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**TOPIC: ARTIFICIAL INTELLIGENCE
AND LEGAL ETHICS**

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Artificial Intelligence and Legal Ethics

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Technologies such as artificial intelligence (AI) tend to outpace their legal governance given the rapid pace of technology versus the slower pace of governance.² This problem applies to legal ethics—new technologies create novel ethical dilemmas that the American Bar Association (ABA) and state bars struggle to keep pace with. Such challenges have been faced by previous technologies such as fax machines, email, cell phones, cloud computing, social media and virtual offices. As one commentator noted, “each new technology comes with its own set of ethical pitfalls and, unfortunately cautionary tales from lawyers who fail to mind them.”³ Consequently, each new technology entering the legal world stimulates a new round of debates about whether we need new legal ethics rules, or additional comments to existing rules, or advisory opinions on how the new technology invokes existing ethical rules, or whether and how attorneys need to adjust their practices to stay within the bounds of professional norms when using new technologies.

No technology will disrupt the practice of law, and society generally, more than artificial intelligence. As a cover story in the *ABA Journal* noted: “Artificial intelligence is more than legal technology. It is the next great hope that will revolutionize the legal profession.... What makes artificial intelligence stand out is the potential for a paradigm shift in how legal work is done.”⁴ Given this “paradigm shift” in how legal work is done, it is not surprising that AI is already creating new questions and challenges in the realm of legal ethics and professional responsibility.

Bar associations are starting to recognize these ethical challenges created by AI. In 2019, the ABA House of Delegates adopted a resolution calling on the courts and lawyers to address the “emerging ethical and legal issues” created by the use of AI in legal practice.⁵ In 2023, the ABA House of Delegates adopted an additional resolution calling for the ethical use of AI by requiring human oversight and accountability for the use of AI systems.⁶

Some states have also started to address the legal ethics issues created by AI. On November 16, 2023, California adopted a “Practical Guidance” on the use of generative AI by attorneys.⁷ The

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² GARY MARCHANT, BRADEN ALLENBY & JOSEPH HERKERT (EDS.), *THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM* (Dordrecht, Germany: Springer, 2011).

³ Cassandra R. Hewlings, *Future of Louisiana’s Ethics and Professionalism Rules: As Technology Changes, Will Ethics Stay the Same?*, *LOUISIANA BAR J.*, June/July 2016, at 42, 42.

⁴ Julie Sobowale, *How Artificial Intelligence Is Transforming the Legal Profession*, *ABA J.*, April 1, 2016, available at https://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession.

⁵ ABA House of Delegates, Resolution 112, Aug. 12, 2019, available at

<https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf>

(“RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (“AI”) in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.”).

⁶ ABA House of Delegates, Resolution 604, (August 8, 2023, available at

<https://www.americanbar.org/content/dam/aba/administrative/news/2023/mym-res/604.pdf>.

⁷ Cheryl Miller, *California Bar Adopts First-of-Its-Kind Guidance on AI for Attorneys*, *Law.Com*, Nov. 16, 2023, available at <https://www.law.com/therecorder/2023/11/16/california-bar-adopts-first-of-its-kind-guidance-on-ai-for-attorneys/>.

guidance does not carry the weight of an amendment to the rules of professional conduct or a formal ethics opinion, but it can be cited in a disciplinary proceeding against an attorney.⁸ The document describes how various of the ethical rules for lawyers apply to generative AI (and will be discussed *passim* below in the context of specific ethical rules).⁹ According to the State Bar, “the Practical Guidance will be a living document that is periodically updated as the technology evolves and matures, and new issues are presented.”¹⁰

The overall recommendation of the California Practical Guidance is quite cautious about attorney use of generative AI: “Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.”¹¹

Florida has also taken action on AI legal ethics in the form of a draft advisory opinion to be finalized in January 2024.¹² The draft advisory opinion describes how generative AI may create some novel ethical issues and recommends how the existing legal ethics rules would apply to such generative AI applications.¹³ The concluding section of the proposed Opinion states that “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.”¹⁴

Several other states have recently established committees to study the use of AI by lawyers and whether changes are needed in those states’ rules of professional responsibility. These states include New Jersey,¹⁵ Texas¹⁶ and Connecticut¹⁷

This White Paper seeks to identify and analyze some of the key ethical questions that AI is creating for practicing lawyers. AI is still in its nascent stages and is expected to continue to grow

⁸ *Id.*

⁹ 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> (hereinafter “California Practical Guidance”).

¹⁰ The State Bar of California, Recommendations from Committee on Professional Responsibility and Conduct on Regulation of Use of Generative AI by Licensees, at 1 (Nov. 16, 2023).

¹¹ California Practical Guidance, supra note 9, at 1.

¹² Florida Bar, Proposed Advisory Opinion 24-1 Regarding Lawyers’ Use of Generative Artificial Intelligence – Official Notice (Nov. 13, 2023), available at <https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-24-1-regarding-lawyers-use-of-generative-artificial-intelligence-official-notice/> hereinafter “FL Prop. Advisory Opinion 24-1”).

¹³ *Id.* Some of the key recommendations in the Florida Advisory Opinion are summarized in the discussion of specific ethical rules below.

¹⁴ *Id.*

¹⁵ Jake Maher, *NJ Courts Turn Attention to AI Impact with New Committee*, LAW360, Sept. 22, 2023.

¹⁶ Lynn LaRowe, *AI Task Force Gets Green Light from Texas State Bar Execs*, LAW360, Sept. 2, 2023.

¹⁷ Christine DeRosa, *Conn. Bar Creates Panels to Examine AI, Women in Profession*, LAW360, Sept. 8, 2023.

exponentially over the next decade in its capabilities and applications. It is therefore likely, if not inevitable, that additional legal ethics issues will be raised by future AI, some of which cannot even be imagined now. In discussing the ethical dilemmas created by AI for attorneys, the ABA Model Rules and their Arizona equivalents are referenced as the existing standards for legal ethics.

1. Competency

The duty of technological competence is the legal ethical rule that is most directly invoked by AI. ABA Model Rule 1.1, and the equivalent Arizona Rule ER1.1., obliges a lawyer to “provide competent representation to a client,” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁸ In 2012, the ABA added comment 8 to Rule 1.1 which requires technological competence by an attorney:

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.¹⁹

Forty States, including Arizona which adopted such a requirement in 2015, have now adopted a similar requirement for attorneys to maintain technological competence.²⁰

AI invokes the duty of technological competency, both with respect to matters that involve substantive legal issues relating to AI systems, and when the attorney uses an AI tool to practice law. AI systems raise many substantive legal issues relating to intellectual property, liability, privacy, cybersecurity, contractual rights, and others, and effective legal advocacy will require the attorney to have a good understanding of the unique attributes of the AI systems. AI tools are also being introduced for many different legal processes, including e-discovery, legal research, document drafting, due diligence, contract review and drafting, billing, time management, and intellectual property applications, amongst others. Each of these AI-enabled legal processes requires an understanding of the AI underlying the software or tool, including its strengths and weaknesses.

Most attorneys likely currently lack the necessary technical competence to understand these AI systems, yet such systems are quickly becoming ubiquitous in the substance and process of law. There is therefore an urgent need for additional training needed to make most attorneys proficient in the use and understanding of AI in legal practice.

In the absence of training, we will see more and more examples of attorneys incompetently using or understanding AI in their legal work. One such well-publicized example recently occurred in New York where an attorney relied on ChatGPT to identify supporting case law, including providing full text of alleged decisions that the AI chatbot had cited but opposing counsel could not locate. It turned out that ChatGPT had “hallucinated” and fabricated the citations and full opinions, a known risk

¹⁸ Ariz. Sup. Ct .Rules, Rule 42, Rules of Prof. Conduct, ER 1.1.

¹⁹ ABA, Model Rules of Professional Responsibility, Rule 1.1 Competence – Comment 8, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.

²⁰ Law Sites, Tech Competence, available at <https://www.lawnext.com/tech-competence>.

of such generative AI programs. The judge in the case sanctioned the attorney, stating that while there is nothing “inherently improper” about an attorney using artificial intelligence, “existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.”²¹ In this case, he continued, the attorneys “abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.”²²

A competent attorney therefore needs to verify the validity of any facts and citations produced by a generative AI program such as ChatGPT. But the duty of competence “requires more than the mere detection and elimination of false AI-generated results.”²³ The attorney also needs to double-check the soundness of the reasoning of text generated by AI systems, as such systems are “stochastic parrots” that like a parrot don’t truly understand the content of the text they generate.²⁴ Such systems are therefore prone to occasionally miss important arguments or counter-arguments, or to misunderstand the concepts they write about. While AI systems are constantly improving, attorney understanding, review, validation and correction of generative AI content will be required for the foreseeable future. AI-generated output used by a competent attorney also should be critically analyzed for bias as well.²⁵ Failure to do any of the aforementioned is tantamount to technologically incompetent legal practice.²⁶

The ability to draft effective generative AI prompts, a skill known as “prompt engineering,” will increasingly become a component of competent legal practice. Competent legal practice goes beyond generative AI however to include all AI tools. Most current AI programs are based on machine learning, which require large quantities of data for training. Attorneys must be aware of the data used to train the AI systems they use. If the training data are not representative of the context in which the AI tool is applied, it can give inaccurate results, for which the attorney would be responsible. Much historical data, especially in the criminal law context, that may be used to train an AI system contains racial, gender and other biases, which unless controlled for or otherwise addressed, can produce biased AI outcomes.²⁷ Garbage in, garbage out. Competent attorneys must be aware of these limitations of AI systems, and guard against their inappropriate use.

In sum, “overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer.”²⁸ But of course, competency does not only include restrictions on use of AI by legal practitioners. Competent legal representation will increasingly involve an obligation

²¹ *Mata v. Avianca, Inc.*, United States District Court, 2023 WL 4114965*1 (S.D. N.Y., June 22, 2023).

²² *Id.*

²³ California Practical Guidance, *supra* note 9, at 3.

²⁴ Emily Bender et al., *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?*, FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency, March 2021, pp. 610–623, available at <https://doi.org/10.1145/3442188.3445922>.

²⁵ California Practical Guidance, *supra* note 9, at 3.

²⁶ “Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.” California Practical Guidance, *supra* note 9, at 3.

²⁷ “AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand” California Practical Guidance, *supra* note 9, at 3.

²⁸ California Practical Guidance, *supra* note 9, at 3.

to use AI tools in appropriate situations.²⁹ The question of when it is unethical not to use AI in practicing law will be a moving target as AI systems continue to improve at a rapid rate.³⁰

2. Duty of Supervision

An attorney has a duty to adequately supervise a non-lawyer assistant. This duty is encoded in ABA Model Rule and Arizona Rule of Professional Responsibility 5.3(b). The ABA Model Rule states: “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.”³¹ This rule is directed at a human assistant — as evidenced by language such as “the person’s” to describe the assistant. Thus, a lawyer has an ethical duty to ensure that human subordinates use AI only in ways that conform to the lawyer’s professional responsibility and obligations.³²

In 2012, the ABA changed the name of its rule from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance.” This arguably expands the scope of the rule to include non-human assistance, such as that provided by an AI system. The proposed Florida ethics opinion provides that “many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer’s use of generative AI.”³³

Machine-learning AI systems now have the unprecedented capability of making their own judgments and decisions, rather than just rotely implementing human instructions as with past legal technologies. AI technologies act therefore more like a human assistant, and are capable of unethical actions if not properly supervised. Accordingly, the ABA and state bars should revise their legal ethics rules to make explicit that an attorney’s duty to supervise assistants applies to AI tools capable of making their own judgments and decisions.³⁴ The proposed Florida ethics opinion adopts this position, stating that a “a lawyer must always review the work product of a generative AI just as the layer must do for the work of nonlawyer assistants such as paralegals.”³⁵

However, there are some significant technical and practical impediments for attorneys to adequately supervise the AI systems that they employ. Many commercial AI systems sold or leased to lawyers by vendors have proprietary algorithms, which make it difficult for attorneys utilizing such algorithms to truly understand and critically assess the results from such algorithms. More fundamentally, AI algorithms based on deep learning are usually a “black box,” which cannot explain how they reached

²⁹ Laura van Wyngaarden, *Do Lawyers Have an Ethical Responsibility to Use AI?*, ATTORNEY AT WORK, April 5, 2018, available at <https://www.attorneyatwork.com/do-you-have-an-ethical-responsibility-to-use-ai-in-your-law-practice/>.

³⁰ The California Bar has committed to further study the question of “whether the duty of competency should specifically require competency in generative AI (i.e., requirement more that what exists in Rule 1.1, Comment [1]....” The State Bar of California, *supra* note 9, at 3.

³¹ ABA MRPR 5.3(b).

³² California Practical Guidance, *supra* note 9, at 4. This includes providing training to the subordinate personnel “on the ethical and practical aspects, and pitfalls, of any generative AI use.” *Id.*

³³ FL Prop. Advisory Opinion 24-1, *supra* note 12.

³⁴ The State Bar of California has committed to study whether ethics rules changes are needed on “how to ‘supervise’ non-human, nonlawyer assistance if the assistance allows for autonomous decision making by generative AI.” The State Bar of California, *supra* note 9, at 3.

³⁵ FL Prop. Advisory Opinion 24-1, *supra* note 12.

their outcomes.³⁶ Even if the AI system was completely explainable and transparent (which they are not), the human user still would be challenged to second-guess the AI system's output given that they are based on millions or even billions of data points, far beyond the capability of the human mind to comprehend.

While much work is being done to create explainable AI, most deep learning tools will remain inscrutable for the foreseeable future, raising tough questions about how attorneys can supervise these systems. Physicians and other professionals are facing similar dilemmas, when very powerful AI systems trained on massive data sets provide recommendations or advice that the human overseeing the system cannot fully interrogate or understand. In such situations, the professional must review the inputs and outputs, and exercise their best judgment, as fraught as that may be. In the end, the attorney who utilizes an AI system, just like the attorney who utilizes non-lawyer assistants, should be responsible for the content provided from such AI sources presented to a court or other tribunal. This duty of oversight over work product produced by AI applies even if the AI system is managed and operated by a third-party.³⁷

3. Duty of Consulting/Communicating with Client

An attorney has a duty to communicate with and consult with their client on significant aspects of the representation. This duty is expressed in ABA Model Rule 1.4, which requires an attorney to “reasonably consult with the client about the means by which the client's objectives are to be accomplished”³⁸ and to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”³⁹ Arizona rule 1.4 has the identical requirements.⁴⁰

The question this requirement raises for AI use is whether an attorney must consult with, and seek permission, on whether to use AI or not in the representation of a client? Moreover, if there is such a duty to consult or seek permission, how much detail is required, in terms of the type or even vendor of the AI system used, and the specific application of that AI tool in pursuing the client's matter.

Not all uses of technology by an attorney require client consultation or permission. For example, whether an attorney uses Word or WordPerfect word processing software, or uses Federal Express or DHL for overnight shipping, is generally the attorney's choice to make without even notice to the client. But other technology choices that may affect the outcome or cost of the representation may be issues that attorneys are obligated to discuss with their clients.

Some AI applications are likely to affect the case outcome or cost of the presentation, such as AI systems for document review, contract drafting, or due diligence. Other applications of AI may be more for internal law firm operations, such as timekeeping or billing AI-based software. Therefore, it

³⁶ Will Knight, *The Dark Secret at the Heart of AI*, TECHNOLOGY REVIEW, Apr. 11, 2017, available at <https://www.technologyreview.com/2017/04/11/51113/the-dark-secret-at-the-heart-of-ai/>.

³⁷ FL Prop. Advisory Opinion 24-1, *supra* note 12.

³⁸ ABA MRPR 1.4(a)(2).

³⁹ ABA MRPR 1.4(b).

⁴⁰ AZ ER 1.4.

may be difficult to generalize whether the use of AI systems require client notification and consent. An additional complication is that an attorney’s use of AI systems may require the uploading of client-specific data into the system for training or application purposes. Such use of client data would seem to require client consent.⁴¹ The proposed Florida ethics opinion on AI states that an attorney is not required to obtain a client’s informed consent unless the AI program the attorney plans to use involves the disclosure of confidential information to a third party.⁴² In contrast, the California Practical Guidance states that “[t]he lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use.”⁴³ Bar associations should provide further clarification to attorneys on their duty to consult with clients and/or seek permission with regard to their use of AI in client representation.⁴⁴

4. Reasonableness of Fees

Rule 1.5 provides that “a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”⁴⁵ When determining whether a fee is reasonable or not, Rule 1.5 directs courts, lawyers and professional ethics bodies towards an eight-factor test to analyzed fees in context based on the facts and circumstances under which the fees were incurred fees.⁴⁶

Prior to the emergence of AI and other advanced technologies, the Rule 1.5 analysis involved an assessment of whether *a human being* performed legal tasks and/or rendered legal advice in a reasonable manner for a reasonable amount of time and, ultimately, for a reasonable cost. To ensure compliance with Rule 1.5, legal professionals had to ask questions like “Was Task X more suitable for a partner-level legal professional or for an associate?” and “Is 11.2 hours a reasonable amount of time

⁴¹ The proposed Florida AI Advisory Opinion recommends “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.” FL Prop. Advisory Opinion 24-1, *supra* note 12.

⁴² FL Prop. Advisory Opinion 24-1, *supra* note 12.

⁴³ California Practical Guidance, *supra* note 9, at 4.

⁴⁴ The State Bar of California has committed to study whether rule changes are needed to address “whether a lawyer should be required to communicate to their client the use of generative AI and in what contexts.” The State Bar of California, *supra* note 9, at 3.

⁴⁵ ABA MRPR 1.5.

⁴⁶ *Id.* The eight factors enumerated under Rule 1.5 include:

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

for a 5th year associate to complete Task Y?” The “reasonable fee” analysis turned almost exclusively on human-generated input and output.⁴⁷

Now, AI tools and other advanced technologies can handle in minutes routine tasks that previously had been handled in weeks by armies of legal professionals. Indeed, technology and AI can perform certain tasks not just faster, but better and more consistently than humans. Principles of efficiency, therefore, dictate that technology often should be the correct first-cut or first pass on things like document review, simple document drafting and other routine and recurring tasks *as long as the AI is reliable, accurate, cost-effective and secure.*

As a result of this new “lawyer-plus-machine” dynamic, there is a new analytic dimension to Rule 1.5 and legal fees.⁴⁸ Lawyers now must consider whether, when and to what extent to use AI when performing legal services for clients and how much to charge when doing so.⁴⁹ With “output” partially generated by attorneys and partially by AI/technology, lawyers need to be thoughtful about striking the proper balance as to a reasonable fee for the dual generated work product. Charging a client for a disproportionately high amount for attorney time may be unfair to a client but allowing an attorney only to be compensated for the cost of automated or programmatic task completion is similarly unfair in the opposite direction. During the early years of generative AI, determining a “reasonable fee” for dual-generated output promises to be more of an art than a science. And there also may be legitimate reasons why an attorney cannot or should not use AI (accuracy, reliability, privacy and so forth) which creates another layer of legal fee variability.

In any of these cases, the costs and expenses associated with the full use, partial-use or non-use of AI should be discussed with a client in advance or at the beginning of the representation to avoid or minimize potential fee disputes. In this regard, the chart below suggests additional questions to help guide a Rule 1.5 analysis, particularly how some of the eight-factors should be contextualized in the age of AI:

Rule 1.5 Eight-Prong Analysis	Relevant Queries in the Age of Artificial Intelligence
The time and labor required	Could reliable AI have accomplished the task faster and better? Would the use of technology have reduced the number of hours billed to a client? Would the use of comparative data have helped the assigning lawyer assign the work to AI versus the “lowest efficient biller”?
The fee charged for such services	Could the professional assign the work to the lowest efficient biller without AI/tech assistance? Was the relative cost of AI cheaper than the lowest efficient biller’s hourly rate? When taking into account the cost of technology, was the blended

⁴⁷ See Rapoport, Nancy B. and Tiano, Jr., Joseph R., Billing Judgment (2022). 96 Am. Bankr. L.J. 311 (2022), Available at SSRN: <https://ssrn.com/abstract=4172409>.

⁴⁸ See Rapoport, Nancy B. and Tiano, Joseph R. Jr., "Reimagining “Reasonableness” Under Section 330(a) in a World of Technology, Data, and Artificial Intelligence" (2023). *Scholarly Works*. 1404. <https://scholars.law.unlv.edu/facpub/1404>. The analysis in the aforementioned article references Section 330(a) of the Bankruptcy Code (11 U.S.C. 330) which is the bankruptcy analog to Rule 1.5 so the analysis carries over.

⁴⁹ The converse scenario also presents an interesting Rule 1.5 dilemma when an attorney must determine what is a “reasonable fees” when the attorney should have, but didn’t use AI or another industry accepted technology, when providing legal services.

	cost of the reduced volume of legal professional time and technology less than the cost of legal professionals alone?
Time limitations	Could AI have performed a task faster and better than a legal professional in early stages of discharging the task?
Novelty, difficulty, experience	With legal professional oversight, could AI have performed the task more efficiently? How much senior oversight would be needed for a junior legal professional versus AI? Would the use of industry benchmarks help the assigning lawyer assign the work to the “lowest efficient biller”? Can a legal professional bill for getting “up-to-speed” with AI tools?

5. Duty of Confidentiality

Rule 1.6(a) states 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).”⁵⁰ Subsection (c) of Rule 1.6 further 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.”

Legal professionals must be mindful that AI technologies rely on vast amounts of data, including information uploaded into AI systems and platforms by users, to train algorithms underlying the AI systems. It is possible that information uploaded and stored in an AI system could be disclosed in future responses to others. Attorneys who use AI platforms therefore must be especially wary about the type and nature of the information being shared, which could contain sensitive, confidential, or privileged information — precisely the type of information Rule 1.6 requires to be kept confidential. Lawyers should not input any client confidential information into any generative AI solution that lacks reasonable and adequate security or that shares inputted information with third parties.⁵¹

Additionally, attorneys and their law firms should adopt best practices, policies and procedures to ensure that inadvertent or unauthorized disclosure does not occur. This includes researching and understanding how the AI tools work and being conversant with the terms of use, security policies and document retention policies of AI platform. Consulting with IT professionals and cybersecurity experts also are excellent precautionary measures. Where client data is uploaded to an AI platform, attorneys should take care to redact sensitive or confidential aspects of the information and enable file protections and encryption controls. Lastly, it is important for attorneys to communicate with clients about the use of an AI platform, the nature of the information to be shared with the platform and the concomitant risks.

6. Duty of Candor Towards Tribunal

Rule 3.3 provides that a “lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the

⁵⁰ ABA MRPR 1.6.

⁵¹ *Id.*

lawyer.⁵² When a lawyer uses AI or AI generated content in the courtroom, the duty of candor requires attorney to verify the truthfulness, completeness and accuracy of all court filings and statements made by the attorney to the Court in connection therewith. Several courts have issued standing orders reinforcing this minimum standard of candor toward the tribunal in respect of the use of AI. Generally speaking, these standing orders require that “[a]ll attorneys and pro se litigants must verify that AI-generated filings & pleadings have been checked for accuracy, using print reporters, traditional legal databases, or other reliable means.”⁵³

7. The Unauthorized Practice of Law

Rule 5.5(a) provides that “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.”⁵⁴ Subsection (b) of Rule 5.5 further states that “a lawyer shall not aid a nonlawyer in the unauthorized practice of law.”⁵⁵ These ethical mandates are subject to a practical exception in Comment 2 to Rule 5.5 where the unauthorized practice of law rule is not violated where a lawyer supervises work he or she has delegated and retains responsibility for the non-lawyer.⁵⁶

The policy underlying the unauthorized practice of law is straightforward. When a non-lawyer endeavors to handle legal matters, the non-lawyer is not technically subject to the same training and rules that apply to lawyers (*i.e.*, the Professional Rules of Conduct) thereby threatening the integrity of the legal profession; the quality of legal advice given; and the desired results and outcomes for clients and others expecting sound legal advice and services.⁵⁷

Although the practice of law is characterized in a slightly different way depending on which state law applies, the overarching principle evidencing the unauthorized practice of law is whether the non-lawyer exercised legal judgment, especially the application of law to a particular set of facts. State codes and ethics opinions add clarity to this principle by defining certain core activities as constituting the practice of law: preparing pleadings and court submissions; drafting legal agreements and documents that establish legal rights (contracts, deeds, trusts, wills); court appearances; and giving legal advice.⁵⁸

⁵² ABA MRPR 3.3.

⁵³ Standing orders have been issued by the Northern District of Texas, Eastern District of Pennsylvania, Northern District of Illinois and the U.S. Court of International Trade.

⁵⁴ ABA MRPR 5.5.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ For an insightful article providing an overview of the unauthorized practice of law and its future, *see generally* Julian Moradian, *A New Era of Legal Services: The Elimination of Unauthorized Practice of Law Rules to Accompany the Growth of Legal Software*, 12 Wm. & Mary Bus. L. Rev. 247 (2020), available at <https://scholarship.law.wm.edu/wmblr/vol12/iss1/7>. A sometimes criticized aspect of bar licensure and the unauthorized practice of law is the anticompetitive and monopolistic effect on the legal profession.

⁵⁸ In Arizona, the “[p]ractice of law means providing legal advice or services to or for another by: (1) preparing or expressing legal opinions to or for another person or entity; (2) representing a person or entity in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration or mediation; (3) preparing a document, in any medium, on behalf of a specific person or entity for filing in any court, administrative agency, or tribunal; (4) negotiating legal rights or responsibilities on behalf of a specific person or entity; or (5) preparing a document, in any medium, intended to affect or secure a specific person’s or entity’s legal rights.” A.R.S. Sup.Ct. Rules, Rule 31(b).

Lawyers can directly engage in the unauthorized practice of law themselves by, for instance, practicing in a jurisdiction in which they do not hold a license to practice law.⁵⁹ That is not, however, where AI poses a risk relative to the unauthorized practice of law.

A very real risk is posed, or at least hypothesized, in the context of a licensed attorney “aiding a nonlawyer in the unauthorized practice of law.”⁶⁰ AI-systems, particularly large language models, are capable of generating legal documents, developing novel legal arguments and incorporating legal research into those work products. In many respects, GenAI tools function in a manner similar to a paralegal or other non-lawyer assistant. GenAI is not merely performing a rote, administrative, “fill-in-the-blank” task, but instead mimicking the cognitive functionality of a non-lawyer by handling legal tasks.⁶¹ As implausible as it might have sounded a decade or two ago that a non-human could be engaged in the (unauthorized) practice of law, the rapid advancement of technology has made the far-fetched very real. It is not yet clear whether attorneys who rely on GenAI to produce oral arguments in a court case or generate pleadings or legal briefs have crossed the blurry line of aiding the unauthorized practice of law, but it is certainly raising eyebrows among state bar commissions and legal ethicists alike.

The cautious lawyer should assume that GenAI tools which are handling tasks much like a human being have stepped into the shoes of a virtual non-lawyer. This means that the exception in Comment 2 to Rule 5.5 carries great importance for any lawyer who uses AI tools. In order to fall within the “safe harbor” exception to comment 2, lawyers using AI tools in the context of their practice must “supervise” and verify the output of GenAI tool, recognizing that the lawyer is retaining ultimate responsibility for the output of the AI tool. While this practice fulfills a lawyer’s professional responsibilities under other ethical rules discussed above, it also should serve to place a lawyer squarely into the exception to improperly aiding the unauthorized practice of law.

Other Attorney Ethics Issues

Another ethical issue has to do with law firm use of AI chatbots for client communications and intake. These can create risks of inadvertently creating an attorney-client relationship when one is not intended or advised. As the draft Florida ethics opinion cautions, “[w]hile generative AI makes 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.”⁶² The chatbot should be programmed to immediately identify itself as a chatbot, and to provide appropriate disclaimers that is not authorized to create an attorney-client relationship.⁶³

AI systems could also trigger the rule against discrimination in ABA MRPR 8.4(g), which provides that an attorney must not “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct

⁵⁹ ABA MRPR 5.5(b).

⁶⁰ ABA MRPR 5.5(a).

⁶¹ *Cf.* A.R.S. Sup.Ct. Rules, Rule 31(b).

⁶² FL Prop. Advisory Opinion 24-1, *supra* note 12.

⁶³ *Id.*

related to the practice of law.”⁶⁴ AI systems trained on historical data often contain racial, gender or other biases in the data that can be incorporated into the AI’s algorithms decisions. Attorneys should be aware of this potential for bias and of approaches for addressing such biases.⁶⁵

Some states are considering mandatory CLE training sessions for attorneys on the ethical use of AI. For example, in its decision on November 16, 2023 to adopt a Practical Guidance on use of AI, the California Bar authorized its staff to develop a one-hour CLE course on ethical use of AI.⁶⁶ In addition, the California State Bar has directed the Committee of Bar Examiners to explore requirements for California-accredited law schools to require courses regarding the competent use of generative AI and to explore regulations related to the bar exam and generative AI.⁶⁷

Judicial Ethics

Judicial ethics may also be affected by AI. At least two states have already issued ethics opinions about the role of judges in using AI. The West Virginia Bar issued an opinion in October 2023 that concluded “that a judge may use AI for research purposes but may not use it to decide the outcome of a case. The Use of AI in drafting opinions or orders should be done with extreme caution.”⁶⁸ The order also counseled judges to review and approve any content generated by an AI system similar to how the judge would review content generated by a judicial clerk.⁶⁹ The Order also cautioned judges to avoid any leakage of confidential data through the use of an AI system.⁷⁰

Shortly thereafter, the Michigan Bar issued its own ethical opinion on judges and AI.⁷¹ The Michigan order emphasized the need for judges to obtain and maintain competency in understanding AI that may be used in their courtroom and cases. The Order concludes that: “Judicial officers have an ethical obligation to understand technology, including artificial intelligence, and take reasonable steps to ensure that AI tools on which their judgment will be based are used properly and that the AI tools are utilized within the confines of the law and court rules. Further, as AI rapidly advances, judicial officers have an ethical duty to maintain technological competence and understand AI’s ethical implications to ensure efficiency and quality of justice.”⁷²

⁶⁴ Arizona doesn’t have an equivalent rule although attorneys are prohibited from engaging “in conduct that is prejudicial to the administration of justice.” ER 8.4(d).

⁶⁵ California Practical Guidance, *supra* note 9, at 5 (“Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees).”).

⁶⁶ Miller, *supra* note 7. The State Bar of California, *supra* note 9, at 4.

⁶⁷ The State Bar of California, *supra* note 9, at 4.

⁶⁸ West Virginia Judicial Investigation Commission, JLC Advisory Opinion 2023-22, at 5 (Oct. 13, 2023), available at http://www.courtswv.gov/legal-community/JICAdvisoryOpinions_OCR/2023Folder/JIC%20Advisory%20Opinion%202023-22

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 5.

⁷¹ State Bar of Michigan, Opinion JI-155, Judicial officers must maintain competence with advancing technology, including but not limited to artificial intelligence (Oct, 27, 2023), available at https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155.

⁷² *Id.*

Business Ethics Issues

The model rules of professional conduct are not the only ethical consideration that lawyers should consider when using AI in a professional context. Business ethics and general ethical considerations also are relevant to an attorney's use of AI and LLM. A non-exhaustive list of these issues include:

Job displacement. As the recent Executive Order issued by President Biden noted "AI is changing America's jobs and workplaces, offering both the promise of improved productivity but also the dangers of increased workplace surveillance, bias, and job displacement."⁷³ When it comes to a shifting workforce, a recent Goldman Sachs report found that over 300 million jobs could be displaced by AI on a global basis in the near future.⁷⁴ Job displacement is a big issue, although it should not be mistaken with job elimination whereby jobs are not replaced. Lawyers are somewhat uniquely positioned to have a greater social impact beyond the immediate legal matters on which they are working because of the case/matter strategy they employ, personnel they enlist, precedent they set and outcomes they drive. Accordingly, one can argue that a lawyer's ethical obligation also includes ethics considerations as a businessperson. These considerations include how our industry's use of AI will affect employment levels within the legal industry, how law students and our younger professional colleagues are being trained and employed in light of AI usage and how we re-train existing legal industry personnel for other positions with and outside the legal industry.

Bias. AI systems rely on countless types and huge volumes of data to operate and improve. If the underlying data sets are incomplete, inaccurate, or skewed, meaningful biases can creep into results generated by AI tools. The biases then can become ingrained, replicated, amplified and perpetuated in an endless cycle. To complicate matters, if reinforcement learning from human feedback (RLHF) is being used to train a foundational model, it is nearly impossible for human preferences, prejudices, choices, and feelings not to be introduced into the model, thereby creating an additional risk of bias. The risk of bias is not a *per se* reason for lawyers not to use AI. It is, however, a reason to be on vigilant lookout for potentially discriminatory outcomes. Beyond vigilance, lawyers should ensure that AI-developers use care in selecting training data and have ample supervision of human-in-the-loop oversight/AI-training improvements.

Transparency. Transparency poses a business ethics issue for which there is no easy solution. The core issue is charting a path to gain a truly in-depth understanding of how AI functions. For the most part, AI systems are developed and operate in a "black-box" environment that is continuously evolving and transforming. Users never know how algorithms produced the output generated by the AI system. In some respects, even those who are tasked with maintaining an AI system do not have full visibility into the precise basis for output generated as it is ever evolving. For lawyers, the lack of transparency impairs one's ability to easily verify the accuracy and reliability of the output generated, which correlates directly to the multitude of lawyers' ethical obligations, discussed above.

⁷³ Exec. Order No. 14110 ___ C.F.R. ___ (October 30, 2023). *See also* Executive Office of the President, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," 88 Federal Register 75191, November 1, 2023, at <https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>.

⁷⁴ Briggs, J., Kodnani, D., et. al., Goldman Sachs Global Economics Analyst: The Potentially Large Effects of Artificial Intelligence on Economic Growth (March 26, 2023), available at <https://www.gspublishing.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html>

Privacy. Data and personal privacy issues occupy a blurry space between business ethics and legal ethics. As AI systems evolve and mature, they will be amassing and analyzing a vast quantum of PII and other information about individuals, such as their personal preferences, behaviors, beliefs, habits and even emotions. This data could be for both legitimate and nefarious purposes from targeted advertising to predicting individuals' future behavior to fraud. Lawyers must be mindful that accumulating and using such personal data raises serious ethical questions about the legal right to privacy as well as potential liability for themselves and their clients. Consent to collection and data usage and control are vital to protect unsuspecting individuals against misuse of personal data by and within AI systems. In many instances, lawyers can be gatekeepers of how private information is collected and used in legal matters.