ARTIFICIAL INTELLIGENCE

Legal Issues, Policy, and Practical Strategies

Cynthia H. Cwik, Christopher A. Suarez,
and Lucy L. Thomson
EDITORS

ABA
AMERICANBARASSOCIATION
Science & Technology
Law Section

Cover design by Sara Wadford/ABA Design

ISBN 978-1-63905-494-7 (epub)

Discounts are available for books ordered in bulk. Special consideration is given to state bars, CLE programs, and other bar-related organizations. Inquire at Book Publishing, ABA Publishing, American Bar Association, 321 N. Clark Street, Chicago, Illinois 60654-7598.

www.ShopABA.org

Chapter 3

AI and Ethics: A Lawyer's Professional Obligations

Lucian T. Pera, John F. Weaver, and Andrew P. Sutton

I. The Use of AI as an Ethics Issue

More so than ever before, attorneys rely on technology to practice law. Attorneys also counsel clients on the legal use of technology and represent clients in disputes concerning technology. To competently provide counsel in the face of accelerating technological change, attorneys are required to stay abreast of not only how new technology works but also how it affects lawyers' professional obligations.

Over the last two generations, attorneys, regulators, and courts have struggled to fit new technologies—from fax machines and computers to cell phones and the internet—into the traditional framework of professional obligations and regulation of lawyers. The explosive debut of ChatGPT in November 2022 brought generative AI to the forefront of public consciousness and began the stunningly swift incorporation of generative AI into a wide variety of legal tools. Attorneys and their clients have been equally swift to adopt tools that use or incorporate AI. Consequently, attorneys are eager for guidance on their professional obligations and the ethical use of AI tools.

As of this writing in spring 2024, guidance for lawyers is sparse. Only one ethics opinion specifically addresses attorney use of AI-driven tools, Florida Bar Ethics Opinion 24-1 (Jan. 19, 2024).[1] Few legal decisions touch

on the topic,[2] with the most notable exception being the headline-grabbing sanctions decision in *Mata v. Avianca, Inc.*,[3] in which a lawyer was sanctioned—and publicly shamed—for filing with a U.S. district court a ChatGPT-drafted court filing that included fake case citations. The moral most observers have drawn from these cases was that lawyers using AI applications, programs, systems, software, and platforms (each an AI tool and collectively AI tools) are professionally obligated to understand and use them competently, as they are required to understand and use any other tool competently.

The authors attempt here to provide a bit more guidance, tied to existing law and rules, in anticipation of further guidance from ethics opinions, case law, and other sources.

As the use of AI by lawyers and their clients becomes more widespread, the authors realize that the reach and limits of any ethics guidance addressing the use of AI tools will change. Lawyers will likely, however, be required to exercise due care in being aware of the use or incorporation of AI into tools or services that they and their clients use, as that use may or may not be obvious. Thus, even knowing when to apply the kind of guidance this chapter seeks to provide seems likely to become an aspect of diligent, prudent, and ethical lawyering.

II. Sources of a Lawyer's Professional Conduct Obligations

The professional obligations of attorneys arise from many sources.

A. The Applicable Standard of Care

Attorneys are generally required, under the law governing legal malpractice, to comply with the applicable standard of care when they provide legal services.[4] The standard of care provides the test for whether an attorney was negligent. While many formulations of the standard of care applicable to attorneys exist, one version requires that an attorney exercise "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction."[5]

Significantly, it is well established that the standard of care changes and evolves with changes in technology. In one famous 1932 decision often taught

in law school, *The T.J. Hooper*, famed judge Learned Hand specifically concluded that a tugboat owner's failure to use the latest technology—radio receivers to hear warnings of storms—could amount to a breach of the standard of care, even though their use was by no means universal.[6]

Without the benefit of any decisions addressing this point specifically as yet, there is little doubt that incorporating AI tools into legal practice without the required competence, leading to injury to a client, could violate the applicable standard of care, whether current or future versions of AI tools are at issue.[7]

B. Fiduciary Duty and Statutory Law

Another source of an attorney's professional obligations to clients is the common law of fiduciary duty, as well as statutory remedies available in various jurisdictions for some attorney misconduct, including laws prohibiting unfair and deceptive trade practices. An attorney's fiduciary duty to a client is generally comprised of the duties of confidentiality and loyalty but also may include duties that directly implicate competence.[8] In some jurisdictions, attorneys are also subject to liability based on specific statutory provisions of various kinds.[9] Little imagination is required to conclude that an attorney's use of AI tools could lead to liability for breach of fiduciary duty. For example, mishandling confidential information in using an AI tool could lead to unintended disclosure, or using an AI tool in a way inconsistent with an attorney's representations to a client could violate an unfair or deceptive trade practice statute.

C. Contract

An attorney's contractual obligations to clients are deeply embedded in virtually every attorney-client relationship. These are most often measured by the attorney's engagement agreement.

Increasingly over the last decade, clients—especially larger corporate clients and those in heavily regulated industries—have imposed much more specific contractual obligations on attorneys, not only on such subjects as billing practices but also on conflicts of interest and information technology and security. Since 2022, these "outside counsel guidelines" have begun to include provisions addressing the use of AI tools. Attorneys who agree to

such outside counsel guidelines have contractual obligations concerning their use of AI tools.

D. Court Rules

Since the November 2022 debut of ChatGPT, and especially since the highly publicized sanctions order in *Mata v. Avianca, Inc.*,[10] several courts have enacted local rules and issued standing orders or other guidance to lawyers appearing before them, requiring that the use of AI tools be disclosed.[11] These efforts raise numerous questions about their meaning, reach, and effectiveness, but it is too soon to tell whether many other courts will follow suit.

E. Other Law

Other laws of more general applicability may apply to lawyers in their work representing clients or in the operation of their practices. In this chapter, the authors merely remind attorneys that they cannot remain unaware that new and emerging regulation of AI and its use may well apply.

F. Ethics Rules

A lawyer's work is directly regulated by rules of professional conduct. This section addresses the specific ethics rules that are implicated by the use of AI tools.

Every U.S. jurisdiction has adopted rules of professional conduct based upon the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). The extent to which the jurisdictions have adopted the precise language of the ABA Model Rules varies from rule to rule,[12] but on the issues discussed here, there is great uniformity in the substance of U.S. jurisdictions' rules. To date, no U.S. jurisdiction has adopted any ethics rule that specifically addresses issues arising from the use of AI tools.

1. Competence (ABA Model Rule 1.1)

ABA Model Rule 1.1 requires an attorney to "provide competent representation to a client," further providing that "[c]ompetent representation

requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment [8] to ABA Model Rule 1.1 notes an attorney's obligation to acquire and maintain competence through continuous education: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject" (emphasis added). This comment was amended in 2012 to add the emphasized language and highlight that this duty of competence requires lawyers to educate themselves about the technology they use in their practice. This added language has been adopted in at least 39 jurisdictions.[13]

There is no doubt that this requirement of competence includes more than knowledge of the law and technical expertise in how to use the law to obtain results for clients in court or in transactions. Competence as required by the rule also requires competence in other tasks necessary to, or actually used in, the practice of law and the representation of clients.

For example, as cybersecurity concerns have increased, the ABA Standing Committee on Ethics and Professional Responsibility has interpreted ABA Model Rule 1.1 (and other rules) to mean that an attorney's failure to competently protect client confidential information from attempts by malicious actors to gain unauthorized access or a failure to protect against inadvertent disclosure can, in certain circumstances, amount to a violation of the ABA Model Rule.[14]

Florida Bar Ethics Opinion 24-1 puts it succinctly: "When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations."[15] The opinion goes on to note that this "specifically includes knowledge of whether the program is 'self-learning,'" which "raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties," thus implicating confidentiality obligations.[16]

2. Diligence (ABA Model Rule 1.3)

Consideration of the ethical use of emerging technologies demonstrates the close relationship between an attorney's ABA Model Rule 1.1 duty of competence and an attorney's ABA Model Rule 1.3 duty of diligence. To

"act with reasonable diligence" in the representation of a client, not only does an attorney need to have a reasonable understanding of how a technology the attorney is using operates, but also the lawyer must engage in the "continuous application of legal reasoning and analysis regarding all the potential options and impacts presented . . . ."[17] To act with the required diligence in using an AI tool, an attorney must reasonably understand its capabilities and limits, as well as the risks and benefits of using it. And while the line between a lawyer's obligation of competence under ABA Model Rule 1.1 and a lawyer's obligation of diligence under Rule 1.3 may be less than clear, it is clear that a lawyer has these duties, perhaps even under both rules.

Prior to using an AI tool, an attorney should reasonably understand what AI is; how AI operates; what the limitations of AI are; and the risks of using the AI tool, including the risk that the AI tool in question may produce a result or information that is false, inaccurate, biased, incomplete, or inappropriate.[18] An attorney's duties with respect to the output of an AI tool are no different than an attorney's duties with respect to any other work product not produced directly by the lawyer, whether produced by an associate or paralegal, a book of forms, or a computer-assisted research service. An attorney must carefully and closely review and evaluate the output of any AI tool to confirm the accuracy and applicability of all information and guidance. Furthermore, an attorney should understand the particular risks and benefits of each AI tool for each use to which the lawyer puts it.

The ways in which a lawyer may learn, understand, and evaluate these risks and benefits may include

1. reading the terms of use, privacy policy, and related documents for each application, including terms on confidentiality;
2. investigating and understanding the scope and content of the data that was used to train the AI tool;
3. understanding the AI tool's data pathways, including (a) whether the AI tool retains the user's queries, input, or user tracking information and use statistics and whether it shares that information with other users; (b) how and where the AI tool stores such information or data; (c) how long the AI tool stores such information or data; (d) how such data can be used or accessed by the AI tool for training or other

analytical purposes; and (e) how such data may be accessed by the software company that owns the AI tool, third parties, partners, delegates, or contractors;

4. knowing the parties responsible for the AI tool and their experience, competence, and reputation; and
5. conducting a due diligence review of each AI tool, including researching reviews and critiques of its strengths and weaknesses, industry standards, and alternatives.

As with every other tool ever used by lawyers, there may well be no substitute for a lawyer's experience using a particular AI tool in real-world situations.

Florida Bar Ethics Opinion 24-1 provides a similar overview of a lawyer's due diligence obligations for AI tools and usefully situates this obligation within two decades of ethics opinions providing guidance on the use of new technologies such as cloud storage and computing, remote paralegal services, electronic storage disposal, and metadata.[19]

3. Client Communications (ABA Model Rule 1.4)

With the burgeoning development of AI tools, the field of AI is in flux, as software developers race to incorporate new features and capabilities into their platforms and applications. The range of AI tools available to attorneys and the integration of AI tools into platforms that attorneys or law firms utilize daily, such as Google or Microsoft Word, will likely make the use of AI tools common in the legal workplace.

ABA Model Rule 1.4 emphasizes the importance of communication between attorneys and their clients. An attorney must "reasonably consult with the client about the means to be used to accomplish the client's objectives." Comment [5] advises that a client should have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Additionally, an attorney must "promptly inform the client of any decision or circumstance" that requires the client's informed consent. ABA Model 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."

Attorneys who use AI tools should consider disclosing their use to clients.[20] An attorney should be able to clearly communicate the "availability, effectiveness, risk, and overall impact on costs of relevant AI systems" to the client.[21] Generally, the accepted interpretation of ABA Model Rule 1.4 requires that a lawyer disclose to a client material developments in the client's representation. This would suggest that some uses of AI would qualify as such a material development. Perhaps using an AI tool to create a list of possible medical specialists to serve as expert witnesses in a case might not need to be disclosed, while using another AI tool to develop a range of predicted verdicts in the same case might well require some disclosure if the lawyer or client intended to rely on those predictions.

Depending on the circumstances, attorneys may need to disclose to clients how digital confidential client information is stored or accessed by third-party vendors or service providers, including providers of AI tools.[22] Attorneys who have incorporated AI tools into their practices might consider including a statement in their client engagement letters or client intake materials that discloses the scope of the lawyer's use of AI tools in the representation, and they might also consider obtaining the client's informed consent. Depending on the nature of the AI tools and how an attorney uses them, the attorney may want to have a conversation with the client about a specific application or use and obtain client consent.

While never mentioning Florida's version of ABA Model Rule 1.4, Florida Bar Ethics Opinion 24-1 glancingly addresses one aspect of these issues, noting that "[i]f 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" Florida's version of Rule 1.6 on confidentiality.[23]

4. Fees (ABA Model Rule 1.5)

ABA Model Rule 1.5 regulates many aspects of attorney fees and expenses, beginning with the prohibition in Rule 1.5(a) on charging "an unreasonable fee or an unreasonable amount for expenses." Building on that prohibition,

most jurisdictions prohibit charging for expenses that are ordinarily accounted as overhead by the lawyer.[24]

Reviewing Florida and other law, Florida Bar Ethics Opinion 24-1 asserts that the ethics rules "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" and that any charges for AI tools must be "reasonable and . . . not duplicative."[25] Further, "the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI."[26]

5. *Confidentiality (ABA Model Rule 1.6)*

ABA Model Rule 1.6 provides that attorneys may not disclose any "information relating to the representation of a client," unless the disclosure is impliedly authorized or the client consents to disclosure. Attorneys must use reasonable efforts to "prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[27] A client's confidential information may come from any source and may include information that is otherwise publicly available.[28] ABA Model Rule 1.9(c) establishes an attorney's duty to maintain the confidentiality of a former client's confidential information.

ABA Model Rule 1.6 requires attorneys to understand the operation and security of AI tools in order to avoid the unintended disclosure of confidential client information. For example, attorneys must understand that AI tools may gather information from users who interact with the application and developers may then use that information for other purposes, such as training the AI tool, targeted advertising, or responding to other users' requests. A prudent attorney should assume that any publicly available AI tools will retain and utilize user prompts, among other user inputs, along with a catalog of information about the user's interactions with the AI tool to benefit the provider. Accordingly, an attorney generally should not share confidential client information with any publicly available AI tools and must be careful to structure interactions with those AI tools to ensure client anonymity and continued confidentiality of client confidential information.

Of course, setting aside inadvertent disclosures, lawyers can and do sometimes consciously and intentionally disclose client confidential information in representing a client. They can do so under ABA Model Rule 1.6 with a client's informed consent or if the disclosure is impliedly

authorized. Florida Bar Ethics Opinion 24-1 suggests that, if using an AI tool does involve the disclosure of confidential information to a third party, a lawyer may well be required to obtain client consent.[29]

But not all use of AI tools will require disclosure of confidential information to a third party. Some attorneys and law firms may use custom-made or private proprietary AI tools separate from publicly available AI tools. Such private AI tools may alleviate some client confidentiality concerns that arise for public AI tools. Private AI tools may incorporate training on attorney or law firm database materials (perhaps including client confidential information of current or former clients) to provide valuable contextual insights that are unique to the users of the platform within the law firm.

The ABA Model Rules impose different restrictions on an attorney's use and disclosure of confidential client information—for example, "use" of client confidential information that is not to the disadvantage of the client is treated very differently under the ABA Model Rules than disclosure. The ABA Model Rules permit an attorney's use (without disclosure) of a current or former client's confidential information to the extent that the use is not to the disadvantage of the client.[30] In addition, even apart from confidential client information, an attorney may use legal knowledge and strategies learned in the representation of current or prior clients in similar matters in the representation of other or later clients, provided that such use occurs without disclosure or disadvantage to the current or former client. As to a former client, ABA Model Rule 1.9(c)(1) also permits the use of confidential client information to the extent that the information has become "generally known."[31]

Because of these restrictions, law firms and attorneys who utilize any confidential client information to train a private AI tool should consider the extent to which confidential information of current and former clients is accessible to the platform for training purposes, in light of the intended purpose and use of the AI tool. For example, if the output of the tool will *never* be shared with anyone outside the law firm, training on a wider set of client data might be possible, because the firm could simply prohibit any disclosure of the information outside the firm. In contrast, if the law firm intended to provide output to clients or others as part of its work product, it might be necessary because of confidentiality restrictions on client information (including, for example, ABA Model Rule 1.6, work product

protection, the attorney-client privilege, and protective orders) for the firm to evaluate all output before disclosure of that output in order to ensure compliance with confidentiality obligations. Additionally, attorneys and law firms whose clients impose specific use restrictions on their information must consider whether use of information concerning those clients' representations—whether for training an AI or other analytical purposes—may violate those restrictions.[32]

6. Duties to Prospective Clients (ABA Model Rule 1.18)

For more than 20 years, the ABA Model Rules have contained Rule 1.18, which addresses a lawyer's obligations to prospective clients—those people with whom a lawyer interacts but who do not ultimately become clients. While no model rule addresses whether and how an attorney-client relationship is established,[33] Model Rule 1.18 addresses a number of related issues.

Many lawyers today use chatbots for marketing or client intake purposes, including on their websites, and some of these chatbots are or can be driven by AI. Florida Bar Ethics Opinion 24-1, in recognition of these tools, raises several concerns.[34] The opinion warns that lawyers must take care in using AI-driven tools like chatbots for these functions in order to avoid the creation of an attorney-client relationship without the lawyer's knowledge. After all, under the law in Florida and elsewhere, an attorney-client relationship can sometimes be established based on the subjective reasonable belief of the client based on interactions with the lawyer—or, here, the lawyer's chatbot. The opinion also warns that "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."[35] This directive suggests that training a marketing or client-intake chatbot will likely become just as essential as training for human nonlawyer assistants.

7. Attorney as Advisor (ABA Model Rule 2.1)

As the sophistication and quality of AI tool work product improve, some attorneys may desire to forgo the time and effort of research, analysis, or

drafting in favor of using an AI tool's fast findings. ABA Model Rule 2.1 provides that an attorney must "exercise independent professional judgment and render candid advice." When advising a client, the attorney may rely on law and "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." When a user enters a prompt into an AI tool requesting a letter, a summary of some written material, or other work product, the user's inclination may be to defer to a reasonably well-written response the application produces; it is, after all, right there and ready to go. Similarly, when a litigator reviews an analysis of venue options prepared by an AI tool, the temptation is to trust the program's data and conclusions; the AI tool may have considered more data than the litigator ever could. However, ABA Model Rule 2.1 reminds attorneys of their obligation not to take AI work product at face value. Even if an AI tool can instantaneously analyze the entirety of humanity's collective knowledge to prodigiously offer prescient predictions on a proven basis, an attorney simply cannot substitute the determinations of the AI tool for the attorney's independent, professional judgment, unless the lawyer has exercised their judgment to conclude that their reliance on the AI tool is well founded.

At times, ABA Model Rule 2.1 is cited as evidence that lawyers are not merely agents of their clients, as agency law does not require an agent to exercise independent, professional judgment.[36] ABA Model Rule 2.1 requires independence "in order to increase the prospects that the attorney's advice will be accurate. Uninformed advice is unlikely to be accurate."[37] Similarly, assuming that the output of an AI tool will be accurate, appropriate, or helpful to the client without careful review decreases the likelihood that the lawyer's counsel or work product will be accurate, appropriate, or helpful to the client. Even when the AI tool's analysis or text is accurate and appropriate—such as a venue analysis that identifies the judge who has issued opinions in similar disputes most favorable to the client—there might be other considerations that favor different recommendations that the attorney should discuss with the client. Those considerations could include sources of information unavailable to an AI tool, such as the personal experience of the lawyer or their partners or, as the rule suggests, moral, economic, social, and political factors.

Even when a lawyer has ample experience with an AI tool and has noted that they have always agreed with the AI tool's conclusions, counsel is still required under ABA Model Rule 2.1 to exercise their professional judgment

and must review the AI tool's conclusions prior to relying on them when presenting advice to the client. Such conclusions can inform client recommendations, but a lawyer's advice should be informed by all relevant factors.[38]

The Wisconsin Supreme Court reached a similar conclusion when it considered the extent to which state circuit courts could rely on risk assessment reports prepared by COMPAS, an AI tool that creates reports evaluating the likelihood a defendant will be a repeat offender. The court accepted the use of such reports, provided they are not determinative in incarcerating a defendant or in the severity of a sentence but are one of many factors circuit courts rely on in sentencing: "[C]onsideration of a [report prepared by an AI tool] at sentencing along with other supporting factors is helpful in providing the sentencing court with as much information as possible in order to arrive at an individualized sentence."[39]

8. Candor toward the Tribunal (ABA Model Rule 3.3)

Lawyers cannot misstate facts or law to a tribunal, and special attention should be given to research and documents prepared by generative AI tools that may be submitted to courts. ABA Model Rule 3.3 prohibits a lawyer from making "a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." The *Mata v. Avianca* case stands in part for the principle that an attorney may be held responsible for erroneous law cited or created by an AI program the lawyer presents to a court.[40] The judge in *Mata* specifically cited ABA Model Rule 3.3, noting a "lawyer may make a false statement of law where he 'liberally us[ed] ellipses' in order to 'change' or 'misrepresent' a court's holding."[41] Under ABA Model Rule 3.3, lawyers are obligated to review all AI-generated research and documents before submitting them to the court, just as they are required to do so with research and documents prepared by any other human or tool.[42]

9. Supervision (ABA Model Rules 5.1 and 5.3)

Attorneys have clear obligations under the ABA Model Rules to supervise lawyers and other staff with whom they work.[43] ABA Model Rule 5.1 provides that any "lawyer having direct supervisory authority over another

lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Similarly, ABA Model Rule 5.3 requires that a lawyer who is supervising other staff "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

Of course, an AI tool is not a lawyer or a staff member, but when a lawyer or staff member is relying on AI to perform tasks that are similar to those performed by attorneys or staff members (e.g., preparing first drafts, analyzing documents), the supervising lawyer must oversee their use of AI. ABA Model Rule 5.1 does not provide for vicarious disciplinary liability of a supervising lawyer, unless the supervising lawyer directs or ratifies the disciplinary violation. But a supervisory lawyer may be disciplined under ABA Model Rule 5.1(b) if they have not "[made] reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct"—for example, if the lawyer charged is responsible for training the other lawyer and has not provided adequate training.[44] Thus a supervising lawyer has an obligation under the rule for the supervision of lawyers working for the supervisor who are using AI tools, probably including ensuring that the supervised lawyer is appropriately trained and aware of their obligations of competence and diligence discussed earlier. Similarly, a lawyer who incorporates AI into their practice must properly review and oversee how other staff members use it.

Arguably, one of the lessons from *Mata* is that lawyers will be held responsible for mistakes an AI tool makes in work they adopt as their own. Although in *Mata* that was because the lawyer signed a submission to the court confirming the document accurately reflected the law when it did not, a supervising lawyer might well similarly be found to have violated ABA Model Rule 5.1 if they rely on research a junior associate generated using an AI tool if that research turns out to be a hallucination that negatively impacts the client and if the supervising lawyer is found to have failed to make "reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

Florida Bar Ethics Opinion 24-1 treats in some depth the application of Florida's version of Rule 5.3 to a lawyer's use of AI tools. The opinion notes both the lawyer's obligation to oversee an AI tool and the potential consequences for failure to do so:

> [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.[45]

Note especially the nuance the opinion draws between the requirement that the lawyer "review the work product of a generative AI *in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals*" (emphasis added), but not necessarily in all situations, and the requirement that "a lawyer must verify the accuracy and sufficiency of all research performed by generative AI." [46] Only time and experience will tell how long this nuance survives in an age of increasing AI use.

10. Unauthorized Practice of Law (ABA Model Rule 5.5)

ABA Model Rule 5.5 bars lawyers from engaging in the unauthorized practice of law (UPL) or assisting another person in engaging in UPL. While lawyer use of AI tools in the course of providing legal services should never amount to UPL—after all, the lawyer is *authorized* to practice law—it is conceivable that a lawyer might somehow assist someone who is not licensed to practice in using or providing legal services through an AI tool without any lawyer oversight or supervision.[47]

11. Advertising (ABA Model Rules 7.1 and 7.2)

While the provisions of the ABA Model Rules governing lawyer advertising were revised and streamlined in 2018, U.S. jurisdictions continue to have quite divergent advertising rules in place. Nevertheless, every U.S.

jurisdiction retains in some form the prohibition of ABA Model Rule 7.1 barring any "false or misleading communication about the lawyer or the lawyer's services."

Florida Bar Ethics Opinion 24-1, relying on a similar prohibition and a more specific prohibition on lawyers creating in marketing efforts "the erroneous impression that the person speaking or shown is the advertising lawyer" or their employee, warns lawyers against the misleading use of AI tools, such as AI-driven chatbots.[48] The opinion provides that disclosure of the use of a chatbot (as opposed to a human being) is required.[49] Further, the opinion warns against any misleading claims being made by AI tools or claims that the lawyer's "generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable."[50]

III. Best Practices and Conclusions

As of this writing, few decisions or ethics opinions directly address the ethical obligations applicable to an attorney's use of AI tools in client representation. Nonetheless, despite a dearth of materials directly on point, we can discern the broad strokes of practical guidelines to inform how attorneys may ethically use emerging AI tools in practice:

- An attorney must understand the basics of any AI tool they use. That does not mean that an attorney must read the software's code or understand the algorithmic science of how an AI tool produces results, but they must understand the AI tool's intended purpose, the ways in which the attorney may effectively use the AI tool, and the quality and accuracy of the work or results it can and should produce. An attorney should also know enough about the AI tool's development, operation, and use, as well as the experience of other users, to reasonably evaluate the reliability and safety of the AI tool for its intended purposes.
- Generally, an attorney should not input confidential client information into a publicly available AI tool. If an attorney must supply confidential client information to an AI tool in order to use the AI tool for its intended purposes, they must understand how the AI tool

handles such confidential information, including what information or data the AI tool retains or shares with others; where such information is stored and for how long; how such information is used; who has access to the information; and whether the information will remain protected or may later be disclosed by the application in any way. To the extent that confidential client information must be supplied to an AI tool, a lawyer should consider whether informed consent from the client is necessary and must make reasonable efforts to protect the confidentiality of such information.

- A reasonable attorney will prudently and appropriately review all of an AI tool's work product for accuracy and applicability prior to the use of such work product, including presentation or submission of such work product or its derivatives to the client, court, or any outside party. Likewise, an attorney should consider whether any facts or legal analysis generated by an AI tool should be independently verified.
- At present, perhaps the greatest uncertainty in a lawyer's ethical obligations concerning the use of AI tools is the extent to which a lawyer should or must obtain client consent or perhaps simply inform a client (such as in an engagement letter) when the lawyer is using an AI tool.[51] Virtually no guidance outside the rules exists.[52] That said, there are surely some circumstances where the use of some current AI tools no more requires client consent than a lawyer's decision to use a law book or Westlaw or Lexis to find a case. At the same time, the use of an AI tool to evaluate the substantive terms of hundreds of vendor contracts critical to the valuation of a company to be acquired by a client might well be a proper subject for discussion with a client. As with any other question of informed consent under the ethics rules, many factors may determine whether informed consent is needed and the nature of that informed consent, including, for example, the experience, sophistication, and goals of the client.
- An attorney should provide confidential client information to an AI tool maintained by a third party with great caution and only after ensuring the information will be maintained as confidential, will be protected by appropriate privacy and security measures, and will not

be accessible to train the third party's AI tool for use beyond the attorney or the attorney's firm.

- An attorney should incorporate AI into their advertising and potential client communications with great caution. Marketing should not suggest that an attorney's AI tools are superior to those of other attorneys unless there is evidence to support that claim. Any chatbot or similar AI tools used to communicate with potential clients should likely note that they are automated tools and should be monitored carefully to ensure they do not give the impression that a potential client's interactions with the tool have created an attorney-client relationship.
- Any fees an attorney charges to clients for AI tools must be reasonable and nonduplicative. The attorney should ensure that clients understand how, and the extent to which, the fees include the attorney's use of AI.

AI tools are transformative technologies that herald the onset of a transitional period in the practice of law. AI tools promise an increase in productivity, capacity, and capability, and the adoption of AI tools may become ubiquitous in law and business operations. As AI tools proliferate throughout the practice of law, specific ethical guidelines will quickly emerge to refine the framework of the broad principles and practices set forth earlier. Attorneys will need to continue to stay abreast of these developments.

---

1. The opinion is available at https://www-media.floridabar.org/uploads/2024/01/FL-Bar-Ethics-Op-24-1.pdf. Two judicial ethics opinions have been issued. *See* W. Va. Jud. Investigation Comm'n Advisory Op. 2023-22 (Oct. 13, 2023), https://www.courtswv.gov/sites/default/pubfilesmnt/2023-11/JIC%20Advisory%20Opinion%202023-22_Redacted.pdf; State Bar of Mich. Judicial Ethics Op. JI-155 (July 7, 2023), https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155#.

2. *See, e.g.*, Park v. Kim, No. 22-2057, 2024 WL 332478, at *4 (2d Cir. Jan. 30, 2024) (referring plaintiff-appellant's attorney for possible disciplinary action based upon his submission of reply brief that contained "non-existent authority" generated by ChatGPT); United States v. Cohen, 2023 WL 8635521, at *1 (S.D.N.Y. Dec. 12, 2023) (ordering defense counsel to "show cause in writing why he should not be sanctioned . . . for citing non-existent cases to the Court"); Will of Samuel, 2024 WL 238160, at *2 (N.Y. Sur. Jan. 11, 2024) (announcing court's intention to sanction moving party's attorney for submitting reply papers containing "fictional and/or erroneous citations as a result of his reliance on a website which contained information created by Generative Artificial Intelligence").

3. No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

4. *See* 2 RONALD E. MALLEN, LEGAL MALPRACTICE §§ 20:1–:16 (2023).

5. *Id*. § 20:2 (citing case, citation omitted).

6. 60 F.2d 737 (2d Cir. 1932) (Hand, J.).

7. There has been one reported instance of a convicted criminal defendant seeking a new trial on the basis of alleged ineffective assistance of counsel, where the defendant alleged that his lawyer incompetently used an AI tool to help craft his closing argument. *See* Josh Gerstein, *Pras Michel of Fugees Seeks New Trial, Contends Former Attorney Used AI for Closing Argument*, POLITICO (Oct. 16, 2023), https://www.politico.com/news/2023/10/16/pras-michel-fugees-trial-ai-closing-argument-00121900.

8. *See* MALLEN, *supra* note 4, §§ 15:1–:31.

9. *See id.*, chs. 9–11 (discussing various bases for statutory liability).

10. No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

11. The first to do so was Judge Brantley Starr of the U.S. District Court for the Northern District of Texas, whose order requires attorneys and pro se litigants to file a "certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence . . . or that any language drafted by generative artificial intelligence will be checked for accuracy." Judge Brantley Starr, Mandatory Certification Regarding Generative Artificial Intelligence (N.D. Tex. May 30, 2023), https://www.txnd.uscourts.gov/judge/judge-brantley-starr. A few other judges have followed, but care should be given to the specific text of each order, as some apply only to generative AI tools and others apply to AI tools more broadly. For example, Judge Michael M. Baylson of the U.S. District Court for the Eastern District of Pennsylvania ordered the disclosure of any use of artificial intelligence that "has been used in any way in the . . . filing." Standing Order re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (E.D. Pa. June 6, 2023), https://www.paed.uscourts.gov/sites/paed/files/documents/locrules/standord/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf. Many applications commonly used by attorneys include AI functionalities, including Google, Westlaw, and Microsoft Word. Orders such as Judge Baylson's might be broad enough to require disclosure of the use of those applications. The U.S. Court of Appeals for the Fifth Circuit is considering a similar rule addressing generative AI tools. *See* Notice of Proposed Amendment to 5th Cir. R. 32.3 (Nov. 21, 2023), https://www.ca5.uscourts.gov//docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6. For a more thorough discussion of judges' orders governing the disclosure of AI use, see Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107(2) JUDICATURE 69 (2023), https://judicature.duke.edu/articles/is-disclosure-and-certification-of-the-use-of-generative-ai-really-necessary/.

12. The ABA maintains a set of documents that analyze the extent to which the 51 U.S. jurisdictions' versions of individual rules vary from each of the ABA Model Rules. *See* Am. Bar Ass'n Ctr. for Prof. Resp., *Jurisdictional Rules Comparison Charts*, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (last visited Mar. 13, 2024).

13. *See* Am. Bar Ass'n Ctr. for Prof. Resp., *Rule 1.1, Comment [8] Technological Competence* (Apr. 4, 2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc1-1-comment-8.pdf (counting 39, but noting Louisiana ethics opinion); Robert J. Ambrogi, *Tech Competence: 40 States Have Adopted the Duty of Technology Competence,* LAWSITES, https://www.lawnext.com/tech-competence (last visited Mar. 13, 2024) (including Louisiana ethics opinion in count).

14. *See, e.g.*, ABA Formal Op. 477R, Securing Communication of Protected Client Information (May 19, 2017).

15. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 2.

16. *Id*.

17. *See* State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (Nov. 16, 2023), https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf [hereinafter Cal. Practical Guidance].

18. *See id.*

19. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 3.

20. ABA Model Rule 1.4 Comment [1] provides: "Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."

21. Julia Brickell et al., *AI, Pursuit of Justice & Questions Lawyers Should Ask*, BLOOMBERG L. (Apr. 2022), https://www.bloomberglaw.com/external/document/X3T91GR8000000/tech-telecom-professional-perspective-ai-pursuit-of-justice-ques.

22. Rafael Baca, *Model Ethics Rules as Applied to Artificial Intelligence*, LAW PRAC. TODAY (Aug. 14, 2020), https://www.lawpracticetoday.org/article/model-ethics-rules-as-applied-to-artificial-intelligence/.

23. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 3–4.

24. *See, e.g.*, ABA Formal Op. 93-379, Billing for Professional Fees, Disbursements and Other Expenses (Dec. 6, 1993) (lawyer should charge clients only for costs that reasonably reflect the lawyer's actual costs).

25. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 6.

26. *Id*.

27. Forty-six jurisdictions adhere to the broad language of Model Rule 1.6. Alaska; Washington, DC; Maine; Michigan; and Virginia retain rules consistent with the ABA's Model Code of Professional Responsibility that require lawyers to protect a narrower set of "client confidences" (information protected by the attorney-client privilege) and "secrets" (information kept private per client request or information that could embarrass or harm the client upon disclosure).

28. Neither Model Rule 1.6 nor Model Code DR 4-101 excepts information that is publicly available. *See* ABA Formal Op. 479 (Dec. 15, 2017).

29. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 3–4 ("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" Florida's version of Rule 1.6 on confidentiality, thus implying that consent may otherwise be required).

30. See Model Rule 1.8(b) with respect to current clients and ABA Model Rule 1.9(c) with respect to former clients. Some jurisdictions also regulate attorneys' use of confidential client information even if there is no harm to the client. For example, Massachusetts prohibits attorneys from using confidential client information for their own or another's benefit.

31. ABA Formal Opinion 479, The "Generally Known" Exception to Former-Client Confidentiality (Dec. 15, 2017), clarifies that this "generally known" exception "applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade" and that such information is not "generally known" due to court records or discussion in court proceedings.

32. As discussed earlier, corporate clients and clients in heavily regulated industries have increasingly imposed on lawyers outside counsel guidelines. These frequently include provisions concerning confidentiality and use of the client's information. Of course, those concerning confidentiality

clearly implicate the use of some AI tools. Less well understood or recognized, however, is the fact that some outside counsel guideline provisions that ban the use of client information for *any* purpose other than the client's representation could, in theory, prevent the lawyer from using information about that client's matter in, for example, training an AI tool or performing broader analysis with an AI tool, whether for the firm's benefit or other firm clients' benefit, even if the information remains completely and effectively anonymized. Lawyers might consider using better or different engagement terms, or refusing to agree to sweeping no-use outside counsel guideline terms, to preserve their ability to use client confidential information in ways consistent with ABA Model Rules 1.6 and 1.9(c).

33. For the common law on how an attorney-client relationship is established, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. L. INST. 2000).

34. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 5.

35. *Id.*

36. Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 96 (2010); *see generally* RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006).

37. Michels, *supra* note 36, at 116.

38. Without pointing to any particular ethics rule, Florida Bar Ethics Opinion 24-1, *supra* note 1, at 5, also cautions a lawyer against allowing a client to rely solely on the output of AI tools, without appropriate cautions to the client about its source and reliability. The opinion notes that, "[j]ust 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." Even where a client knows, or even requests, the use of AI tools, it may well be incumbent on a lawyer to advise the client concerning the limits and risks of those AI tools.

39. Wisconsin v. Loomis, 371 Wis. 2d 235, 266 (2016).

40. As noted earlier, in the wake of *Mata v. Avianca*, several jurisdictions have produced standing orders including unequivocal statements that a responsible attorney will be held accountable for erroneous citations or manufactured jurisprudence made by an AI tool in court submissions.

41. Mata v. Avianca, No. 22-CV-1461 (PKC), 2023 WL 4114965, at *12 (S.D.N.Y. June 22, 2023) (citations omitted).

42. *See* Cal. Practical Guidance, *supra* note 17, at 5.

43. Douglas R. Richmond, *Watching Over, Watching Out: Lawyers' Responsibilities for Non-lawyer Assistants*, 61 U. KAN. L. REV. 441, 443 (2012) (noting that ABA Model Rules 5.1 and 5.3 "establish a comprehensive, flexible supervisory regime").

44. *Id.* at 447–48; Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 KY. L.J. 231, 240–41 (2007); *see In re* Wilkinson, 805 So. 2d 142 (2002) (upholding attorney suspension for failure to properly supervise another attorney and a nonlawyer clerk in violation of ABA Model Rules 5.1(b) and 5.3).

45. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 4–5.

46. *Id.*

47. At least one company has tried offering an AI tool that would assist pro se litigants during a court hearing, although the AI tool was arguably only a marketing stunt, and the company ceased that effort amidst allegations of UPL. It is worth considering whether a properly produced and governed AI tool that could improve access to justice might be carved out from UPL prohibitions.

48. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 7.

49. *Id.*

50. *Id.*

51. An attorney's ethical obligations under the ABA Model Rules are different, of course, than practical, client-specific considerations regarding disclosure and confirmation of AI tools. Even though an attorney may not be ethically obligated to disclose use of AI tools or to obtain client consent before using a particular AI tool, they may opt to pursue consent or disclosure based on their own opinion of AI and/or their relationship with clients.

52. Some exceptions exist. *See* Cal. Practical Guidance, *supra* note 17, at 4:

> A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client.
>
> The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use.
>
> A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.