.

In the absence of purchasing an instance of a third-party tool with appropriate privacy protections in place, lawyers have three other options for satisfying their confidentiality obligations. First, they could use the tools without uploading or sharing client confidences. Generative AI can be quite useful even without disclosing confidential information, just as legal research tools can be helpful without disclosing client confidences.

Second, lawyers could build their own generative AI tools. Although few law firms and legal departments currently have sufficient resources to do so on their own, the expense of deploying these tools internally may not be as expensive as many lawyers believe.[25]

A third option is for a lawyer to obtain a client's informed consent under Rule 1.6(a).[26] Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[27] Rule 1.0 Comment 6 elaborates on the meaning of informed consent, but the essential idea is that the client must have sufficient information to make an informed decision, with lawyers having a greater obligation to disclose information to unsophisticated clients than to those who are experienced regarding the conduct for which consent is sought.[28] For example, before sharing confidential information with a generative AI tool, a lawyer would have to explain the implications of doing so in more detail to the typical client than to the executive of an AI company. That said, given the current lack of technological sophistication of most lawyers and clients, it may not be possible in some instances to obtain informed consent to share sensitive information with many generative AI tools.

In sum, lawyers can comply with their duty of confidentiality when using generative AI tools either by not sharing confidential information (e.g., by prompting the tool with generic information) or by using tools owned and controlled by

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[25] *See* Robert J. Ambrogi, *Four Months After Launching Its 'Homegrown' GenAI Tool, Law Firm Gunderson Dettmer Reports on Results so far, New Features, and a Surprise on Cost*, LAWSITES (Dec. 20, 2023) https://www.lawnext.com/2023/12/four-months-after-launching-its-homegrown-genai-tool-law-firm-gunderson-dettmer-reports-on-results-so-far-new-features-and-a-surprise-on-cost.html [https://perma.cc/6N35-GVD4] (commenting on Gunderson Dettmer's recent launch of "ChatGD"). Gunderson's Chief Innovation Officer projects that the total annual cost for providing ChatGD to the entire firm "will be less than $10,000." *See id.*

[26] *See* MODEL RULES OF PRO. CONDUCT r 1.6(a) (AM. BAR ASS'N 2020) (providing that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)").

[27] *See* MODEL RULES OF PRO. CONDUCT r 1.0(e) (AM. BAR ASS'N 2020) (defining informed consent).

[28] *See* MODEL RULES OF PRO. CONDUCT r 1.0 cmt. [6] (AM. BAR ASS'N 2020) (elaborating on the definition of informed consent).

companies that have appropriate terms and conditions on how the information can be used. An increasing number of well-established, reputable companies that have long served the legal industry are already launching generative AI tools in an attempt to satisfy these requirements.[29] Building a proprietary service is another option that is likely to become increasingly cost effective, and informed consent offers yet another possibility depending on the sophistication of the lawyer and the client.

B. Consulting with Clients Under Model Rule 1.4

Rule 1.4 imposes a number of duties on lawyers to keep clients informed about a pending matter.[30] As applied to generative AI, the most relevant portion may be Rule 1.4(a)(2). It explains that "a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished."[31] Comment [3] elaborates on the duty this way:

> In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions

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[29] *See* LexisNexis, *LexisNexis Launches Lexis+ AI, a Generative AI Solution with Linked Hallucination-Free Legal Citations*, LEXISNEXIS (Nov. 14, 2023) https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-launches-lexis-ai-a-generative-ai-solution-with-hallucination-free-linked-legal-citations [https://perma.cc/T82P-R2QY] (explaining development and capabilities of Lexis+ AI); Thomson Reuters, *Thomson Reuters Launches Generative AI-Powered Solutions to Transform how Legal Professionals Work*, THOMSON REUTERS (Nov. 15, 2023) https://www.thomsonreuters.com/en/press-releases/2023/november/thomson-reuters-launches-generative-ai-powered-solutions-to-transform-how-legal-professionals-work.html [https://perma.cc/KS42-BY4Y] (debuting AI-Assisted Research on Westlaw Precision).

[30] *See* MODEL RULES OF PRO. CONDUCT r 1.4 (AM. BAR ASS'N 2020). Rule 1.4 provides as follows:

> (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.

See id.

[31] *See* MODEL RULES OF PRO. CONDUCT r 1.4(a)(2) (AM. BAR ASS'N 2020) (explaining that lawyers must reasonably consult with their clients to accomplish clients' objectives).

the lawyer has taken on the client's behalf.[32]

Because the use of generative AI can be viewed as one of the "means to be used to accomplish the client's objectives," Rule 1.4(a)(2) arguably imposes on a lawyer the duty to consult with a client before using such services.[33] Thus, even if a lawyer can overcome the confidentiality issues described earlier—such as by deploying a tool within the law firm that contains appropriate privacy protections—a lawyer may still have to inform the client about the tool's use in the client's matter. Indeed, some lawyers have begun to inform clients about these uses in their engagement letters.[34]

Such a consultation is only arguable because it is not entirely clear that a lawyer's use of generative AI is sufficiently important to warrant a consultation in all circumstances. For example, lawyers already take advantage of some basic forms of generative AI without even realizing it—such as when they use the autocomplete feature in Microsoft Word—and lawyers should not need to consult clients before using such tools.[35]

Even when lawyers use more sophisticated forms of generative AI (e.g., using it to draft a legal memo), it is not obvious that a lawyer should have to consult with the client before doing so.[36] Assuming the lawyer is appropriately protecting client confidences and carefully reviewing the outputs, one could conclude that lawyers should have no greater obligation to consult with clients before using generative AI than before using online legal research tools, querying Google, or storing client documents on a network drive.

That said, at least for now, lawyers are well-advised to consult with clients before using generative AI to assist with anything other than the *de minimis* case of autocompleting simple text. Consultation aligns with the principle of transparency that underlies Rule 1.4 and aids in managing client expectations about the nature and source of the legal services provided.[37] Given the novelty and evolving nature of

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[32] MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. [3] (AM. BAR ASS'N.).
[33] *See* MODEL RULES OF PRO. CONDUCT r. 1.4(a)(2) (AM. BAR ASS'N.) (requiring lawyers to "reasonably consult" with their client about the means used to accomplish a client's objectives).
[34] *See* Isabel Gottlieb, *Law Firms Wrestle with How Much to Tell Clients About AI Use*, BLOOMBERG LAW (Nov. 29, 2023) https://news.bloomberglaw.com/business-and-practice/law-firms-wrestle-with-how-much-to-tell-clients-about-ai-use [https://perma.cc/YBN6-MQUE] (asking numerous firms about how they disclose the use of generative AI to their clients).
[35] *See generally*, Andrea Eoanou, *Introducing New AI Enhancements in Microsoft 365: New Features Coming to Microsoft Editor and More!*, MICROSOFT (Oct. 12, 2022) https://techcommunity.microsoft.com/t5/microsoft-365-blog/introducing-new-ai-enhancements-in-microsoft-365-new-features/ba-p/3643499 [https://perma.cc/7R84-U5B2] (describing new autocomplete features in Outlook and Word); Microsoft, *Welcome to Copilot in Word*, MICROSOFT, https://support.microsoft.com/en-us/office/welcome-to-copilot-in-word-2135e85f-a467-463b-b2f0-c51a46d625d1 [https://perma.cc/4QMA-JQCV] (announcing how Word customers can use Copilot AI to draft documents).
[36] *See* N.J. Guidance, *supra* note 6, at 4-5 (reaching a similar conclusion).
[37] *See* MODEL RULES OF PRO. CONDUCT r 1.4 (AM. BAR ASS'N 2020).

generative AI, clients may not be fully aware of its capabilities and limitations, so for the time being, lawyers should typically consult with clients before using generative AI in more substantive ways.

That said, this duty may evolve considerably in the future. Even if a duty of consultation currently exists under Rule 1.4, generative AI tools are likely to become so ubiquitous in the years to come that consultation is likely to become unnecessary. In the meantime, however, such a consultation is highly advisable for anything other than the most basic of drafting tasks.

C. Oversight of Nonlawyer Services Under Model Rule 5.3

In 2012, the Ethics 20/20 Commission proposed a two-letter change to the title of Rule 5.3 from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."[38] The change signaled that lawyers use an increasingly wide range of non-human forms of assistance when representing clients and should consider several factors when using those services.[39] The Ethics 20/20 Commission also proposed (and the ABA adopted) several new Comments that were designed to guide lawyers with regard to the use of such third-party services.[40]

As discussed earlier in the context of the duty of confidentiality, Comment 3 is especially helpful in understanding how Rule 5.3 applies to a lawyer's use of generative AI.[41] The Comment has implications well beyond issues of confidentiality and suggests that lawyers who use third-party services must make reasonable efforts to ensure that those services are performed in a manner that is consistent with the lawyer's own obligations.[42] The extent of the lawyer's obligation will necessarily turn on the "education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality."[43]

These factors suggest that lawyers will have varying duties of oversight

[38] *See* ABA COMM'N. ON ETHICS 20/20, RES. 105A REVISED, REPORT TO THE HOUSE OF DELEGATES 2 (2012) (describing change from "Assistants" to "Assistance") [hereinafter RES. 105A REVISED]; MODEL RULES OF PRO. CONDUCT r 5.3 (AM. BAR ASS'N 2020) (stating modified title).
[39] *See* ABA COMM'N ON ETHICS 20/20, RES. 105C, REPORT TO THE HOUSE OF DELEGATES 2 (2012) [hereinafter RES. 105C] (introducing change to Rule 5.3).
[40] *See ABA Commission on Ethics 20/20*, AM. BAR ASS'N. https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on--ethics-20-20/ (last visited Feb. 19, 2024) (describing all accepted and proposed changes to Model Rules).
[41] *See* MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. [3] (AM. BAR ASS'N. 2020) (explaining how to use nonlawyer assistance outside firm).
[42] *See id.* (noting how lawyers must make reasonable efforts to ensure nonlawyer compliance with Model Rule 5.3).
[43] *See id.* (describing standard of Model Rule 5.3, Comment 3).

depending on the nature of the generative AI service that they use. For example, if a lawyer is simply using Microsoft's autocomplete feature, the lawyer would not have an obligation to take any particular action. The feature typically inserts only a few words at the end of a sentence, making it easy for a lawyer to determine the reasonableness of the suggested wording and to either accept, reject, or modify it. The "nature of the service involved" in this example is modest and should not require a lawyer to take any additional steps under Rule 5.3.[44]

In contrast, if a lawyer uses more sophisticated forms of generative AI, there will be additional oversight obligations. Among other considerations, the lawyer would have to understand the "education, experience, and reputation" of the generative AI before using it.[45] For example, a lawyer might look into how the generative AI service was trained and what procedures are used to ensure the accuracy of outputs. The lawyer might also investigate the reputation of the tool by reviewing the increasing number of studies that document how reliable various generative AI services are (i.e., the extent to which the tool "hallucinates").[46] A lawyer can have more confidence when using a generative AI tool that has a reputation for accuracy in the context of legal services than when using a tool that does not have any indicators of reliability. Moreover, as the Comment suggests and as discussed earlier, the lawyer will have to assess the confidentiality implication of using the generative AI service.

A lawyer might reasonably decide to use a generative AI tool after considering these factors, but the lawyer should still carefully review all AI-generated content for accuracy before relying on it. To be clear, the high likelihood of errors does not mean that Rule 5.3 prohibits lawyers from using the service. Rather, in much the same way that lawyers have to check the work of paralegals or inexperienced summer associates (who often make mistakes), lawyers will have to do the same when generating content through AI. A high probability of error does not mean a lawyer is prohibited from using a particular service; it just means that the lawyer must vet the content more carefully.

D. The Duty of Competence Under Rule 1.1

All of the preceding ethical obligations arguably fall under the more general obligation to act competently with regard to technology. Prior to the work of the Ethics 20/20 Commission, the word "technology" did not even appear in the Model Rules, so the Commission decided that the Model Rules should address the issue and that a comment related to the duty of competence was the appropriate place to do

[44] *See id.* (tying lawyer's disclosure obligations to the nature of the services involved).
[45] *See* MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. [3] (AM. BAR ASS'N. 2020).
[46] *See* IBM, *What are AI Hallucinations?*, IBM, https://www.ibm.com/topics/ai-hallucinations [https://perma.cc/WMD4-GU6P] (explaining what leads to generative AI hallucinations).

so.[47]

The new language (in italics) says that, "[t]o 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*…."[48] The idea here is that, to maintain competence, lawyers necessarily need to remain aware of both the benefits and the risks associated with existing and emerging technologies.

In the context of generative AI, this obligation means that lawyers should understand the potential advantages and risks from the tools. [49] Lawyers can quite reasonably conclude that, under some circumstances, generative AI does not present a sufficient benefit to outweigh the risks and vice versa. This assessment is a necessary part of a lawyer's ongoing duty of competence.[50]

In sum, lawyers have to navigate a number of ethical issues when using generative AI, including some not even referenced here. For example, lawyers may have to deal with issues involving the unauthorized practice of law, duties to prospective clients under Rule 1.18 (e.g., when generative AI is used to interact with potential clients) and duties related to fees under Rule 1.5 (e.g., how lawyers charge for their time when using generative AI and the prohibition against lawyers billing for time that they did not spend on a matter).[51] Moreover, the legal profession is likely to face other ethics-related issues going forward, such as whether to have mandatory training on generative AI for both law students and practicing lawyers, as the California Committee on Professional Responsibility and Conduct recently suggested.[52] The overarching point, however, is that the ethics rules will not impede the steady advance of generative AI in the delivery of legal services.

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[47] *See* ABA COMM'N ON ETHICS 20/20, *supra* note 40 (proposing changes to the Comments to Model Rule 1.1). *See infra* note 48.

[48] *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. [8].

[49] *See* Jessica R. Blaemire, *Analysis: Lawyers Recognize Ethical Duty to Understand Gen AI*, BL ANALYSIS (Oct. 19, 2023) https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-lawyers-recognize-ethical-duty-to-understand-gen-ai [https://perma.cc/542A-T2LR] (explaining results of study). In fact, many attorneys have already concluded that they can use generative AI in their practice without violating an ethical duty. *See id.* For example, Bloomberg Law asked 452 attorneys for their opinion on legal ethics and the use of generative AI and "almost 70% said that it's possible to use generative AI in legal practice without violating an ethical duty, and almost as many (66%) said it can be used without violating the ABA Model Rules or state equivalents." *See id.* These results suggest that, while the Model Rules may not currently have provisions that directly address generative AI, the legal profession recognizes that the rules of professional conduct are unlikely to impede the legal profession's adoption of generative AI. *See generally id.*

[50] *See generally id.* (finding 66% of surveyed attorneys believe that the use of AI does not violate ABA Model Rules).

[51] *See* MODEL RULES OF PRO. CONDUCT r. 1.18 (AM. BAR ASS'N. 2020) (describing duties to prospective clients); MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N. 2020) (explaining lawyer fee schedules and arrangements); Fla. Bar Standing Comm. on Pro. Ethics, *supra* note 6 (describing billing-related issues arising from lawyers' use of generative AI).

[52] *See infra* note 78 (recommending such training).

III. Obligations Imposed by Court Order

Some courts have responded to the emergence of generative AI by issuing standing orders that impose near-outright bans on lawyers' use of AI or require lawyers to disclose when they have used the technology for court filings.[53] Both types of orders are overly broad and unnecessary.

A. The Problems with Banning AI

One example of a ban comes from Judge Michael J. Newman of the United States District Court for the Southern District of Ohio.[54] Judge Newman has a standing order that not only prohibits the use of generative AI tools to prepare a court filing but extends that prohibition to the use of nearly all forms of artificial intelligence.[55] The standing order provides as follows:

> No attorney for a party, or a *pro se* party, may use Artificial Intelligence ("AI") in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, *inter alia*, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.[56]

This ban is problematic for two reasons. First, by prohibiting the use of nearly all forms of AI—and not just generative AI—the order is dramatically overbroad. The definition of "artificial intelligence" varies, but it commonly "refers to the ability of machines and computers to perform tasks that would normally require human intelligence."[57] Using this definition, the order would prohibit lawyers from using most types of professional productivity software, such as Microsoft Word, Outlook, and Gmail, given that most of these tools perform tasks (like spellchecking and

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[53] *See, e.g.,* J. Michael J. Newman, Artificial Intelligence ("AI") Provision in Both Civil and Criminal Cases (S.D. Ohio July 14, 2023); J. Roy Ferguson, Standing Order Regarding Use of Artificial Intelligence (394th Jud. Dist. Tex, June 9, 2023); J. Stephen Alexander Vaden, Order on Artificial Intelligence, (U.S. Ct. Int'l. Trade, June 6, 2023).

[54] Newman, *supra* note 53.

[55] *Id.*

[56] *Id.*

[57] Jennifer Monahan, *Artificial Intelligence, Explained,* https://www.heinz.cmu.edu/media/2023/July/artificial-intelligence-explained (Jul. 2023) (last visited Feb. 22, 2024). *See also* Clara Pilato, *Artificial Intelligence vs Machine Learning: What's the difference?*, https://professionalprograms.mit.edu/blog/technology/machine-learning-vs-artificial-intelligence/ (last visited Feb. 23, 2024) (describing artificial intelligence as the ability of "computers to imitate cognitive human functions" and noting that "artificial intelligence is everywhere").

grammar checking) that used to require human-level intelligence.[58] The order also would seem to extend to e-discovery services, which almost always rely on some form of AI.[59] Since those e-discovery services do not fall within the safe harbor of "legal search engines," lawyers would presumably be prohibited from using them to find relevant information when preparing a court filing.

Not only is the court order overbroad, but it is also unnecessary. Lawyers are already subject to sanctions or discipline for filing inaccurate or false documents using AI.[60] For example Rule 11(b) of the Federal Rules of Civil Procedure (FRCP) requires lawyers to thoroughly research their pleadings, filings, or motions to a court using "an inquiry reasonable under the circumstances." [61] In other words, lawyers must certify that their filings do not contain fictitious legal contentions, citations, or claims.[62] Model Rule 3.1, which has been adopted in nearly every U.S. jurisdiction, imposes almost identical obligations.[63]

These provisions were more than adequate to discipline and sanction the infamous New York lawyer who cut and pasted bogus citations from ChatGPT into a court document.[64] In fact, the judge in that case (Judge P. Kevin Castel) acknowledged "there is nothing inherently improper about using a reliable artificial

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[58] John Roach, *How AI is making people's workday more productive,* https://news.microsoft.com/source/features/ai/microsoft-365-intelligent-workday-productivity/ (May 6, 2019) (explaining how artificial intelligence was infused in Microsoft products in 2019 through spellchecking and grammar checking).

[59] *See AI for Lawyers: How Law Firms are Leveraging AI for Document Review*, CASEPOINT, https://www.casepoint.com/resources/spotlight/leveraging-ai-document-review-law-firms/ [https://perma.cc/V3PP-WRPF] (offering ways to use AI throughout the e-discovery process); *Casetext Launches AllSearch, Powerful Document Search Technology for Litigators*, CASETEXT (June 6, 2022) https://casetext.com/blog/allsearch-launch/ [https://perma.cc/XG2N-RWWH] (promoting AllSearch's ability to streamline e-discovery workflows).

[60] *See* Mata v. Avianca, No. 22-cv-1461, 2023 U.S. Dist. LEXIS 108263, at *3 (S.D.N.Y. June 22, 2023) (sanctioning attorney under FRCP 11 for submitting document with fictitious citations generated by ChatGPT).

[61] *See* Fed. R. Civ. P. 11(b) (imposing obligations on lawyers when filing documents with the court). The Rule provides as follows:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances … (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . .

See id.

[62] *Id.*

[63] *Compare* MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N. 2020) (describing a lawyer's obligations with regard to meritorious claims & contentions), *with* Fed. R. Civ. P. 11(b) (outlining similar standards).

[64] *See Mata*, 2023 U.S. Dist. LEXIS 108263, at *45-46 (sanctioning attorney for false citations).

intelligence tool for assistance."[65] Judge Castel correctly recognized that an across-the-board ban is unnecessary because both the Model Rules and the Federal Rules of Civil Procedure provide sufficient protections against a lawyer's careless use of AI.

B. The Overbreadth of Orders Requiring Disclosure

Some courts have adopted a more targeted approach by simply requiring lawyers to disclose when they have used generative AI to prepare a court filing.[66] For example, U.S. Magistrate Judge Gabriel Fuentes of the United States District Court for the Northern District of Illinois has a standing order with the following directive: "[a]ny party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used."[67]

The United States Court of Appeals for the Fifth Circuit similarly specifies that:

> Counsel and unrepresented filers must … certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.[68]

Other courts have adopted conceptually similar approaches.[69]

These directives are an improvement over Judge Newman's order, but they are still overly broad.[70] One problem is that lawyers are now using generative AI without even realizing it. Take, for example, this very essay, which was drafted using Microsoft Word 365. At various times while drafting the piece, Microsoft suggested ways to autocomplete a sentence (including while writing this sentence). These autocomplete features are a form of "generative AI," and they are now incorporated into a wide range of professional software. Does a lawyer have to disclose to a court

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[65] *Id.* at *1 (noting the effective and ethical applications of AI in legal work).
[66] *See* Magis. J. Gabriel A. Fuentes, Standing Order for Civil Cases Before Magistrate Judge Fuentes, (N.D. Ill. May 5, 2023) (requiring any party to disclose the use of generative AI in court-filed documents to court); J. Brantley Starr, Mandatory Certification Regarding Generative Artificial Intelligence, (N.D. Tex. May 30, 2023) (requiring all attorneys or *pro se* litigants to certify that generative AI did not draft any portion of filing).
[67] Fuentes, *supra* note 66.
[68] 5th Cir. R. 32.3 (proposed Amendment, Dec. 1, 2023) [hereinafter Fifth Circuit Standing Order].
[69] *See, e.g.,* Fuentes, *supra* note 66; Starr, *supra* note 66; Vaden, *supra* note 53; Ferguson, *supra* note 53; J. Michael M. Baylson, Standing Order RE: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (E.D. Penn., June 6, 2023).
[70] *Compare* Newman, *supra* note 53 (creating generative AI standing order), *with* 5th Cir. R. 32.3 (proposed Amendment, Dec. 1 2023) (allowing for use of generative AI with human oversight for accuracy), *and* Fuentes, *supra* note 66 (requiring attorneys or pro se litigants to disclose the use of generative AI, but not banning it).

each time a filed document may have had some words generated by commonly used tools? If courts only intend to require lawyers to disclose when they use AI to generate more substantive content, how much more substantive does it need to be? The lines are difficult to draw already, but they will become increasingly so as generative AI is incorporated more deeply and widely into professional tools.

Another problem with these orders is that they would require lawyers to disclose when they have used generative AI just to brainstorm ideas. The tools are often quite useful in helping to think through possible arguments or to suggest weaknesses in wording. There is no clear public policy rationale for why a lawyer should have to disclose such uses, but most of the standing orders effectively impose such a disclosure requirement.[71]

The standing orders are not only worded too broadly, but like Judge Newman's order, they are unnecessary. As noted earlier, the rules of professional conduct and rules of civil procedure impose sufficient duties on lawyers with regard to their filings. A notification requirement will not only cause increasing confusion as generative AI tools become ubiquitous, but courts have ample tools to ensure that lawyers fulfill their ethical and legal duties to the court.[72]

Judges have expressed their concerns about generative AI in a variety of ways, with Judge Brantley Starr of the United States District Court for the Northern District of Texas offering among the most elaborate explanations:

> These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than

[71] *See* Fuentes, *supra* note 66 (requiring any party that uses generative AI in research or drafting documents to disclose its use); Vaden, *supra* note 53 (mandating disclosure of use of generative AI in any submission to Judge Vaden); Baylson, *supra* note 69 (requiring any attorney or *pro se* litigant to disclose generative AI use in any submitted filing); *see also* Maura R. Grossman et al., *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 69, 76 (2023) (arguing that current standing orders with disclosure requirements unnecessarily burden litigants).
[72] *See, e.g.,* Mata v. Avianca, No. 22-cv-1461, 2023 U.S. Dist. LEXIS 108263, at *45-46 (S.D.N.Y. June 22, 2023) (using existing provisions to impose sanctions).

> principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing. A template Certificate Regarding Judge-Specific Requirements is provided here.[73]

The problem with this reasoning is that it proves too much. Lawyers have long used a variety of methods to prepare court filings that trigger conceptually similar concerns, yet courts do not impose any new certification obligations. Consider, for example, lawyers who use summer associates to help prepare the first draft of a court filing, including a brief. The summer associate is much more likely to make mistakes than a lawyer (i.e., summer associates do not have "requisite accuracy and reliability for legal briefing"), but despite this risk of error, courts do not require lawyers to separately certify that have adequately supervised summer associates who worked on the filing. Lawyers understand their obligations to provide appropriate oversight and review before filing a document with a court. That obligation is sufficient in the context of summer associates, and it is sufficient with regard to generative AI.

Having said that, there is arguably no downside to courts reminding lawyers to comply with their existing ethical and legal obligations when using generative AI, especially given the nascent nature of the technology. Most of the existing orders, however, go beyond such a reminder. They institute notification requirements or outright bans, which cause increasing confusion and impose unnecessary new obligations as these tools become more widespread. For now, the best approach is for courts to rely on their existing ability to sanction lawyers or to simply remind lawyers that they should be careful when using generative AI.

IV. The Future of the Duty of Competence

The contention of this essay so far has been fairly modest and can be summarized by two basic points. First, lawyers can typically use generative AI in ethically compliant ways by adopting appropriate procedures and protocols. Second, judicial efforts to prohibit these tools or impose notification requirements are either problematic or unnecessary.

The final section of this essay makes an even more provocative claim: generative AI is advancing so rapidly that we may eventually move away from saying that lawyers are ethically permitted to use it, to saying that lawyers are ethically *required* to do so. The idea here is that, just as we would question the competence of

[73] Starr, *supra* note 66.

a lawyer who pulls out a typewriter to prepare a client document, we will at some point question the competence of a lawyer who begins drafting legal documents by opening a word processing program to a blank screen and typing from scratch. Lawyers will be expected to use generative AI tools—or whatever they will be called in the future—as part of the modern, competent practice of law.

Lawyers already have begun to use these tools to improve the quality of their work or make it more efficient. For example, generative AI tools are helping lawyers draft clauses and phrases in transactional documents; summarize large collections of documents in litigation and transactional work; draft and respond to emails; brainstorm possible arguments to raise in litigation or identify weaknesses in existing arguments; draft interrogatories and document requests; draft simple transactional documents; prepare first drafts of simple motions and briefs; identify inconsistencies in deposition and trial testimony in real time; prepare first drafts of legal memos; and identify possible deposition topics and questions.[74] These use cases have emerged within only one year of ChatGPT's release, when these tools are in their relative infancy. The level of sophistication is likely to grow significantly in the future, making these tools indispensable to modern law practice.

Is this transition likely to happen soon? The answer is almost certainly, "no." As Bill Gates once said, "People often overestimate what will happen in the next two years and underestimate what will happen in ten."[75] Generative AI's potential to transform the legal profession is enormous, but it will not lead to seismic changes in the immediate future. The tools are evolving; their reliability is still improving; and the use cases are still emerging. Law firms, legal departments, and legal services providers are understandably cautious about deploying these tools, and they are waiting to see how the market evolves in the coming years.

Put another way, generative AI is going through some version of the so-called Gartner hype cycle, where we expect a new technology to be more transformative than we can reasonably expect it to be in the short term. We may soon enter the "trough of disillusionment" if we are not there already.

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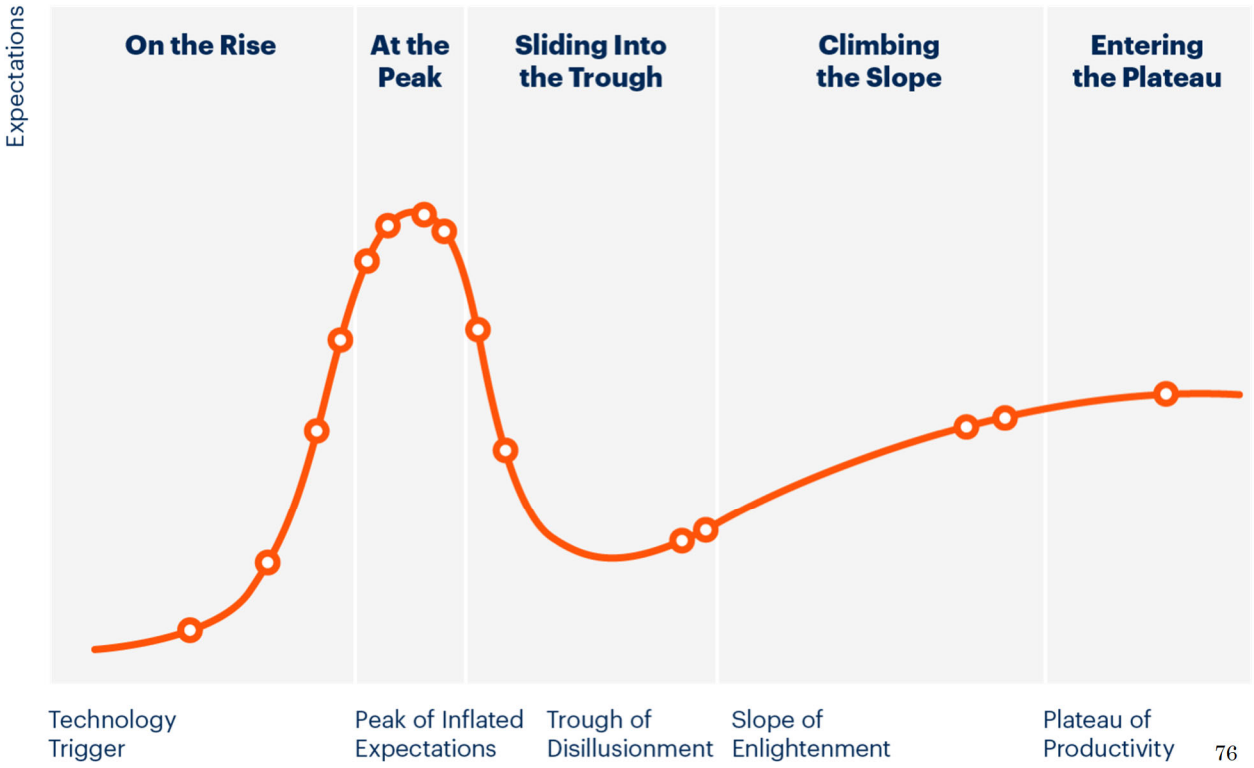
[74] *See, e.g.,* Patrick Smith, *Sullivan & Cromwell's Investments in AI Lead to Discovery, Deposition 'Assistants,'* ALM LAW.COM (Aug. 21, 2023) https://www.law.com/americanlawyer/2023/08/21/sullivan-cromwell-investments-in-ai-lead-to-discovery-deposition-assistants/ [https://perma.cc/TUX4-UK2L] (describing current and future uses of generative AI at Sullivan & Cromwell); *How To . . . Use AI to Ace Your Next Deposition*, CASETEXT (Aug. 31, 2023), https://casetext.com/blog/4-steps-to-acing-your-next-deposition-using-ai/ [https://perma.cc/TY3D-38X3] (explaining how AI helps litigators efficiently and effectively prepare for depositions).

[75] BILL GATES ET AL., THE ROAD AHEAD 316 (2d. ed. 2023).



That said, generative AI will very likely become ubiquitous in much the same way as email and online legal research. Competent lawyers are now expected to know how to use those tools, and the same will eventually be true for generative AI (i.e., the technology will reach the right side of the curve, but perhaps with a steeper upward slope).

The email analogy may be especially apt. When the technology first became available, ethics opinions urged considerable caution and even suggested that lawyers might violate their duty of confidentiality by using it.[77] We have now reached the point where lawyers *must* have an email address in order to remain licensed to practice law.[78] We are likely to see a similar transition for generative AI, as we move

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[76] *See Decide Which Technologies Are Crucial to Future Proof Your Business*, GARTNER, https://www.gartner.com/en/marketing/research/hype-cycle [https://perma.cc/EQQ5-G9PF] (explaining and illustrating Gartner hype cycle).

[77] *See* Laurel S. Terry, *30th Anniversary Commemorative Issue: Commemorative Contributions: The Impact of Global Developments on U.S. Legal Ethics During the Past Thirty Years,* 30 GEO. J. LEGAL ETHICS 365, 372 (2017) (explaining the history behind the legal profession's treatment of email); ABA Comm. on Ethics & Pro. Resp., Formal Op. 99-413 (1999) (concluding that lawyers can use email and fulfill their ethical obligations under Rule 1.6); ABA Comm. on Ethics & Pro. Resp., Formal Op. 477 (2017) (concluding that lawyers may transmit information about their client over the internet without violating the Model Rules).

[78] *See Attorneys Must Provide E-mail Address to the Bar by Feb. 1*, STATE BAR OF CAL., https://www.calbarjournal.com/January2010/TopHeadlines/TH3.aspx [https://perma.cc/TUA6-2NPQ] (announcing change to Rule 9.7 and requiring attorneys to provide e-mail addresses); *Service: It's the*

from urging caution to expecting usage.

V. Conclusion

The Model Rules offer an adaptable framework for guiding lawyers on their use of generative AI. This adaptability is by design. When the Ethics 20/20 Commission proposed amendments to the Model Rules more than a decade ago, it understood that the amendments needed to offer sufficiently flexibility to accommodate future technological developments.[79]

This flexible approach implies that we can expect the assessment of generative AI to evolve in the future as the tools become more reliable and useful. At some point, generative AI is likely to become so critical to the effective and efficient delivery of legal services that lawyers will have an ethical obligation to use it. We may even come to see generative AI as an important way to serve the public's unmet legal needs and as a powerful tool for addressing the access-to-justice crisis.[80]

The first sentence of the preamble to the Model Rules says that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[81] If we take this obligation seriously, we necessarily need to consider how new technologies can help us to better serve our clients and the public. Generative AI is such a technology and may have more potential in this regard than any technology ever invented.

Law, ILL. STATE BAR ASS'N (Sept. 17, 2017), https://www.isba.org/barnews/2017/09/27/email-service-it-s-law [https://perma.cc/7WG7-2Y5R] (explaining recent update to Illinois Supreme Court Rule 11); *Annual Regulatory Compliance*, VA. STATE BAR, https://vsb.org/Site/Site/lawyers/compliance.aspx [https://perma.cc/6S8F-AXKZ] (mandating all attorneys to keep an "email of record" to maintain their license).

[79] *See* Letter from ABA Comm'n. on Ethics 20/20 Working Group, to ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Individuals, and Entities (Sept. 20, 2010) (on file with author) (discussing the Commission's goal of offering recommendations and proposals for ethically integrating technology into practice).

[80] *See WJP Rule of Law Index, United States*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/country/2022/United%20States/Civil%20Justice [https://perma.cc/B4QS-BQ75] (ranking United States 115 out of 140 countries in access to civil justice); Ashwin Telang, Article, *The Promise and Peril of AI Legal Services to Equalize Justice*, 2023 HARV. J.L. & TECH. 1, 3 (Mar. 14, 2023) https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice [https://perma.cc/8XUB-4S5Z] (describing AI's ability to answer legal questions and offer low-cost legal assistance).

[81] MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2020).

FLORIDA BAR ETHICS OPINION
OPINION 24-1
January 19, 2024

Advisory ethics opinions are not binding.

Lawyers may use generative artificial intelligence ("AI") in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program's policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer's ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

RPC: 4-1.1; 4-1.1 Comment; 4-1.5(a); 4-1.5(e); 4-1.5(f)(2); 4-1.5(h); 4-1.6; 4-1.6 Comment; 4-1.6(c)(1); 4-1.6(e); 4-1.18 Comment; 4-3.1; 4-3.3; 4-4.1; 4-4.4(b); Subchapter 4-7; 4-7.13; 4-7.13(b)(3); 4-7.13(b)(5); 4-5.3(a)

OPINIONS: 76-33 & 76-38, Consolidated; 88-6; 06-2; 07-2; 10-2; 12-3; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993); Iowa Ethics Opinion 11-01; New York State Bar Ethics Opinion 842

CASES: *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023); *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992); *The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002); *Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006)

The Florida Bar Board of Governors has directed the Board Review Committee on Professional Ethics to issue an opinion regarding lawyers' use of generative artificial intelligence ("AI"). The release of ChatGPT-3 in November 2022 prompted wide-ranging debates regarding lawyers' use of generative AI in the practice of law. While it is impossible to determine the impact generative AI will have on the legal profession, this opinion is intended to provide guidance to Florida Bar members regarding some of the ethical implications of these new programs.

Generative AI are "deep-learning models" that compile data "to generate statistically probable outputs when prompted." IBM, What is generative AI?, (April 20, 2023), https://research.ibm.com/blog/what-is-generative-AI (last visited 11/09/2023). Generative AI can create original images, analyze documents, and draft briefs based on written prompts. Often, these programs rely on large language models. The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine

how a program came to a specific result. Tsedel Neeley, 8 Questions About Using AI Responsibly, Answered, Harv. Bus. Rev. (May 9, 2023).

While generative AI may have the potential to dramatically improve the efficiency of a lawyer's practice, it can also pose a variety of ethical concerns. Among other pitfalls, lawyers are quickly learning that generative AI can "hallucinate" or create "inaccurate answers that sound convincing." Matt Reynolds, vLex releases new generative AI legal assistant, A.B.A. J. (Oct. 17, 2023), https://www.abajournal.com/web/article/vlex-releases-new-generative-ai-legal-assistant (last visited 11/09/2023). In one particular incident, a federal judge sanctioned two unwary lawyers and their law firm following their use of false citations created by generative AI. *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023).

Even so, the judge's opinion explicitly acknowledges that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance." Id. at 1.

Due to these concerns, lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.

Confidentiality

When using generative AI, a lawyer must protect the confidentiality of the client's information as required by Rule 4-1.6 of the Rules Regulating The Florida Bar. The ethical duty of confidentiality is broad in its scope and applies to all information learned during a client's representation, regardless of its source. Rule 4-1.6, Comment. Absent the client's informed consent or an exception permitting disclosure, a lawyer may not reveal the information. In practice, the most common exception is found in subdivision (c)(1), which permits disclosure to the extent reasonably necessary to "serve the client's interest unless it is information the client specifically requires not to be disclosed[.]" Rule 4-1.6(c)(1). Nonetheless, it is recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information.

Rule 4-1.6(e) also requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation." Further, a lawyer's duty of competence requires "an understanding of the benefits and risks associated with the use of technology[.]" Rule 4-1.1, Comment.

When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations. For generative AI, this specifically includes knowledge of whether the program is "self-learning." A generative AI that is "self-learning" continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters. Neeley, supra n. 2. Use of a "self-learning" generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties.

Existing ethics opinions relating to cloud computing, electronic storage disposal, remote paralegal services, and metadata have addressed the duties of confidentiality and competence to prior technological innovations and are particularly instructive. In its discussion of cloud computing resources, Florida Ethics Opinion 12-3 cites to New York State Bar Ethics Opinion 842 and Iowa Ethics Opinion 11-01 to conclude that a lawyer should:

- Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

While the opinions were developed to address cloud computing, these recommendations are equally applicable to a lawyer's use of third-party generative AI when dealing with confidential information.

Florida Ethics Opinion 10-2 discusses the maintenance and disposition of electronic devices that contain storage media and provides that a lawyer's duties extend from the lawyer's initial receipt of the device through the device's disposition, "including after it leaves the control of the lawyer." Opinion 10-2 goes on to reference a lawyer's duty of supervision and to express that this duty "extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts[.]" Id.

Florida Ethics Opinion 07-2 notes that a lawyer should only allow an overseas paralegal provider access to "information necessary to complete the work for the particular client" and "should provide no access to information about other clients of the firm." Additionally, while "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved[,]" including "whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." Id. Again, this guidance seems equally applicable to a lawyer's use of generative AI.

Finally, Florida Ethics Opinion 06-2 provides that a lawyer should take reasonable steps to safeguard the confidentiality of electronic communications, including the metadata attached to those communications, and that the recipient should not attempt to obtain metadata information that they know or reasonably should know is not intended for the recipient. In the event that the recipient inadvertently receives metadata information, the recipient must "promptly notify the sender," as is required by Rule 4-4.4(b). Similarly, a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers.

It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party. If the use of a generative AI program does not involve the disclosure of confidential

information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to Rule 4-1.6.

Oversight of Generative AI

While Rule 4-5.3(a) defines a nonlawyer assistant as a "a person," many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.

First, just as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer's own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants.

Second, a lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

Third, these duties apply to nonlawyers "both within and outside of the law firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); see Fla. Ethics Op. 07-2. The fact that a generative AI is managed and operated by a third-party does not obviate the need to ensure that its actions are consistent with the lawyer's own professional and ethical obligations.

Further, a lawyer should carefully consider what functions may ethically be delegated to generative AI. Existing ethics opinions have identified tasks that a lawyer may or may not delegate to nonlawyer assistants and are instructive. First and foremost, a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation.

Florida Ethics Opinion 88-6 notes that, while nonlawyers may conduct the initial interview with a prospective client, they must:

- Clearly identify their nonlawyer status to the prospective client;
- Limit questions to the purpose of obtaining factual information from the prospective client; and
- Not offer any legal advice concerning the prospective client's matter or the representation agreement and refer any legal questions back to the lawyer.

This guidance is especially useful as law firms increasingly utilize website chatbots for client intake. While generative AI may make these interactions seem more personable, it presents additional risks, including that a prospective client relationship or even a lawyer-client relationship has been created without the lawyer's knowledge.

The Comment to Rule 4-1.18 (Duties to Prospective Client) explains what constitutes a consultation:

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Similarly, the existence of a lawyer-client relationship traditionally depends on the subjective reasonable belief of the client regardless of the lawyer's intent. *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

For these reasons, a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations.

Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the "work product" of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.

Legal Fees and Costs

Rule 4-1.5(a) prohibits lawyers from charging, collecting, or agreeing to fees or costs that are illegal or clearly excessive while subdivision (b) provides a list of factors to consider when determining whether a fee or cost is reasonable. A lawyer must communicate the basis for fees and costs to a client and it is preferable that the lawyer do so in writing. Rule 4-1.5(e). Contingent fees and fees that are nonrefundable in any part must be explained in writing. Rule 4-1.5(e); Rule 4-1.5(f)(2).

Regarding costs, a lawyer may only ethically charge a client for the actual costs incurred on the individual client's behalf and must not duplicate charges that are already accounted for in

the lawyer's overhead. *See, The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002) (lawyer sanctioned for violations including a $500.00 flat administrative charge to each client's file); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (lawyer should only charge clients for costs that reasonably reflect the lawyer's actual costs); Rule 4-1.5(h) (lawyers accepting payment via a credit plan may only charge the actual cost imposed on the transaction by the credit plan).

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

While a lawyer may separately itemize activities like paralegal research performed by nonlawyer personnel, the lawyer should not do so if those charges are already accounted for in the lawyer's overhead. Fla. Ethics Op. 76-33 & 76-38, Consolidated. In the alternative, the lawyer may need to consider crediting the nonlawyer time against the lawyer's own fees. Id. Florida Ethics Opinion 07-2 discusses the outsourcing of paralegal services in contingent fee matters and explains:

> The law firm may charge a client the actual cost of the overseas provider [of paralegal services], unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third-party provider.

Additionally, a lawyer should have sufficient general knowledge to be capable of providing competent representation. *See, e.g., Att'y Grievance Comm'n of Maryland 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." Id. at 5.

In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI.

Lawyer Advertising

The advertising rules in Subchapter 4-7 of the Rules Regulating The Florida Bar include prohibitions on misleading content and unduly manipulative or intrusive advertisements.

Rule 4-7.13 prohibits a lawyer from engaging in advertising that is deceptive or inherently misleading. More specifically, subdivision (b) includes prohibitions on:

> (3) comparisons of lawyers or statements, words, or phrases that characterize a lawyer's or law firm's skills, experience, reputation, or record, unless the characterization is objectively verifiable; [and]
>
> * * *
>
> (5) [use of] a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm unless the advertisement contains a clear and conspicuous disclaimer that the person is not an employee or member of the law firm[.]

As noted above, a lawyer should be careful when using generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion or deception, a lawyer must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

Conclusion

In sum, a lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services. Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies.

RULES, PROCEDURE, COMMENTS

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at the next quarterly meeting. Any comment or request should be directed to the Ethics Committee at ethicscomments@ncbar.gov no later than March 30, 2024.

Council Actions

At its meeting on January 19, 2024, the State Bar Council adopted the ethics opinion summarized below:

2023 Formal Ethics Opinion 4
Use of a Lawyer's Trade Name for Keyword Advertisements in an Internet Search Engine

Proposed opinion rules that the intentional selection of another lawyer's unique firm trade name in a keyword advertisement campaign is prohibited, but that prohibition does not apply when the trade name is also a common search term.

Ethics Committee Actions

At its meeting on January 18, 2024, the Ethics Committee considered a total of six inquiries, including the opinion noted above. Four inquiries were sent or returned to subcommittee for further study, including an inquiry addressing a lawyer's ability to obligate a client's estate to pay the lawyer for any time spent defending the lawyer's work in drafting and executing the client's will and an inquiry exploring a lawyer's duty of confidentiality when inheriting confidential client information. Additionally, in October 2023 the Ethics Committee published Proposed 2023 Formal Ethics Opinion 3, Installation of Third Party's Self-Service Kiosk in Lawyer's Office and Inclusion of Lawyer in Third Party's Advertising Efforts; based on comments received during publication, the committee voted to return the inquiry to subcommittee for further study. The committee also approved the publication of one new proposed formal ethics opinion on a lawyer's use of artificial intelligence in a law practice, which appears below.

Proposed 2024 Formal Ethics Opinion 1 Use of Artificial Intelligence in a Law Practice

January 18, 2024

Proposed opinion discusses a lawyer's professional responsibility when using artificial intelligence in a law practice.

Editor's Note: There is an increasingly vast number of helpful resources on understanding Artificial Intelligence and the technology's interaction with the legal profession. The resources referenced in this opinion are not exhaustive but are intended to serve as a starting point for a lawyer's understanding of the topic. Over time, this editor's note may be updated as additional resources are published that staff concludes would be beneficial to lawyers.

Background

"Artificial intelligence" (hereinafter, "AI") is a broad and evolving term encompassing myriad programs and processes with myriad capabilities. While a single definition of AI is not yet settled (and likely impossible), for the purposes of this opinion, the term "AI" refers to "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." Nat'l Artificial Intelligence Initiative Act of 2020, Div. E, sec. 5002(3) (2021). Said in another, over-simplified way, AI is the use of computer science and extensive data sets to enable problem solving or decision-making, often through the implementation of sophisticated algorithms. AI encompasses, but is not limited to, both extractive and generative AI,1 natural language processing, large language models, and any number of machine learning processes.2 Examples of law-related AI programs range from online electronic legal research and case management software to e-discovery tools and programs that draft legal documents (e.g., a trial brief, will, etc.) based upon the lawyer's input of information that may or may not be client-specific.

Most lawyers have likely used some form of AI when practicing law, even if they didn't realize it (e.g., widely used online legal research subscription services utilize a type of extractive AI, or a program that "extracts" information relevant to the user's inquiry from a large set of existing data upon which the program has been trained). Within the year preceding the date of this opinion, generative AI programs that create products in response to a user's request based upon a large set of existing data upon which the program has been trained (e.g., Chat-GPT) have grown in capability and popularity, generating both positive and negative reactions regarding the integration of these technological breakthroughs in the legal profession.3 It is unquestioned that AI can be used in the practice of law to increase efficiency and consistency in the provision of legal services. However, AI and its work product can be inaccurate or unreliable despite its appearance of reliability when used during the provision of legal services.4

Inquiry #1:

Considering the advantages and disadvantages of using AI in the provision of legal services, is a lawyer permitted to use AI in a law practice?

Opinion #1:

Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying upon or implementing the AI's work product in the provision of legal services.

On the spectrum of law practice resources, AI falls somewhere between programs, tools, and processes readily used in law practice today (e.g. case management systems, trust account management programs, electronic legal research, etc.) and nonlawyer support staff (e.g. paralegals, summer associates, IT professionals, etc.). Nothing in the Rules of Professional Conduct specifically addresses, let alone prohibits, a lawyer's use of AI in a law practice. However, should a lawyer choose to employ AI in a practice, the lawyer must do so competently, the lawyer must do so securely, and the lawyer must exercise independent judgment in supervising the use of such processes.

Rule 1.1 prohibits lawyers from "handl[ing] a legal matter that the lawyer knows or should know he or she is not competent to handle[,]" and goes on to note that "[c]ompetent representation

requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 recognizes the reality of advancements in technology impacting a lawyer's practice, and states that part of a lawyer's duty of competency is to "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Rule 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 5.3 requires a lawyer to "make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[,]" and further requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[.]" Rules 5.3(a) and (b). The requirements articulated in Rule 5.3 apply to nonlawyer assistants within a law firm as well as those outside of a law firm that are engaged to provide assistance in the lawyer's provision of legal services to clients, such as third-party software companies. *See* 2011 FEO 6 ("Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer.").

A lawyer may use AI in a variety of manners in connection with a law practice, and it is a lawyer's responsibility to exercise independent professional judgment in determining how (or if) to use the product of an AI tool in furtherance of the representation of a client. From discovery and document review to legal research, drafting contracts, and aggregating/analyzing data trends, the possibilities for employing AI in a law practice are increasingly present and constantly evolving. A lawyer's decision to use and rely upon AI to assist in the lawyer's representation of a client is generally hers alone and one to be determined depending upon a number of factors, including the impact of such services, the cost of such services, and the reliability of the processes.5 This opinion does not attempt to dictate when and how AI is appropriate for a law practice.

Should a lawyer decide to employ AI in the representation of a client, however, the lawyer is fully responsible for the use and impact of AI in the client's case. The lawyer must use the AI tool in a way that meets the competency standard set out in Rule 1.1. Like other software, the lawyer employing an AI tool must educate herself on the benefits and risks associated with the tool, as well as the impact of using the tool on the client's case. Educational efforts include, but are not limited to, reviewing current and relevant resources on AI broadly and on the specific program intended for use during the provision of legal services. A lawyer that inputs confidential client information into an AI tool must take steps to ensure the information remains secure and protected from unauthorized access or inadvertent disclosure per Rule 1.6(c). Additionally, a lawyer utilizing an outside third-party company's AI program or service must make reasonable efforts to ensure that the program or service used is compatible with the lawyer's responsibilities under the Rules of Professional Conduct pursuant to Rule 5.3. Whether the lawyer is reviewing the results of a legal research program, a keyword search of emails for production during discovery, proposed reconciliations of the lawyer's trust account prepared by a long-time assistant, or a risk analysis of potential borrowers for a lender-client produced by an AI process, the lawyer is individually responsible for reviewing, evaluating, and ultimately relying upon the work produced by someone—or something—other than the lawyer.

Inquiry #2:

May a lawyer provide or input a client's documents, data, or other information to a third-party company's AI program for assistance in the provision of legal services?

Opinion #2:

Yes, provided the lawyer has satisfied herself that the third-party company's AI program is sufficiently secure and complies with the lawyer's obligations to ensure any client information will not be inadvertently disclosed or accessed by unauthorized individuals pursuant to Rule 1.6(c).

At the outset, the Ethics Committee does not opine on whether the information shared with an AI tool violates the attorney-client privilege, as the issue is a legal question and outside the scope of the Rules of Professional Conduct. A lawyer should research and resolve any question on privilege prior to engaging with a third-party company's AI program for use in the provision of legal services to a client, particularly if client-specific information will be provided to the AI program.

This inquiry is akin to any lawyer providing confidential information to a third-party software program (practice management, cloud storage, etc.), on which the Ethics Committee has previously opined. As noted above, a lawyer has an obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating the representation of the client." Rule 1.6(c). What constitutes "reasonable efforts" will vary depending on the circumstances related to the practice and representation, as well as a variety of factors including the sensitivity of the information and the cost or benefit of employing additional security measures to protect the information. Rule 1.6, cmt. [19]. Ultimately, "[a] lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties" when using technology to handle, communicate, analyze, or otherwise interact with confidential client information. 2008 FEO 5; *see also* 2005 FEO 10; 2011 FEO 6.

The Ethics Committee in 2011 FEO 6 recognized that employing a third-party company's services/technology with regards to confidential client information requires a lawyer to exercise reasonable care when selecting a vendor. The opinion states:

[W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality....A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of [technology] that the lawyer is required to apply when representing clients.

2011 FEO 6 (internal citations omitted). In exercising reasonable care, the opinion discusses a sample of considerations for evaluating whether a particular third-party company's services are compatible with the lawyer's professional responsibility, including:

• The experience, reputation, and stability of the company;
• Whether the terms of service include an agreement on how the company will handle confidential client information, including security measures employed by the company to safeguard information provided by the lawyer; and
• Whether the terms of service clarify how information provided to the company will be retrieved by the lawyer or otherwise safely destroyed if not retrieved should the company go out of business, change ownership, or if services are terminated.

2011 FEO 6; *see* Rule 5.3. A proposed ethics opinion from the Florida Bar on a lawyer's use of AI adds that lawyers should "[d]etermine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information" when determining whether a third-party company's technological services are compatible with the lawyer's duty of confidentiality. *See* Florida Bar Proposed Advisory Opinion 24-1 (published Nov. 13, 2023).

Furthermore, this duty of reasonable care continues beyond initial selection of a service, program, or tool and extends throughout the lawyer's use of the service. A lawyer should continuously educate herself on the selected technology and developments thereto—both individually and by "consult[ing] periodically with professionals competent in the area of online security"—and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure. 2011 FEO 6.

The aforementioned considerations—including the consideration regarding ownership of information articulated by the Florida Bar opinion—are equally applicable to a lawyer's selection and use of a third-party company's AI service/program. Just as with any third-party service, a lawyer has a duty under Rule 5.3 to make reasonable efforts to ensure the third-party AI program or service is compatible with the lawyer's professional responsibility, particularly with regards to the lawyer's duty of confidentiality pursuant to Rule 1.6. Importantly, some current AI programs are publicly available to all consumers/users, and the nature of these AI programs are to retain and train itself based on the information provided by any user of its program. Lawyers should educate themselves on the nature of any publicly available AI program intended to be used in the provision of legal services, with particular focus on whether the AI program will retain and subsequently use the information provided by the user. Generally, and as of the date of this opinion, lawyers should avoid inputting client-specific information into publicly available AI resources.

Inquiry #3:

If a firm were to have an AI software tool initially developed by a third-party but then used the AI tool in-house using law firm owned servers and related infrastructure, does that change the data security requirement analysis in Opinion #2?

Opinion #3:

No. Lawyer remains responsible for keeping the information secure pursuant to Rule 1.6(c) regardless of the program's location. While an in-house program may seem more secure because the program is maintained and run using local servers, those servers may be more vulnerable to attack because a lawyer acting independently may not be able to match the security features

typically employed by larger companies whose reputations are built in part on security and customer service. A lawyer who plans to independently store client information should consult an information technology/cybersecurity expert about steps needed to adequately protect the information stored on local servers.

Relatedly, AI programs developed for use in-house or by a particular law practice may also be derivatives of a single, publicly available AI program; as such, some of these customized programs may continue to send information inputted into the firm-specific program back to the central program for additional use or training. Again, prior to using such a program, a lawyer must educate herself on the nuances and operation of the program to ensure client information will remain protected in accordance with the lawyer's professional responsibility. The list of considerations found in Opinion #2 offers a starting point for questions to explore when identifying, evaluating, and selecting a vendor.

Inquiry #4:

If a lawyer signs a pleading based on information generated from AI, is there variation from traditional or existing ethical obligations and expectations placed on lawyers signing pleadings absent AI involvement?

Opinion #4:

No. A lawyer may not abrogate her responsibilities under the Rules of Professional Conduct by relying upon AI. Per Rule 3.1, a lawyer is prohibited from bringing or defending "a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]" A lawyer's signature on a pleading also certifies the lawyer's good faith belief as to the factual and legal assertions therein. *See* N.C. R. Civ. Pro. 11 ("The signature of an attorney...constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."). If the lawyer employs AI in her practice and adopts the tool's product as her own, the lawyer is professionally responsible for the use of the tool's product. *See* Opinion #1.

Inquiry #5:

If a lawyer uses AI to assist in the representation of a client, is the lawyer under any obligation to inform the client that the lawyer has used AI in furtherance of the representation or legal services provided?

Opinion #5:

The answer to this question depends on the type of technology used, the intended product from the technology, and the level of reliance placed upon the technology/technology's product. Ultimately, the attorney/firm will need to evaluate each case and each client individually. Rule 1.4(b) requires an attorney to explain a matter to her client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Generally, a lawyer need not inform her client that she is using an AI tool to complete ordinary tasks, such as conducting legal research or generic case/practice management. However, if a lawyer delegates

substantive tasks in furtherance of the representation to an AI tool, the lawyer's use of the tool is akin to outsourcing legal work to a nonlawyer, for which the client's advanced informed consent is required. See 2007 FEO 12. Additionally, if the decision to use or not use an AI tool in the case requires the client's input with regard to fees, the lawyer must inform and seek input from the client.

Inquiry #6:

Lawyer has an estate planning practice and bills at the rate of $300 per hour. Lawyer has integrated an AI program into the provision of legal services, resulting in increased efficiency and work output. For example, Lawyer previously spent approximately three hours drafting standard estate planning documents for a client; with the use of AI, Lawyer now spends only one hour preparing those same documents for a client. May Lawyer bill the client for the three hours of work that the prepared estate documents represent?

Opinion #6:

No, Lawyer may not bill a client for three hours of work when only one hour of work was actually experienced. A lawyer's billing practices must be accurate, honest, and not clearly excessive. Rules 7.1, 8.4(c), and 1.5(a); *see also* 2022 FEO 4. If the use of AI in Lawyer's practice results in greater efficiencies in providing legal services, Lawyer may enjoy the benefit of those new efficiencies by completing more work for more clients; Lawyer may not inaccurately bill a client based upon the "time-value represented" by the end product should Lawyer not have used AI when providing legal services.

Rather than billing on an hourly basis, Lawyer may consider billing clients a flat fee for the drafting of documents—even when using AI to assist in drafting—provided the flat fee charged is not clearly excessive and the client consents to the billing structure. *See* 2022 FEO 4.

Relatedly, Lawyer may also bill a client for actual expenses incurred when employing AI in the furtherance of a client's legal services, provided the expenses charged are accurate, not clearly excessive, and the client consents to the charge, preferably in writing. *See* Rule 1.5(b). Lawyer may not bill a general "administrative fee" for the use of AI during the representation of a client; rather, any cost charged to a client based on Lawyer's use of AI must be specifically identified and directly related to the legal services provided to the client during the representation. For example, if Lawyer has generally incorporated AI into her law practice for the purpose of case management or drafting assistance upon which Lawyer may or may not rely when providing legal services to all clients, Lawyer may not bill clients a generic administrative fee to offset the costs Lawyer experiences related to her use of AI. However, if Lawyer employs AI on a limited basis for a single client to assist in the provision of legal services, Lawyer may charge those expenses to the client provided the expenses are accurate, not clearly excessive, and the client consents to the expense and charge, preferably in writing.

Endnotes

1. For a better understanding of the differences between extractive and generative AI, *see* Jake Nelson, *Combining Extractive and Generative AI for New Possibilities, LexisNexis* (June 6, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/combining-extractive-and-generative-ai-for-new-possibilities (last visited January 10, 2024).

2. For an overview of the state of AI as of the date of this opinion, *see What is Artificial Intelligence (AI)?*, IBM, ibm.com/topics/artificial-intelligence (last visited January 10, 2024). For information on how AI relates to the legal profession, *see AI Terms for Legal Professionals: Understanding What Powers Legal Tech*, LexisNexis (March 20, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech (last visited January 10, 2024).

3. John Villasenor, *How AI Will Revolutionize the Practice of Law*, Brookings Institution (March 20, 2023), brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/ (last visited January 10, 2024); Steve Lohr, *AI is Coming for Lawyers Again*, New York Times (April 10, 2023), nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html (last visited January 10, 2024).

4. Larry Neumeister, *Lawyers Blame ChatGPT for Tricking Them Into Citing Bogus Case Law*, AP News (June 8, 2023), apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fdf4f099aa 122437dbb59b (last visited January 10, 2024).

5. In certain circumstances a lawyer may need to consult a client about employing AI in the provision of legal services to that client, see Opinion #5, below.

The Ethics Committee welcomes feedback on the proposed opinion; feedback should be sent to ethicscomments@ncbar.gov.

Small Entities Must File New Beneficial Ownership Information Reports in 2024

November 30, 2023 | Kristine A. Tidgren

Update: On March 1, 2024, in the case of *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala.), a federal district court in the Northern District of Alabama, Northeastern Division, entered a final declaratory judgment, concluding that the Corporate Transparency Act exceeds the Constitution's limits on Congress's power and enjoining the Department of the Treasury and FinCEN from enforcing the Corporate Transparency Act against the plaintiffs. FinCEN has stated that it will follow this ruling as it applies to the plaintiffs. All others must continue to comply with the CTA's reporting requirements. On March 11, the government filed its notice of appeal to the Eleventh Circuit. We will continue to follow this issue.

Update: FinCEN opened the online portal for filing Beneficial Ownership Information reports on January 1, 2024. You can access it here: https://boiefiling.fincen.gov/fileboir.

Beginning January 1, 2024, most small entities—including single member LLCs—must file online reports with the federal government, disclosing information about the beneficial owners of the entities. This new reporting requirement—estimated to impact at least 32.6 million entities in 2024—was created by the Corporate Transparency Act (CTA). Existing entities will have until January 1, 2025, to make their first beneficial ownership information (BOI) report. Entities first created or registered in 2024 will have 90 days from creation to get their first reports filed. Any entity that has already filed a report will generally have 30 days to make updates required by the CTA.

Background

The CTA was enacted as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283. The CTA was enacted to prevent money laundering, corrupt financial transactions, and financial terrorism. It requires the Financial Crimes Enforcement Network (FinCEN) (a bureau of the U.S. Treasury) to establish and maintain a national registry of beneficial owners of entities that are otherwise not subject to disclosure regulations. Specifically, FinCEN has stated that collection of BOI will "help to shed light on criminals who evade taxes, hide their illicit wealth, and defraud employees and customers and hurt honest U.S. businesses through their misuse of shell companies." In furtherance of these goals, the CTA authorizes FinCEN to share the collected information with government agencies, financial institutions, and financial regulations, subject to safeguards and protocols. Unauthorized use or disclosure of BOI may be subject to criminal and civil penalties. On September 22, 2022, FinCEN issued final regulations, 31 CFR § 1010.380, which go into effect January 1, 2024.

Who Must File a Report?

The rule identifies two types of reporting companies: domestic and foreign. Domestic reporting companies are corporations, limited liability companies (LLCs), or any entities created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe. This generally means that limited liability partnerships, limited liability limited partnerships, business trusts in certain states, and most limited partnerships are also required to file reports if they are not otherwise excepted from the reporting requirement. Single-member LLCs, disregarded for tax purposes, **are** subject to BOI reporting requirements.

Foreign reporting companies are corporations, LLCs, or other entities formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office.

Entity Type	Reporting Entity (unless exempted?)
LLC	Yes
SMLLC	Yes
General Partnership	No
Sole Proprietorship	Not unless corporation or LLC
Limited Partnership	Yes
S Corporation	Yes
C Corporation	Yes
Trust	Not unless required to file with Secretary of State, but trustees or beneficiaries may be beneficial owners of other reporting entities

Exceptions to Reporting

The following entities are specifically excepted from the BOI reporting requirements by the FinCEN rules:

1. Certain types of securities reporting issuers.
2. A U.S. governmental authority.
3. Certain types of banks.
4. Federal or state credit unions as defined in section 101 of the Federal Credit Union Act.
5. Bank holding company as defined in section 2 of the Bank Holding Company Act of 1956, or any savings and loan holding company as defined in section 10(a) of the Home Owners' Loan Act.
6. Certain types of money transmitting or money services businesses.
7. Any broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934, that is registered under section 15 of that Act (15 U.S.C. 78o).

8. Securities exchanges or clearing agencies as defined in section 3 of the Securities Exchange Act of 1934, and that is registered under sections 6 or 17A of that Act.
9. Certain other types of entities registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.
10. Certain types of investment companies as defined in section 3 of the Investment Company Act of 1940, or investment advisers as defined in section 202 of the Investment Advisers Act of 1940.
11. Certain types of venture capital fund advisers.
12. Insurance companies defined in section 2 of the Investment Company Act of 1940.
13. State-licensed insurance producers with an operating presence at a physical office within the United States, and authorized by a State, and subject to supervision by a State's insurance commissioner or a similar official or agency.
14. Commodity Exchange Act registered entities.
15. Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002.
16. Certain types of regulated public utilities.
17. Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.
18. Certain pooled investment vehicles.
19. Certain types of tax-exempt entities.
20. Entities assisting a tax-exempt entity described in 19 above.
21. Large operating companies with at least 20 full-time employees, more than $5,000,000 in gross receipts or sales, and an operating presence at a physical office within the United States.
22. The subsidiaries of certain exempt entities.
23. Certain types of inactive entities that were in existence on or before January 1, 2020, the date the CTA was enacted.

Additional information about entities exempt from reporting is detailed in the Beneficial Ownership Information Reporting Regulations at 31 CFR § 1010.380(c)(2) and in the Small Entity Compliance Guide. Businesses must review the specific criteria for an exemption before determining that the exemption applies.

What Must Be Reported?

A reporting company must disclose:

- Its full legal name and any trade name or DBA;
- A complete address, including the street address of the principal place of business for U.S. companies and primary U.S. location for other businesses;
- The State, Tribal, or foreign jurisdiction in which it was formed or first registered, depending on whether it is a U.S. or foreign company; and
- Its Taxpayer Identification Number (TIN).
- For domestic entities, this is the IRS TIN, including an employee identification number (EIN). For foreign entities without a TIN, a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction should be entered.

Additionally, for each **beneficial owner** and each **company applicant** (see below), the company must provide the individual's:

- Full legal name;
- Birthdate;
- A complete address; and
    - For company applicants who form or register an entity in the course of the company's business, this includes the street address of the company applicant. For all individuals, beneficial owners and applicants, the address must be the residential street address of the individual.
- An identifying number from a non-expired driver's license, passport, or other approved document for each individual, as well as an image of the document from which the document was obtained.

Beneficial Owners

In general, beneficial owners are individuals who:

1. directly or indirectly exercise "substantial control" over the reporting company, or
2. directly or indirectly own or control 25% or more of the "ownership interests" of the reporting company.

Substantial Control

Individuals have substantial control of a reporting company if they direct, determine, or exercise substantial influence over important decisions of the reporting company. [31 CFR §1010.380(d)(1)]. Those deemed to exercise substantial control over a reporting company include:

- Senior officers such as chief financial officers, chief executive officers, general counsel, chief operating officers, or any other similar positions, regardless of title
- An individual with authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body)
- An individual who directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:
    - The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
    - The reorganization, dissolution, or merger of the reporting company;
    - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
    - The selection or termination of business lines or ventures, or geographic focus, of the reporting company
    - Compensation schemes and incentive programs for senior officers;
    - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;

    - Amendments of any substantial governance documents of the reporting company
- An individual with any other form of substantial control over the reporting company

An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:

- Board representation (determined on a case-by-case basis);
- Ownership or control of a majority of the voting power or voting rights of the reporting company;
- Rights associated with any financing arrangement or interest in a company;
- Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- Any other contract, arrangement, understanding, relationship, or otherwise.

Based on the breadth of the substantial control definition, FinCEN has stated that it expects a reporting company will identify at least one beneficial owner under that definition, regardless of whether (1) any individual satisfies the ownership definition, or (2) exclusions to the definition of beneficial owner apply.

Ownership Interests

Ownership interest (for purposes of determining whether an individual directly or indirectly owns or controls 25% or more of the "ownership interests" of the reporting company) is defined as follows:

- Any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights;
- Any capital or profit interest in an entity;
- Any instrument convertible, with or without consideration, into any share or instrument described in above, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described above, regardless of whether characterized as debt;
- Any put, call, straddle, or other option or privilege of buying or selling any of the items described above without being bound to do so, except to the extent that such option or privilege is created and held by a third party or third parties without the knowledge or involvement of the reporting company; or
- Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

An individual may also directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including:

- Joint ownership with one or more other persons of an undivided interest in such ownership interest;
- Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual;
- With regard to a trust or similar arrangement that holds such ownership interest:
    - As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
    - As a beneficiary who:
        - Is the sole permissible recipient of income and principal from the trust; or
        - Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
        - As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or
        - Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company.

The rules provide that beneficial owners **do not include**:

- A minor child, provided the reporting company reports the required information of a parent or legal guardian of the minor child and states that the individual is the parent or legal guardian of a minor (once the minor child reaches the age of majority, the report must be updated)
- An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual
- An employee of a reporting company, acting solely as an employee, provided that such person is not a senior officer
- An individual whose only interest in a reporting company is a future interest through a right of inheritance
- A creditor of a reporting company

Company Applicants

Companies created or registered **on or after** January 1, 2024, must report the company applicants, in addition to beneficial owners. Company applicants include (1) the individual who directly files the document that creates, or first registers, the reporting company; and (2) the individual that is primarily responsible for directing or controlling the filing of the relevant document. Companies created or registered before January 1, 2024, are required to report only beneficial owners.

FinCen Identifier

An individual or reporting company may obtain a FinCEN identifier by submitting an application at or after the time that the reporting company submits its initial report. Each identifier is specific to the individual or reporting company. If an individual has obtained a FinCEN identifier, the reporting company may use that identifier in its report instead of reporting all of the required information for the individual.

A reporting company uses its FinCEN identifier to submit updated reports, as required.

When Must Reporting Companies File Reports?

Reporting companies created or registered before January 1, 2024, must file their first BOI report no later than January 1, 2025. Reporting companies created or registered on or after January 1, 2024, but before January 1, 2025, must file their first BOI report within 90 calendar days of receiving actual or public notice from the state's secretary of state or similar office that the company was created or registered. Reporting companies created or registered on January 1, 2025, or later must file their initial reports within 30 days.

Once a reporting company has filed its first report, it must file a new report any time the reported information changes, making the prior report inaccurate. Reporting companies will have 30 days to report any changes or updates to reported information. The 30 days begins after the company becomes aware of or has reason to know of an inaccuracy in a prior report. Likewise, any reporting company that no longer meets the requirements of an exemption from reporting shall file its report within 30 calendar days after it no longer qualifies for the exemption.

If an individual becomes a beneficial owner by virtue of rights transferring at the death of another, a change is deemed to occur when the estate of the deceased beneficial owner is settled, either through the operation of intestacy laws or through a testamentary disposition. An updated report must identify any new beneficial owners. FinCEN has state that a change must be reported with respect to a document image when the name, date of birth, address, or unique identifying number of the document changes.

How Will Reports be Filed?

All BOI reports must be filed electronically. FinCEN will begin accepting reports on January 1, 2024. No reports may be filed before that time. The person filing the report will be required to certify that the report is true, correct, and complete.

What are the Penalties for Noncompliance?

The rule states that it shall be unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with this section, or to willfully fail to report

complete or updated beneficial ownership information to FinCEN in accordance with the new law.

The CTA authorizes civil reporting failure penalties of not more than $500 (inflation adjusted to $591) for each day that the violation continues or has not been remedied and criminal penalties up to $10,000. The statute also calls for possible imprisonment of up to two years. In the preamble to the rule, FinCEN states that it "intends to prioritize education and outreach to ensure that all reporting companies and individuals are aware of and on notice regarding their reporting obligations." The final rule clarifies that a person is considered to have failed to report complete or updated BOI if the person causes the failure or is a senior officer of the entity at the time of the failure. A penalty safe harbor applies to companies that discover an inaccuracy and file a corrected report within 90 days of the filing of an initial report.

Example

In 2020, George and Marge formed GM, LLC, an entity to manage their farmland. They each own 50% of the LLC. George and Marge are the only officers of the entity, which has no employees.

George and Marge are both beneficial owners of GM, LLC. By January 1, 2025, the LLC must file an online beneficial ownership information report with FinCEN, reporting the required information for the company, George, and Marge.

If GM, LLC. is not formed until January 5, 2024, it will have 90 days to file its BOI report.

Can Reporting Companies Solicit Help with Filing Reports?

FinCEN guidance clarifies that reporting companies can enlist third-party service companies to file BOI reports on their behalf. Those seeking assistance may ask whether the attorney who set up the business structure is providing this service. At this time, it is unclear whether or to what extent making determinations regarding BOI reporting requirements constitutes the practice of law. To the extent that a determination may cross that line, accountants and non-attorney tax professionals will be unable to assist with these reports.

Resources

The following are several helpful links providing more information about BOI reporting requirements.

Small Entity Compliance Guide

Frequently Asked Questions

Final Rule and Other Regulations

Four-Page Brochure

AICPA Considerations for Non-Attorney Tax Professionals

Expired and Expiring Tax Provisions Impacting Agriculture

2022/2023 Changes

Bonus Depreciation

The TCJA allowed 100 percent bonus depreciation through 2022 for qualifying property acquired and placed into service after September 27, 2017. [IRC § 168(k)(6)(A)]. It then established a phase-out over the next four years, in increments of 20%. [IRC § 168(k)(A)]. For assets placed in service in 2023, the phase-out limits the bonus depreciation deduction to 80% of the basis. The phase-out will continue as follows:

- 2023: 80 percent bonus,
- 2024: 60 percent bonus,
- 2025: 40 percent bonus, and
- 2026: 20 percent bonus.

After 2026, bonus depreciation is scheduled to end.

Note: Although the bonus depreciation provisions of the TCJA were set to sunset, the TCJA's increase of the Section 179 deduction was a permanent change. The deduction will remain at its current level, indexed for inflation, after 2025. In 2023, the maximum Section 179 deduction is $1,160,000, reduced dollar for dollar for qualifying purchases above $2.8 million.

Income Tax Provisions Expiring at the End of 2025

Lower Individual Tax Rates

Most farm businesses are sole proprietorships, partnerships, or S Corporations. This means that business income passes through to the owners, who pay taxes based upon individual income tax rates. From 2018 to 2025, the TCJA lowered individual income tax rates across the board. [IRC § 1(j)].

The graduated rates that apply to ordinary income were also restructured to include the following brackets: 10%, 12% (down from 15%), 22% (down from 25%), 24% (down from 28%), 32% (down from 33%), 35%, and 37% (down from 39.6%). IRC § 1(j)(2).

On January 1, 2026, the tax rates and brackets will reset to pre-2018 levels.

Increased Standard Deduction

Taxpayers only itemize deductions if the amount they can deduct on 1040, Schedule A, is more than their standard deduction. The TCJA has significantly decreased the number of taxpayers who itemize deductions by nearly doubling the standard deduction. In 2018, it increased the standard deduction from $13,000 to $24,000 for married filing jointly taxpayers and from $6,500 to $12,000 for single taxpayers. [I.R.C. § 63]. In 2023, these standard deduction amounts are $27,700 for married filing jointly and $13,850 for singles.

The increased standard deduction is in place through 2025 and will reset to prior levels, indexed for inflation, in 2026.

Increased Child Tax Credit

The TCJA raised the child tax credit from $1,000 to $2,000 per qualifying child for tax years 2018 through 2025. [I.R.C. § 24(h)(2)]. Of this credit, $1,400 per child is refundable. The TCJA also created a new $500 nonrefundable credit for each dependent who does not qualify for the child tax credit, including those over the age of 16. [I.R.C. § 24(h)(4)]. In addition to receiving a larger child tax credit, more families have qualified for the child tax credit under the TCJA because the phase-out of the credit does not begin until a married filing jointly couple reaches adjusted gross income of $400,000 or a single taxpayer reaches an adjusted gross income of $200,000. Under prior law, the $1,000 credit per child began to phase out when the married filing jointly couple had modified adjusted gross income above $110,000 and the single taxpayer had modified adjusted gross income above $75,000.

In 2026, the child tax credit is scheduled to reset to pre-2018 levels.

Qualified Business Income Deduction

For tax years 2018 through 2025, the TCJA allows most individuals receiving income from a sole proprietorship or a pass-through business—including an S corporation or a partnership—to take a 20% qualified business income deduction (QBI deduction). [I.R.C. § 199A]. Additionally, agricultural cooperatives are allowed to take a 9% I.R.C. § 199A(g) deduction or pass that deduction through to their patrons, similar to the old domestic production activities deduction (DPAD) under I.R.C. § 199.

Section 199A is set to expire in 2026. This will significantly impact small businesses, as well as agricultural cooperatives and their patrons. The DPAD deduction provided by I.R.C. § 199, was permanently repealed by the TCJA in 2018, and it is not scheduled to be reinstated in 2026.

> **Note**: In contrast to the pass-through tax deduction, the TCJA provision lowering the top corporate tax rate from 35% to 21% was a permanent change.

Employer-Provided Meals

The TCJA reduced the deduction for meals provided for the convenience of the employer from 100% to 50% through 2025. In 2026, the deduction is fully eliminated.

End of the Personal Exemption

In 2017, taxpayers could generally take a personal exemption of $4,050 for themselves, their spouse, and each of their dependents. In conjunction with increasing the standard deduction and lowering individual income tax rates, the TCJA suspended the personal exemption from 2018 through 2025. [I.R.C. § 151(d)(5)(A)]. Personal exemptions are scheduled to return in 2026.

End of the State and Local Tax Deduction Limit

For tax years 2018 through 2025, the TCJA limits the amount of combined state and local income and property taxes taxpayers can claim as an itemized deduction to $10,000 ($5,000 for

married filing separately*)*. [I.R.C. § 164(b)(6)(B)].

This SALT deduction limit is scheduled to end in 2026. In the meantime, many states have passed pass through entity (PTE) provisions allowing state income tax to be paid by pass through entities, thereby allowing a deduction at the entity level and an offsetting credit to the individual owner.

Lower Home Mortgage Interest Deduction Limits

Through 2025, the TCJA lowered the home mortgage interest deduction from $1 million ($500,000 married filing separately) to $750,000 ($375,000 married filing separately). [I.R.C. § 163(h)(3)(F)]. The TCJA also suspended the deduction for interest paid on a home equity loan, unless that loan is used to buy, build, or substantially improve the taxpayer's home that secures the loan. [I.R.C. § 163(h)(3)(B)].

These provisions are scheduled to disappear in 2026.

Suspended Miscellaneous Itemized Deductions

For tax years 2018 through 2025, the TCJA has suspended all miscellaneous itemized deductions subject to the 2% floor, including, for example, unreimbursed employee expenses, hobby expenses, and investment fees. [I.R.C. § 67(g)].

These deductions are scheduled to return in 2026.

Other TCJA Income Tax Changes and Their Impact

Like-Kind Exchange

The TCJA retained the I.R.C. § 1031 like-kind exchange gain recognition deferral for real property, but eliminated it for personal property, such as farm equipment or livestock. [I.R.C. § 1031(a)(1)]. This was a permanent change.

Excess Business Loss Limits

The TCJA implemented an excess business loss rule that replaced (and expanded upon) the excess farm loss rule. Under I.R.C. § 461(l)(3)(A), an "excess business loss" is one that exceeds $500,000 (married filing jointly) or $250,000 (single). These limit amounts have been indexed for inflation, so that in 2023, loss limits are $578,000 for MFJ and $$289,000 for singles. Any loss disallowed by this rule is treated as a net operating loss and subject to NOL carryover rules.

Although 2025 was originally the last year for this provision, intervening legislation has further extended this provision through December 31, 2028.

Vehicle Depreciation

For passenger automobiles placed into service after December 31, 2017, the TCJA significantly increased the dollar limitations on depreciation and expensing for passenger automobiles. [I.R.C. § 280F]. These limits are not set to sunset in 2026. For more information on these limits, see Chapter 8, Depreciation and Expensing, of this Workbook.

Net Operating Losses

The TCJA reduces the five-year carryback of net operating losses for a farming business to two years. [I.R.C. § 172(b)(1)(B)]. It also limits the net operating loss deduction to 80 percent of taxable income for losses incurred after December 31, 2017. [I.R.C. § 172(a)(2)]. The law also allows indefinite carryovers, instead of the 20-year carryover allowed under prior law. [I.R.C. § 172(b)(1)(A)(ii)]. Net operating losses incurred prior to 2018 are still allowed to be deducted against 100 percent of taxable income.

The NOL changes are not scheduled to sunset.

Cash Accounting

I.R.C. § 448(b)(1) excepts a "farming business" from its general requirement that C corporations and partnerships with a C corporation partner use the accrual method of accounting. For this purpose, "farming business" means the trade or business of farming within the meaning of I.R.C. § 263A(e)(4). [I.R.C. § 448(d)(1)(A)]. I.R.C. § 447(a), however, generally requires that taxable income arising from the trade or business of farming for a C corporation or a partnership with a C corporation partner is to be computed using the accrual method.

The TCJA significantly expanded the availability of the cash method of accounting to farming C corporations and partnerships with a C corporation partner. Beginning in 2018, the I.R.C. § 447 accrual accounting requirement does not apply to any farming corporation that meets the gross receipts test of I.R.C. § 448(c). For purposes of the I.R.C. § 447(a) accrual accounting requirement, a C corporation that meets the gross receipts test for any taxable year is not treated as a corporation at all for that taxable year. [I.R.C. § 447(c)(2)]. This means that partnerships with such C corporations as partners are also not required to use the accrual method of accounting. Farming S Corporations continue to be wholly excluded from an accrual accounting requirement, regardless of gross receipts.

These provisions are not scheduled to sunset.

Farm Machinery or Equipment Depreciation

Beginning in 2018, the TCJA required new farm machinery or equipment to be depreciated over a period of five years, instead of seven. [I.R.C. § 168(e)(3)(B)(vii)]. This change does not apply to grain bins, cotton ginning assets, fences, or other land improvements. The TCJA also allows farmers to use the 200% declining balance method of MACRS depreciation for many farming assets. [I.R.C. § 168(b)(2)]. These changes were permanent and will not end in 2026.

Tax Bill Passes House in Early 2024

January 23, 2024 | Kristine A. Tidgren

On January 31, 2024, the House passed H.R. 7024, the "Tax Relief for American Families and Workers Act of 2024," by a vote of 357-70. A summary of the bill's provisions follows. As of June of 2024, the bill has stalled in the Senate.

Child Tax Credit

The proposal would increase the child tax credit for some tax filers, through 2025.

The current child tax credit is $2,000 per qualifying child under the age of 17. The credit begins to phase out if income exceeds $400,000 for married filing joint couples and $200,000 for other filers. The credit is primarily designed to offset income; however, a portion of the credit is refundable, meaning that tax filers do not have to have any income to claim that portion of the credit. This is called the "additional child tax credit."

Under current law, the additional child tax credit is 15 percent of earned income that exceeds $2,500. Earned income includes wages, salaries, tips, net earnings from self-employment, and other taxable employee compensation. Alternatively, tax filers with three or more qualifying children may calculate the additional child tax credit by subtracting the earned income tax credit from the amount of their Social Security taxes. Regardless of the formula used, the current additional child tax credit is limited to $1,600 per child for the 2023 tax year and $1,700 per child in 2024.

Proposed Change

The proposal would allow tax filers to multiply the amount calculated for the additional child tax credit by the number of children before applying the limit. Additionally, the refundability limit of the credit would be increased to $1,800 per child for 2023, $1,900 per child for 2024, and $2,000 per child in 2025. The proposal would also apply inflation adjustments to the $2,000 credit, beginning in 2024. Finally, the proposal would allow tax filers to use their earned income from the current or prior year (whichever is greater) when calculating the 2024 and 2025 credit.

Example:

In 2023, a parent with two qualifying children and earned income of $10,000 would qualify for a $4,000 child tax credit. However, the additional child tax credit or refundable portion of the credit would be limited to $1,125 (Fifteen percent of [10,000 earned income minus $2,500]). This means the parent would be limited to a total refund of $1,125.

Under the proposal, this same parent would receive a $2,250 refund because the calculated additional child tax credit would be multiplied by the number of children ($1,125 x 2).

The proposal would change the child tax credit only through 2025. In 2026, when the Tax Cuts and Jobs Act has expired, the credit is scheduled to fall back to $1,000 per qualifying child. Additionally, the credit would begin to phase out at $110,000 of MAGI for married filing joint taxpayers and $75,000 of MAGI for single, non-married taxpayers.

In comparison to these proposals, the 2021 COVID-era child tax credit was increased to $3,000 for children ages 6-17 and $3,600 for children ages 5 and under. It was fully refundable and payable in advance.

Bonus Depreciation

Additional first-year depreciation (usually called bonus depreciation) allows taxpayers to immediately deduct an increased percentage of the adjusted basis of qualified property in the year the asset is placed into service. Bonus depreciation is automatic unless the taxpayer elects out. Taxpayers must elect out by class. Bonus depreciation is available for most farming assets with a recovery period of 20 years or less, including general purpose farm buildings, equipment, and drainage tile.

Although the Tax Cuts and Jobs Act provided 100 percent bonus depreciation for a time, the applicable percentage has begun to phase down:

Tax Year Placed in Service Date	Percentage of Bonus Depreciation
September 18, 2017 through December 31, 2022	100 percent
2023	80 percent
2024	60 percent
2025	40 percent
2026	20 percent
2027 and later	None

Proposed Change

The proposal would restore bonus depreciation to 100 percent for qualified property placed in service in 2023 through 2025. In 2026, the applicable percentage would fall to 20 percent (as currently scheduled), and bonus depreciation would not exist in 2027 or later. For Congress, the discussion of bonus depreciation after 2025 would be folded into the larger discussion of other Tax Cuts and Jobs Act provisions expiring at the end of 2025.

Section 179

Perhaps more favored by the agricultural sector because of its flexibility, the Section 179 deduction allows taxpayers with an active business to immediately expense the cost of qualifying assets instead of depreciating them over a number of years. The Section 179 deduction is available for most assets used by the taxpayer in an active farming business. Although it applies

to single purpose agricultural and horticultural buildings, it does not apply to multi-purpose farm buildings.

For taxable years beginning in 2023, the maximum Section 179 deduction is $1,160,000. That deduction is phased out, dollar-for-dollar, when the value of qualified property placed in service that tax year exceeds $2,890,000. In 2024, the maximum Section 179 deduction is $1,220,000 and the phaseout threshold amount is $3,050,000.

The Section 179 deduction and phaseout threshold are adjusted for inflation each year. The Tax Cuts and Jobs Act made the Section 179 deduction permanent. It is not scheduled to expire after 2025. These deduction limits are applied at the entity level, as well as the owner level. As equipment costs have increased, more farming operations are exceeding the threshold limit. For these farms, bonus depreciation is the only accelerated cost recovery method available. As noted above, in 2024, only 60 percent of the adjusted basis may be deducted using bonus depreciation.

Taxpayers may take the Section 179 deduction for a particular asset (it doesn't have to apply to the entire class) for any amount they choose and then apply bonus depreciation to the remaining basis. If bonus depreciation is not 100 percent, the taxpayer will take appropriate MACRS depreciation deductions for the remaining basis.

Proposed Change

The proposal would increase the Section 179 deduction for the 2024 tax year to $1,290,000, with a phaseout threshold of $3,220,000. These amounts would be indexed for inflation after tax year 2024.

Deduction for Research and Experimental Expenditures

Before 2022, Section 174 generally allowed businesses that incurred domestic research or experimental (R&E) expenditures to presently deduct those expenses in the year they were incurred or to capitalize the expenses and recover them ratably over five years. A 10-year amortization option was also provided. Deductions were reduced by any research credit claimed under Section 41.

In 2017, Congress included a provision in the Tax Cuts and Jobs Act stating that beginning after 2021, R&E expenses must be capitalized and amortized ratably over a period of five years. That change went into effect at the beginning of 2022, meaning that many companies that had been able to presently deduct R&E expenses faced significantly higher tax bills. R&E expenditures are generally all costs incident to the development or improvement of a product, including the salaries of those developing or improving the product. Expenditures for developing new software are included in the definition of R&E expenditures that must be amortized.

Proposed Change

The proposal would create Section 174A to temporarily restore the ability of taxpayers to presently deduct domestic R&E expenditures incurred in 2022 through 2025. The proposal includes transition and implementation rules.

Business Interest Deduction Limit

The Tax Cuts and Jobs Act created Section 163(j) to generally restrict the business interest deduction, beginning in 2018, to the sum of (1) business interest income, 30 percent of adjusted taxable income, and floor plan financing interest. This limit applies only to businesses that exceed the gross receipts amount set in Section 448(c). In 2024, this means that businesses with $30 million or less in gross receipts are generally not subject to the business interest deduction limit. Tax shelters are subject to the limit, regardless of gross receipts. Farming businesses (as defined in IRC § 263A(e)(4)) and agricultural cooperatives may elect not to be subject to the business interest limitation. Such farming businesses, however, are then required to use the alternative depreciation system to depreciate any property used in the farming business with a recovery period of 10 years or more.

When created, the law provided that through tax year 2021, adjusted taxable income was computed without a reduction for depreciation, amortization, or depletion. In other words, these amounts were included in the adjusted taxable income against which the 30 percent business interest deduction was calculated.

For tax years after 2021, however, the law provided that adjusted taxable income included the deductions for depreciation, amortization, and depletion. This significantly reduced the business interest deduction allowable to businesses subject to the Section 163(j) limit.

Proposed Change

The proposal would calculate adjusted taxable income without including depreciation, amortization, and depreciation through the end of 2025. This provision would allow taxpayers to elect to apply this rule to tax years after 2021.

Information Reporting

Under current law, a Form 1099-MISC or a Form 1099-NEC is generally required for certain payments totaling $600 or more in a tax year.

Proposed Change

The proposal would increase the threshold for the 1099-MISC and 1099-NEC to $1,000 per taxpayer per tax year, beginning with tax year 2024. This amount would be indexed for inflation for calendar years after 2024. The threshold for backup withholding would be adjusted to correspond to the new information reporting threshold.

Employee Retention Credit

The employee retention credit (ERC) has spawned billions of dollars of fraudulent claims (see IRS Unveils Voluntary Disclosure Program for Erroneous ERC Claims for more information). Under current law, taxpayers can file claims for 2020 through April 15, 2023, and claims for 2021 through April 15, 2025. A five-year statute of limitations applies to ERC claims filed for quarters three and four of 2021. The standard three-year statute of limitations applies to claims for periods before that time.

Proposed Change

The proposal provides that no credit or refund of the ERC will be allowed or made **unless the claim is filed on or before January 31, 2024.** Additionally, the proposal would extend the statute of limitations for assessments relating to ERC claims to six years after the latest of:

- The date the original return was filed,
- The date on which the return is treated as filed under present statute of limitations rules, OR
- The date on which the credit or refund of the ERC is made.

The proposal would also extend the period for taxpayers to claim deductions for wages attributable to invalid ERC claims that are corrected after the standard period of limitations.

Finally, the proposal would significantly increase potential penalties for ERC promoters. A promoter is defined as any person who provides aid, assistance, or advice with respect to an affidavit, refund, claim, or other document relating to an ERC, if the person charges fees based on the amount of the credit or meets a gross-receipts test.

Other Provisions

Many provisions within the proposal are related to Taiwan. It also includes several provisions for location-specific disaster relief and several provisions designed to incentivize affordable housing.

Considerations

It appears that the proposed tax package has widespread support, although no one in Washington appears to be satisfied with all of the provisions. It is not certain at this time whether the bill will pass or if it will pass without significant amendment. If the bill does pass, the timeframe for its passage is unclear. The individual filing season is set to open January 29, 2024, so the clock is certainly ticking.

Taxpayers who would be impacted by these changes may consider waiting to file until it is known whether this bill will become law. Farmers planning to file their returns and pay their taxes by March 1 to avoid estimated tax penalties (which will be higher this year because of

inflation adjustments) will face difficulty, even if the bill does not pass, because of uncertainty so close to the deadline. If the bill does pass, necessary software changes and recalculations may make the March 1 deadline impossible for impacted filers.