Artificial Intelligence in Law Practice: Navigating the Ethical Landscape

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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).

Florida Bar Ethics Opinion, *Opinion 24-1* (January 19, 2024), available at: https://www.floridabar.org/etopinions/opinion-24-1/

Massachusetts Board of Bar Overseers (by Afton Pavletic), *The Wild West of Artificial Intelligence: Ethical Considerations for the Use of A.I. in the Practice of Law*, available at: https://bbopublic.massbbo.org/web/f/The_Wild_West_of_Artificial_Intelligence.pdf (last visited April 13, 2024).

State Bar of Michigan JI-155 (October 27, 2023), available at: https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155 (last visited April 13, 2024).

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).

Judicial Orders on AI

RAILS (Responsible AI in Legal Services) Compilation of Court Orders on AI, available at: https://rails.legal/resource-ai-orders/ (last visited April 13, 2024).

Selected Current Articles on AI in the Delivery of Legal Services

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).

John Villasenor, *How AI Will Revolutionize the Practice of Law*, Brookings Institution (March 20, 2023), available at: brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/ (last visited April 13, 2024).

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

[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_meetin g_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).

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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;

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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).

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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).

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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 Assistan<u>ts</u>" to "Responsibilities Regarding Nonlawyer Assistan<u>ce</u>."[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

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[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

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[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

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[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).

14

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

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[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.
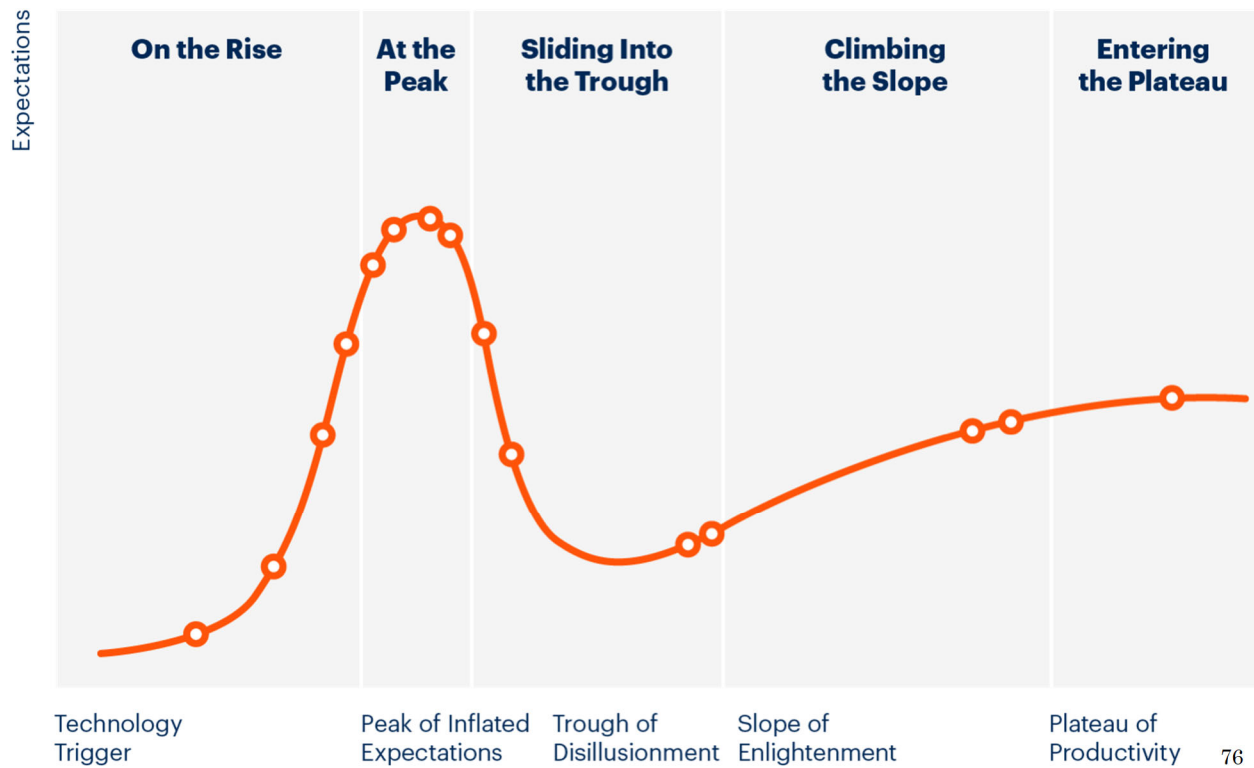
Lawyers already have begun to use these tools to improve the quality of their work or make it more efficient. For example, generative AI tools are helping lawyers draft clauses and phrases in transactional documents; summarize large collections of documents in litigation and transactional work; draft 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).

| On the Rise | At the Peak | Sliding Into the Trough | Climbing the Slope | Entering the Plateau |

Expectations

Technology Trigger — Peak of Inflated Expectations — Trough of Disillusionment — Slope of Enlightenment — Plateau of Productivity [76]

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*

17

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).

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, <u>8 Questions About Using AI Responsibly, Answered</u>, 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, <u>vLex releases new generative AI legal assistant</u>, 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." <u>Id.</u> 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, <u>supra</u> 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.