Ethics and Professionalism

ABA Formal Opinion 512, *Generative Artificial Intelligence Tools* **(July 29, 2024).** *[pp. 186-87]*

- The explosion of ChatGPT
  - Nov. 30, 2022: ChatGPT debuts
  - May 2024: estimated 180 million active users
- *And* the lawyer hijinks began quickly....
  - *Mata v. Avianca, Inc*., No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023).
  - *U.S. v. Michel* (motion filed Oct. 16, 2023).

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AI and legal ethics

- **Could you give me a summary one paragraph definition of artificial intelligence?**
- **ChatGPT: Artificial intelligence (AI)** refers to the simulation of human intelligence in machines, enabling them to perform tasks that typically require human cognition. This encompasses abilities such as learning, reasoning, problem-solving, perception, and language understanding. Through algorithms and computational models, AI systems can process vast amounts of data, adapt to new inputs, and execute tasks autonomously or augment human capabilities.

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- Current lawyer tools using AI:
  - Casetext
  - Lexis+ AI
  - Westlaw Precision
  - Microsoft Co-Pilot
  - Harvey.ai
  - HighQ Collaborate
  - Gideon
  - LexMachina
  - various e-discovery tools

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- Client and consumer use of AI legal tools

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- Uses of AI tools for lawyers:
  - Summarize a lengthy document (*e.g.*, deposition, opinion)
  - Legal research
  - Drafting a pleading, contract
  - Editing or proofing a draft
  - Analysis of a documents (*e.g.*, appellate brief, contract)
  - Structure a deposition examination
  - Translate legalese
  - Due diligence review of contracts
  - E-discovery review
  - Marketing (*e.g.*, turn article into social media posts)

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- Ethics guidance so far....
  - ABA Formal Opinion 512 (July 29, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf
  - D.C. Bar Ethics Opinion 388 (April 2024), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-388
  - Florida Bar Ethics Opinion 24-1 (Jan. 19, 2024), https://www.floridabar.org/etopinions/opinion-24-1/

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- Ethics guidance so far....
  - Ky. Bar Ass'n, Ethics Opinion KBA E-457 (March 15, 2024), https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)_/kba_e-350.pdf
  - Mo. Informal Opinion 2024-11 (May 2024), https://mo-legal-ethics.org/informal-opinion/2024-11/
  - St. Bar of N.M. Ethics Advisory Cte. Formal Ethics Opinion 2024-004 (Sept. 24, 2024), https://www.sbnm.org/Portals/NMBAR/GenAI%20Formal%20Opinion%20-%20Sept_2024_FINAL.pdf

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- Ethics guidance so far....
  - N.Y. City Bar Ass'n, Cte. on Prof'l Eth., Formal Opinion 2024-5 (Aug. 7, 2024), https://www.nycbar.org/wp-content/uploads/2024/08/20221329_GenerativeAILawPractice.pdf
  - N.C. St. Bar 2024 Formal Eth. Op. 1, Use of Artificial Intelligence in a Law Practice (Nov. 1, 2024), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2024-formal-ethics-opinion-1/

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- Ethics guidance so far....
  - Pa. Bar Ass'n and Phila. Bar Ass'n, Joint Formal Opinion 2024-200 (May 2024), https://www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf
  - W. Va. Lawyer Disc. Bd., Legal Eth. Op. 24-01 (June 14, 2024), https://storage.googleapis.com/msgsndr/Rgd68xOkcVdteTsBkf6O/media/667ac9c219bb7a1f7a4df4c2.pdf

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- Other authority:
  - Calif. St. Bar, 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
  - Ill. St. Bar Ass'n, Report of Task force on Artificial Intelligence (Sept. 27, 2023), https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/ai-task-force/skm-c360i23100414470.pdf
  - Mich. St. Bar, Artificial Intelligence for Attorneys-Frequently Asked Questions (May 2024), https://www.michbar.org/opinions/ethics/AIFAQs

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- Other authority:
  - Minn. St. Bar Ass'n, Working Group on AI, Implications of Large Language Models (LLMs) on the Unauthorized Practice of Law (UPL) and Access to Justice (June 2024), https://www.mnbar.org/docs/default-source/default-document-library/msba-ai-working-group-final-report-and-recommendations.pdf
  - N.J. Sup. Ct. Cte. on Artificial Intelligence, Preliminary Guidelines on New Jersey Lawyers' Use of Artificial Intelligence (Jan. 24, 2024), https://www.njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey

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- Other authority:
  - N.Y. St. Bar Ass'n, Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence (April 8, 2024), https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf
  - St. Bar of Texas, Taskforce for Responsible AI in the Law, Interim Report to the State Bar of Texas Board of Directors (July 2024), https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=62597
  - St. Bar of Texas Prof'l Ethics Cte., Proposed Opinion PO-2024-6 (Nov. 19, 2024), https://www.texasbar.com/AM/pec/vendor/drafts/PO_2024_6.pdf

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- Other authority:
  - U.S. Patent and Trademark Office, Guidance on Use of Artificial Intelligence-Based Tools in Practice Before the United States Patent and Trademark Office, Docket No. PTO–P–2024–0013 (April 11, 2024), https://www.federalregister.gov/documents/2024/04/11/2024-07629/guidance-on-use-of-artificial-intelligence-based-tools-in-practice-before-the-united-states-patent
  - Va. St. Bar, Standing Cte. on Legal Ethics, Guidance on Generative Artificial Intelligence (Feb. 2024), https://vsb.org/Site/Site/lawyers/ethics.aspx?hkey=bc8a99e2-7578-4e60-900f-45991d5c432b

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- Plus two judicial ethics opinions:
  - St. Bar of Mich. Standing Committee on Judicial Ethics, JI-155 (Oct, 27, 2023), https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155
  - W. Va. Judicial Investigation Comm'n, JIC Advisory Op. 2023-22 (Oct. 13, 2023), https://www.courtswv.gov/sites/default/pubfilesmnt/2023-11/JIC%20Advisory%20Opinion%202023-22_Redacted.pdf

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- Sources of law governing lawyer obligations concerning AI
  - Standard of care
  - Fiduciary duty
  - Statutory duties (*e.g.*, deceptive trade practices acts)
  - Contracts (*e.g.*, outside counsel guidelines)
  - New court rules and standing orders
  - Other law on AI

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- Ethics rules touching on AI use
  - Competence (Rule 1.1)
  - Diligence (Rule 1.3)
  - Client Communications (Rule 1.4)
  - Fees (Rule 1.5)
  - Confidentiality (Rules 1.6 and 1.9)
  - Prospective clients (Rule 1.18)
  - Candor toward tribunals (Rule 3.3)
  - Supervision (Rules 5.1 and 5.3)
  - Unauthorized Practice of Law (Rule 5.5)
  - Advertising (Rule 7.1)

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AI and legal ethics

- Two key principles
- Competence (mainly Rules 1.1 and 1.3)
  - Fully understand each tool you use as a lawyer—does it contain or rely on AI?
  - How does it work? Is it built with lawyers in mind?
  - Check your (AI's) work.
- Confidentiality (mainly Rules 1.6 and 1.9(c))
  - Read TOS—any obligation of confidentiality?
  - What data is it trained on? Does it store or use for (or disclose to) others information input? How will output be used?

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- Generative AI in the courts
  - Responsible AI in Legal Services (RAILS), Duke Center on Law and Tech: Comprehensive, available at https://rails.legal/resource-ai-orders/

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- Considerations in lawyer use of an AI tool
  - Lawyer competence
    - Does it ***require*** use of some AI tools? Does it ***prohibit*** use of some AI tools?
    - How can we tell the difference?
  - Role of the client in lawyer AI use
    - Is disclosure to the client required?
    - Is client consent required?
  - Tool-by-tool, use-case-by-use-case analysis needed?
    - Meeting bots
    - Contract or document analysis tools
    - Predictive analytics

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- Diligence in adoption or use of an AI tool
  - Review of TOS
  - Evan Harris & David W. Tollen, "Fine print face-off: which top large language models provide the best data protection terms? (352)," https://www.legalevolution.org/2024/04/fine-print-face-off-which-top-large-language-models-provide-the-best-data-protection-terms-352/
  - Confidentiality; use of data; ownership of data
  - Market research
    - Designed for lawyers; used by lawyers
  - Need for client consent

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- May a lawyer ethically:
  - Use ChatGPT to draft a pleading?
  - Use Google to research a potential defense in a breach of contract matter?
  - Use Westlaw Precision's AI to identify all potential defenses to a breach of contract action?
  - Use Grammarly to edit a brief?
  - Use Otter.ai to record and summarize a video meeting with a client?
  - Use AI tools (*e.g.*, ChatGPT) to run across lawyer/firm's documents and generate template documents for use inside firm?

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