

Strategies for Ethical AI Practices for the Modern Lawyer

Presented by the
American Bar Association
Section of Environment, Energy, and Resources



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Speaker Biographies

Jeremy L. Kahn is a Principal at Berman Fink Van Horn. Jeremy advises a broad range of clients in business disputes, including in trial and appellate courts. His complex commercial litigation and appellate practice focuses on business disputes, including contractual matters and business torts, insurance recovery, fraud, deceptive trade practices, partnership and shareholder matters, banking and consumer finance cases, real estate, and trade secret and noncompete litigation. Jeremy handles his clients' matters from the start of the dispute, through litigation, and, if necessary through the appellate process. He has successfully handled numerous appeals in both state and federal appellate courts.

Jeremy graduated from the University of Miami School of Law (summa cum laude), where he was an executive editor of the University of Miami Law Review and a member of the Charles C. Papy, Jr. Moot Court Board. Jeremy also completed a judicial clerkship with the Honorable Kenneth A. Marra of the United States District Court for the Southern District of Florida.

Angela Kalsi is a partner at UB Greensfelder. She helps her clients protect, manage, and enforce their intellectual property (IP) in the U.S. and around the globe. As her clients' trusted partner, she advises businesses and individuals on a wide array of trademark, copyright, artificial intelligence (AI), design, trade secret, M&A, and licensing issues.

Angela devises and implements global strategies for managing the trademark and copyright portfolios of multinational companies; at the same time, she excels at helping smaller companies develop robust IP portfolios to best position them for their next stage of growth. Angela enforces and defends her clients' IP rights all over the globe, including in cases before the Trademark Trial and Appeal Board and before numerous international IP offices. Angela also advises her clients on best practices concerning the evolving IP issues implicated by new technologies, including AI.

Angela's experience includes working with artists, start-ups, and Fortune 100 companies in a diverse array of industries. She uses this background to adapt her skillset to the unique needs of her clients, always tailoring a practical approach based on a meaningful understanding of her client's priorities.

In her professional community, Angela serves on a leadership committee of the International Trademark Association (INTA), where she hones her expertise in the many nuanced areas of international trademark protection. She also serves on a leadership committee of Chicago Women in IP (ChiWIP), which supports women in the intellectual property field.

In the Chicago community, Angela donates her time to legal aid programs for women- and minority-owned small businesses, and she is an enthusiastic supporter of the arts and animal welfare. Angela earned her J.D. from DePaul University College of Law and her B.A. from the University of Michigan.

Cari Sheehan is an Assistant Clinical Professor of Business Law & Ethics at the IU Kelley School of Business – Indianapolis where she currently teaches Commercial Law and Business Ethics. Additionally, Ms. Sheehan is an Adjunct Professor at the Robert H. McKinney School of Law where she has taught courses in Professional Responsibility, Torts, and Appellate Practice and Procedure. In practice, Ms. Sheehan is a Conflict Attorney with Scopelitis Garvin Light Hanson & Feary advising on conflicts and other ethical issues. Ms. Sheehan is a well-respected seminar and continuing legal education speaker covering a range of ethical issues across various platforms both locally and on a national level.



**ABA SECTION OF
ENVIRONMENT, ENERGY,
AND RESOURCES
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CONFERENCE**

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STRATEGIES FOR ETHICAL AI PRACTICES FOR THE MODERN LAWYER

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RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.



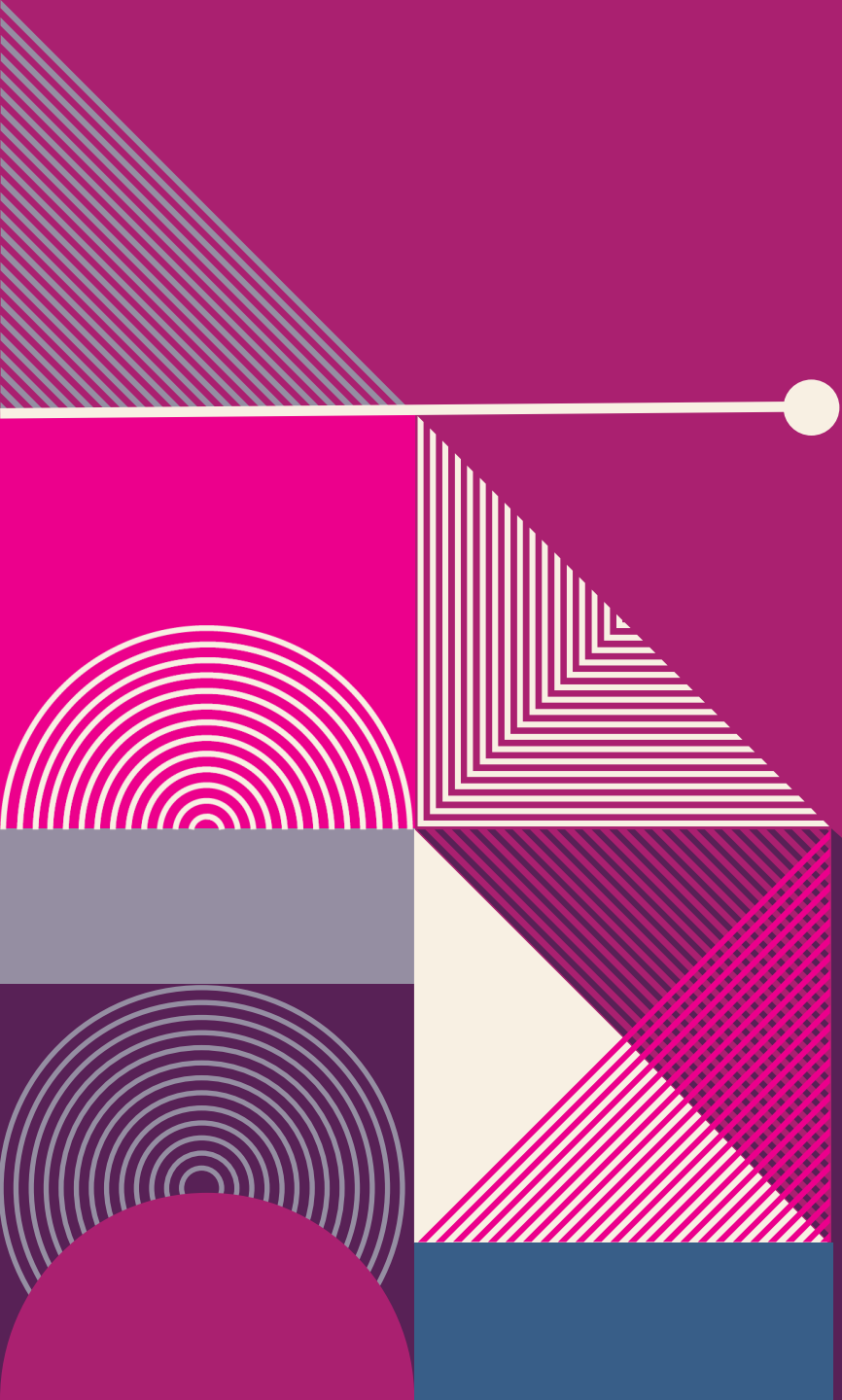
RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 3.1

MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.



RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) 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 lawyer; ...

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal...

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) 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).

...

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.




RULE 8.4 MISCONDUCT

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;...

(g) 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 related to the practice of law...



RULE 1.4 COMMUNICATIONS

(a) A lawyer shall: ...

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; ...


RULE 1.5 FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses...

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.



RULE 5.1 RESPONSIBILITY OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

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- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A 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.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE (CONT'D)

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.



FRCP RULE 11. SIGNING PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

...(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law...



ONGOING DEVELOPMENTS



THANK YOU

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Strategies for Ethical Expertise in Your AI Legal Practice

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Introduction

Generative artificial intelligence programs such as ChatGPT and Microsoft Copilot are changing the way people work across various industries, including the legal profession. In a matter of seconds, these programs can write a song or a legal brief, or anything in between. Generative AI programs generate content based on prompts from the user. Such content can be text, images, videos, music, or even computer code. These programs are “trained” on a large body of data, and they continue to “learn” as more people use the system and more data is inputted into them. Text-based generative AI systems are based on large language models, or LLMs, which use a prompt or input to predict the next text to generate. In practical terms, an attorney could input a prompt such as, “Please write a demand letter to the insurer of an environmentally-contaminated property” or “Please draft a cross-examination of a PFAS expert in an environmental litigation case,” and a few seconds later a fully drafted demand letter or cross-examination will appear. The attorney could then enter follow-up prompts with additional information or requests to generate new revisions of the letter (e.g., “Rewrite while citing Illinois law.” or “Assume the reporting deadline has passed.”).

While generative AI can be an effective tool in an attorney’s practice, attorneys should use it responsibly while keeping in mind the risks and ethical considerations that go along with its use. Such risks and ethical considerations include privacy and confidentiality concerns, issues with ensuring the accuracy of AI-generated content, biases, and others. That does not mean to fear the risks and ignore AI. As others in the legal industry tap into its efficiencies, those who do not use it will be left behind. And even those who choose not to use it cannot control what their partners, associates, clients, and opposing counsel may do. Also, as the comments to Rule 1.1 make clear, lawyers have an ethical obligation to keep abreast of both the benefits and risks associated with relevant technology. Running away from new technology is not an option. The best approach is to understand the risks and ethical concerns and use generative AI responsibly and effectively as an aid to one’s practice rather than as a substitute for human creation.

Accuracy

By now, you have probably heard some of the horror stories of lawyers getting in trouble using generative AI. The fact patterns have generally been the same. A lawyer starts using ChatGPT or some other generative AI program. The lawyer plays around with it asking various legal questions and becoming increasingly impressed by its speed and accuracy. The lawyer gets more ambitious and asks ChatGPT to write a response to a motion to dismiss, throwing in a few relevant facts and issues for background. Voila! ChatGPT generates a well-written legal brief in a few seconds, complete with favorable case cites and quotations that are on point and incredibly helpful. The lawyer drafts his response while copying and pasting large portions of ChatGPT’s response and then files it.

A few weeks later, the lawyer's heart drops as he reads an order to show cause stating that the court is unable to find several of the cases cited in the response and ordering the lawyer to submit the cases or otherwise show cause why he should not be sanctioned. The lawyer scrambles and, for the first time, checks the citations on WestLaw or Lexis only to learn that they are completely made up. With only minor variations in the fact pattern (perhaps one lawyer signed onto a brief not knowing that another lawyer in the firm used ChatGPT to draft it), this has occurred over and over again in multiple jurisdictions across the country.

How did this happen? The lawyer was a victim of what in the AI world is called a "hallucination." A hallucination is when an AI program generates an output that seems plausible but is factually incorrect. ChatGPT and other generative AI programs will never respond, "I don't know." They aim to please. That means they aim to come up with an answer even if they do not have one. So, for example, consider the following prompt: "Whether sexual harassment by professors has been a problem at American law schools; please include at least five examples, together with quotes from relevant newspaper articles." When prompted, ChatGPT responded with examples of news articles of law professors accused of sexual harassment, including dates and quotes. The professors and law schools named were real. The periodicals, such as the Washington Post, were real. The articles were fake. These were hallucinations. Hallucinations can lead to fake cases, fake propositions of law, fake facts, or even potentially defamatory material. Because generative AI programs may hallucinate and provide inaccurate information, a host of ethical rules are implicated.

Rule 1.1 requires lawyers to provide competent representation to a client. The comments to the rule make clear that this requires lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." To satisfy the core competency rule, attorneys must be aware of the risks of inaccuracies in AI-generated content.

Rule 1.3 requires lawyers to "act with reasonable diligence." With respect to using generative AI, reasonable diligence means not relying on AI to replace the lawyer as the creator or author of the content. While generative AI can be used as a tool, the lawyer must cite check the cases, make sure that the factual and legal propositions are correct, and overall make sure that the final product is proofed for appropriateness and accuracy.

The risks of inaccuracy significantly implicate Rules 3.1 and 3.3. Under Rule 3.1, a lawyer shall not "assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." According to the comments, this means that lawyers are required to inform themselves about the applicable law for their clients' cases and determine whether they can make good-faith arguments in support of their clients' positions. While it should go without saying, Rule 3.3 prohibits a lawyer from knowingly making "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 lawyer." As the comments to the rule state: "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal."

This is where the attorneys described above have gotten in trouble. Citing fake cases with fake quotations is a false representation of law. While it is debatable whether some of these attorneys "knowingly" made false representations, that generally has not saved lawyers from

sanctions for citing hallucinated cases to the court. For example, in response to an order to show cause in *Mata v. Avianca, Inc.*, Case No. 22-cv-1461 (PKC) (S.D.N.Y), one attorney filed an affidavit explaining that he relied on the work of another attorney at his firm, and the other attorney explained in his affidavit that he used ChatGPT to obtain the citations in question and “was unaware of the possibility that its content could be false.” The court still sanctioned them under Rule 11 with a \$5,000 penalty and ordered them to inform their client and the judges whose names were wrongfully invoked of the sanctions imposed. The court found that even the first attorney violated Rule 11 by not reading a single case cited in the court filing and taking no other steps to check whether the assertions were supported by law. In another instance, the Colorado bar suspended a lawyer for 90 days for citing fake cases generated by ChatGPT.¹

Considering the risks of fake citations and other inaccuracies, some judges have issued new rules or standing orders regarding lawyers’ use of generative AI. The Eastern District of Texas added a new local rule that lawyers employing generative AI technology “must review and verify any computer-generated content” to ensure compliance with the standards of Rule 11 and other applicable rules and standards of practice.² Judge Brantley Starr (N.D. Tex.) issued a standing order requiring all attorneys appearing before him to “file on the docket a certificate attesting either that no portion of the filing was drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence was checked for accuracy, using print reporters or traditional legal databases, by a human being.”³ Magistrate Judge Gabriel A. Fuentes (N.D. Ill.) issued a standing order requiring that “[a]ny party using any generative AI tool in the preparation or drafting of documents for filing with the Court must disclose in the filing that AI was used and the specific AI tool that was used to conduct legal research and/or to draft the document.”⁴ Judge Fuentes’s order makes clear that reliance on an AI tool does not constitute the “reasonable inquiry” that Rule 11 requires. Judge Arun Subramanian (S.D.N.Y) has a standing order that simply warns attorneys that, while use of generative AI is not prohibited, “counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means” and that the court will hold the attorneys responsible for providing accurate citations.⁵ On the other end of the spectrum, Judge Michael Newman (S.D. Ohio) has a standing order that completely bans the use of artificial intelligence to prepare any court filing, with an exception for “information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing.”⁶ In short, lawyers must now check not just the court’s local rules, but also judge-specific rules regarding prohibitions or limitations on the use of generative AI.

¹ See *People v. Zachariah C. Crabill*, 23PDJ067 (Nov. 22, 2023), available at <https://coloradosupremecourt.com/PDJ/Decisions/Crabill,%20Stipulation%20to%20Discipline,%2023PDJ067,%201-22-23.pdf>.

²<https://txed.uscourts.gov/sites/default/files/goFiles/GO%2023-11%20Amending%20Local%20Rules%20Effective%20December%201%2C%202023.pdf>.

³ <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>.

⁴https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev'd%205-31-23.pdf

⁵https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf.

⁶<https://www.ohsd.uscourts.gov/sites/ohsd/files/MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf>.

State bars have also issued guidance. Perhaps the most robust guidance has come from the Florida Bar, which issued an ethics opinion regarding various aspects of using generative AI.⁷ With respect to inaccuracies, the ethics opinion notes the risk of hallucinations and cites cases where attorneys have been sanctioned for their use of false citations created by generative AI. The Florida Bar ethics opinion states that lawyers must make reasonable efforts to ensure their law firms have policies that reasonably assure that the use of generative AI is compatible with lawyers' professional obligations. Lawyers also must review the work product of generative AI similar to how they would review the work of a nonlawyer assistant, like a paralegal. Lawyers also must verify the accuracy and sufficiency of all research performed by generative AI. Failure to do so can lead to both sanctions as well as violations of multiple rules of professional conduct.

While generative AI is powerful and impressive, it cannot replace a lawyer's independent judgment. At the end of the day, the lawyer signs the brief and is responsible for ensuring its accuracy. Judges and state bars have quickly made clear that reliance on AI is not an excuse. Therefore, lawyers using generative AI must take reasonable steps to ensure the accuracy of AI-generated content as well as make sure they are complying with any other applicable local rules or standing orders related to AI.

Confidentiality

Rule 1.6 provides that lawyers shall not reveal information relating to the representation of a client unless the client gives informed consent. A lawyer must also take reasonable steps to prevent the disclosure of confidential information. Client confidentiality is broad. It includes anything reasonably related to the representation—for instance, discovery, witness statements, strategy, arguments, research, investigative materials, and more.

Lawyers should never assume privacy in what they enter into a generative AI system. ChatGPT, for instance, has no confidentiality guarantee. ChatGPT even recognizes that it is not responsible for protecting confidential information. When ChatGPT was queried “Prof. Rule of Conduct 1.6 and ChatGPT” it generated the following response:

As an AI language model, I do not have the ability to practice law or provide legal advice, and I am not subject to the American Bar Association's Model Rules of Professional Conduct, including Rule 1.6 which concerns confidentiality of information. However, as an AI language model, I am designed to protect the privacy and confidentiality of users' information and data. I use various techniques to ensure that user data and information are kept secure and confidential. Nonetheless, it is important for users to remember that they are responsible for protecting their own confidential information and should use discretion when sharing sensitive information online.

⁷ See Fla. Bar. Ethics Op. 24-1 (Jan. 19, 2024), available at <https://drive.google.com/file/d/1fOr1fTAZR9AOEbb2XJbCDCcBO0SLc0wt/view>.

ChatGPT is designed to be dependent upon data gained from other inquiries to improve its performance and accuracy. ChatGPT utilizes the data from other inquiries to generate responses to new inquiries, and in many cases, it generates content that is similar or identical to former or existing content. As such, there is no guarantee that ChatGPT will not use a lawyer's queried information to generate a response, potentially even verbatim, to another user. This could be a breach of client confidentiality. Other than ensuring that one is not inputting confidential information in the first place, there is no fool-proof way to maintain client confidentiality while using ChatGPT. Lawyers should assume that the same applies to all generative AI programs, unless that lawyer has carefully read the terms and conditions and explicitly found otherwise

Other Privacy Implications

General Data Protection Regulation

Another possible ethical concern for lawyers using generative AI is the General Data Protection Regulation (GDPR), which is a European Union (EU) law that regulates the collection, processing, and transfer of personal data of individuals in the EU. It also addresses the export of personal data outside the EU and European Economic Area (EEA) areas. The GDPR aims primarily to give control to individuals over their personal data and to simplify the regulatory environment for international business by unifying the regulation within the EU. It was adopted in April 2016, and became enforceable in May 2018.

The GDPR has extraterritorial effect, meaning that it applies to any entity that offers goods or services to individuals in the EU or monitors their behavior, regardless of where the entity is located. The GDPR imposes strict obligations on data controllers and processors, such as obtaining consent, providing transparency, ensuring security, and respecting data subjects' rights. Violating the GDPR can result in hefty fines and lawsuits.

One of the major challenges for lawyers using generative AI is to ensure that they do not violate the GDPR or any other data protection laws that may apply to their jurisdiction. Generative AI systems based on large language models rely on large amounts of data to generate natural language responses. Some of this data may contain personal or sensitive information that is protected by the GDPR or other laws. Lawyers who use generative AI to interact with clients or potential clients in the EU, or to handle cases involving personal data of individuals in the EU, need to be careful about how they collect, store, and process such data. They also need to inform their clients about the use of generative AI and obtain their consent before using it.

Some things for lawyers to consider when it comes to GDPR:

- **Data controller or processor:** Depending on how generative AI is used, the lawyer may be considered a data controller or a data processor under the GDPR. A data controller is the entity that determines the purposes and means of processing personal data, while a data processor is the entity that processes personal data on behalf of the data controller. Both data controllers and processors have obligations under the GDPR, such as ensuring data security, notifying data breaches, and complying with data subjects' rights.

- **Data minimization and purpose limitation:** The GDPR requires that personal data should be collected and processed only for specified, explicit, and legitimate purposes, and that no more data than necessary should be processed. Lawyers who use generative AI should ensure that they only collect and process the minimum amount of personal data that is relevant and necessary for their legal services, and that they do not use generative AI for purposes that are incompatible with the original purpose of collection.
- **Data transfer and storage:** The GDPR restricts the transfer of personal data outside the EU and EEA areas, unless there is an adequate level of data protection in the destination country, or there are appropriate safeguards in place, such as contractual clauses or binding corporate rules. Lawyers who use generative AI should ensure that they do not transfer or store personal data of individuals in the EU to countries or entities that do not provide adequate data protection, or without obtaining the consent of the data subjects or providing them with the necessary information.
- **Data security and confidentiality:** The GDPR requires that personal data should be protected by appropriate technical and organizational measures against unauthorized or unlawful processing, accidental loss, destruction, or damage. Lawyers who use generative AI should ensure that they implement adequate security measures to prevent data breaches, such as encrypting the data, using strong passwords, limiting access, and monitoring the activities of generative AI. They should also ensure that they respect the confidentiality of their clients and do not disclose any personal or sensitive information to third parties without authorization or legal obligation.
- **Data subject rights:** The GDPR grants several rights to data subjects, such as the right to access, rectify, erase, restrict, or object to the processing of their personal data, or the right to data portability. Lawyers who use generative AI should ensure that they comply with the requests of data subjects who exercise their rights, and that they provide them with the necessary information about how their data is processed, such as the identity of the data controller or processor, the purpose and legal basis of processing, the retention period, and the rights of the data subjects.

Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that protects the privacy and security of health information of individuals in the United States. HIPAA applies to covered entities, such as health care providers, health plans, and health care clearinghouses, and their business associates, who perform functions or activities on behalf of the covered entities involving the use or disclosure of protected health information (PHI). PHI is any information that relates to the physical or mental health or condition of an individual, the provision

of health care to an individual, or the payment for the provision of health care to an individual, and that identifies the individual or can be used to identify the individual.

Lawyers who use ChatGPT or other generative AI programs should be aware of the potential implications of HIPAA for their practice, especially if they handle health-related matters, such as personal injury, medical malpractice, workers' compensation, disability, or health care fraud. They should ensure that they do not use or disclose PHI of their clients or other parties without authorization or legal justification, and that they obtain the necessary agreements from their clients and business associates to comply with HIPAA. They should also ensure that they implement adequate safeguards to protect the confidentiality, integrity, and availability of PHI that is processed by the generative AI program, such as using encryption, authentication, access control, audit trails, and backup systems. They should also monitor the performance and behavior of ChatGPT and report any incidents or breaches that may affect the privacy or security of PHI.

Gramm-Leach-Bliley Act

Lawyers who use generative AI for their practice should be aware of the potential implications of Gramm-Leach-Bliley Act (GLBA) for their use of the system, especially if they handle financial matters or personal information of their clients or other consumers. They should ensure that they follow the ethical and legal obligations under GLBA and the Rules of Professional Conduct, such as obtaining informed consent, protecting confidentiality, avoiding conflicts of interest, and supervising non-lawyer assistants. They should also evaluate the reliability, accuracy, and quality of the output generated by generative AI and verify it with independent sources before relying on it or presenting it to others. They should also disclose the use of generative AI to their clients and other relevant parties and explain the benefits and risks of using the system. They should also monitor the performance and behavior of generative AI programs and report any incidents or breaches that may affect the privacy or security of personal information.

GLBA regulates the collection, use, and disclosure of personal information by financial institutions, such as banks, insurance companies, and securities firms. Personal information is any information that a consumer provides to obtain a financial product or service, or that results from any transaction involving a financial product or service, or that a financial institution otherwise obtains about a consumer in connection with providing a financial product or service. Lawyers who represent financial institutions or their clients, or who provide financial products or services themselves, such as tax advice, estate planning, or debt collection, may be subject to GLBA and its privacy and security rules. They should ensure that they obtain the necessary notices and consents from their clients and other consumers before using or disclosing personal information, and that they protect the personal information from unauthorized access or use by ChatGPT or other generative AI programs. They should also comply with the opt-out requirements for sharing personal information with third parties or affiliates for marketing purposes.

California Consumer Privacy Act

Another law that lawyers who use generative AI should be aware of is the California Consumer Privacy Act (CCPA), which took effect on January 1, 2020. The CCPA grants Californian consumers certain rights over their personal information, such as the right to know

what personal information is collected, used, shared, or sold by businesses, the right to delete personal information held by businesses, the right to opt-out of the sale of personal information, and the right to non-discrimination for exercising their privacy rights. Businesses that are subject to the CCPA must provide notice to consumers about their data practices, honor consumer requests, and implement reasonable security measures to protect personal information.

Lawyers who use generative AI may fall under the scope of the CCPA if they meet one or more of the following criteria: they have an annual gross revenue of more than \$25 million; they buy, receive, sell, or share the personal information of 50,000 or more consumers, households, or devices; or they derive 50% or more of their annual revenue from selling consumers' personal information. Personal information is defined broadly by the CCPA as any information that identifies, relates to, describes, references, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or device. This may include names, addresses, email addresses, social security numbers, IP addresses, geolocation data, biometric data, internet activity data, professional or employment-related information, and inferences drawn from other personal information.

Lawyers who use generative AI and are subject to the CCPA should ensure that they comply with the requirements and obligations of the law, such as providing clear and conspicuous notice to their clients and other consumers about how they collect, use, and share their personal information, and how they can exercise their rights under the CCPA. They should also respect the consumer's choice to opt out of the sale of their personal information, and not discriminate against them for doing so. They should also implement and maintain reasonable security procedures and practices to protect their personal information from unauthorized or unlawful access, use, or disclosure by the generative AI program being used. They should also train their staff and non-lawyer assistants on how to handle consumer requests and comply with the CCPA.

Federal Trade Commission Act

The Federal Trade Commission Act (FTC Act) is a federal law that prohibits unfair or deceptive acts or practices in commerce and empowers the FTC to enforce the law and protect consumers. The FTC Act applies to lawyers who use generative AI as well, and they should be aware of the potential risks and liabilities of using this technology.

For example, lawyers who use generative AI to generate legal documents, advice, or communications for their clients or potential clients may be liable under the FTC Act if the generative AI program produces inaccurate, misleading, or incomplete information, or if the lawyers fail to disclose the use of generative AI to their clients or obtain their informed consent. Lawyers who use generative AI to market their services or solicit new clients may also violate the FTC Act if they make false or unsubstantiated claims about their qualifications, experience, or results, or if they imply that generative AI is endorsed by the FTC or any other authority. Furthermore, lawyers who use generative AI to collect, store, or transmit personal information of their clients or other consumers should ensure that they comply with the FTC's guidelines on privacy and data security, and that they do not engage in unfair or deceptive practices that harm consumers' privacy rights or interests.

Intellectual Property

Another privacy issue that lawyers who use generative AI should be aware of is in the realm of intellectual property. Intellectual property refers to the legal rights that protect the creations of the human mind, such as patents, trademarks, copyrights, and trade secrets. In certain instances, intellectual property protection depends on either the timing of disclosure or the maintenance of secrecy, both of which can be seriously impacted by the use of generative AI.

For inventors seeking the protection of a patent for their innovation, generative AI may seem like a useful tool to quickly draft or proofread a patent application. However, as established above, generative AI programs may not necessarily keep user prompts private. Accordingly, the entry of patent details into a generative AI program could qualify as a public disclosure. As patent applications must be filed within one year of a public disclosure, an inventor's use of generative AI could unknowingly start the clock on this crucial deadline and risk the inventor missing her window to protect the invention.

Additionally, just as its name implies, trade secret protection relies on that information, formula, method, process, etc. remaining a secret. The entry of trade secret information into a prompt in ChatGPT or another generative AI program could very well qualify as a public disclosure that nullifies that trade secret protection. As many may have read about last year, Samsung workers allegedly entered confidential information, including proprietary source code, into ChatGPT to check for errors.⁸ As discussed above, users cannot retrieve data once it is entered into ChatGPT, and information put into prompts is not kept confidential. Therefore, Samsung's confidential information was effectively made public to the world at large.

Lawyers who use generative AI should be careful to understand and comply with the intellectual property laws and regulations that apply to their practice and their clients. They should also inform their clients of the potential intellectual property implications and risks of using generative AI and obtain their informed consent before proceeding.

Prejudice and Bias

Rule 8.4 has been referred to as the 'kitchen sink' rule. It is the rule that encompasses almost every misconduct that a lawyer can engage in and is generally included in most disciplinary complaints. The rule provides that lawyers may be brought up on ethical violations for general professional misconduct, such as violating or assisting others to violate the Rules of Professional Conduct, anything that is prejudicial to the administration of justice, and lawyer bias/discrimination.

Encouraging nonlawyers to use ChatGPT or other generative AI programs in a way that would be a violation if done by a lawyer is a violation of the Rules of Professional Conduct, and the lawyer may be in violation of Rule 8.4(a). Lawyers must remember that they cannot encourage or engage others to perform acts that they as lawyers are prohibited from performing due to the Rules of Professional Conduct.

⁸ See <https://mashable.com/article/samsung-chatgpt-leak-details>.

As discussed in the Accuracy section above, lawyers must not blindly rely on ChatGPT or other generative AI programs, particularly regarding documents that will be filed with the court or used in a legal proceeding due to concerns of accuracy and completeness of the information generated. The use of inaccurate or incomplete data can hinder the legal process and harm the client in violation of Rule 8.4(d). Lawyers need to fully understand the generative AI platform in question prior to deciding whether to utilize it in legal practice.

ChatGPT, for instance, provides on its main query screen that it may occasionally produce harmful instructions or biased content. In many states, lawyers are prohibited under Rule 8.4(g) from engaging in conduct that is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sex, orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. Generative AI technology like ChatGPT can fuel biases and stereotypes contained in the database utilized to generate responses (e.g. only males can be police officers, etc.). Even with the best safeguards, it is impossible to be 100% certain all bias is removed before utilizing content from generative AI programs. If lawyers do not recognize the biased content and merely cut-and-paste, they are at risk of violating Rule 8.4(g).

Bias in Employment Decisions

One of the possible applications of generative AI is to automate the process of screening and hiring candidates for a job. However, this also raises ethical concerns about the potential bias and discrimination that may result from relying on an artificial intelligence system to make such decisions. For instance, imagine using an algorithm to rank teachers based on their performance and dismiss those who score low. Is the algorithm being arbitrary, unreliable, and unfair? Does it violate due process rights and discriminate against teachers of different races and nationalities? This example (and real cases emerging) illustrate some of the risks and challenges of using generative AI technologies to make employment decisions.

Generative AI such as ChatGPT, like any other machine learning system, is dependent on the data that it is trained on. If the data is biased, incomplete, or inaccurate, the system will inherit and amplify those biases in its outputs. For example, if ChatGPT is trained on legal texts that reflect historical or systemic discrimination against certain groups of people, it may generate responses that are biased against those groups as well. Furthermore, ChatGPT may not be able to account for the context, nuance, and complexity of human situations, and may produce results that are irrelevant, misleading, or harmful. For instance, if ChatGPT is asked to evaluate a candidate's resume, it may not be able to consider the candidate's unique skills, experiences, and circumstances, and may rely on superficial or stereotypical criteria instead.

Therefore, lawyers who use generative AI to assist them with employment decisions need to be aware of the ethical implications and potential pitfalls of doing so. They need to ensure that they comply with the relevant laws and regulations that govern employment discrimination, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the New York State Human Rights Law. They also need to adhere to the Rules of Professional Conduct, especially Rule 1.1 on competence, Rule 1.6 on confidentiality, Rule 2.1 on independent judgment, and Rule 5.3 on supervision of non-lawyers. Lawyers should not delegate their professional responsibility to any generative AI

program and should exercise due diligence and oversight over its use. They should also inform their clients and obtain their consent before using generative AI for employment decisions. Finally, lawyers should monitor and review the outputs of any generative AI program and verify their accuracy, relevance, and fairness before relying on them or passing them on to others.

Despite its flaws, generative AI is an amazing technology that has the potential to revolutionize how legal services are provided. It has the potential to be a tremendous time-saver and a great place to start legal research. However, for the present time, lawyers should utilize it with caution due to the numerous potential ethical violations that could occur.

Other Ethical Considerations

While accuracy, confidentiality, and bias rightfully dominate many conversations about ethics and generative AI, there are numerous other issues that attorneys should be aware of when considering the use of generative AI in their practice.

Among these is the duty of transparency. Rule 1.4, which concerns communications in the lawyer-client relationship, requires attorneys to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” This almost certainly includes disclosing the use of AI in completing work for a client. Companies are increasingly aware of the risks associated with using generative AI, and it is a major topic of conversation in selecting outside counsel. At the same time, many companies are embracing the idea of using generative AI in a legal practice to improve efficiencies and reduce costs. In any event, the question of whether or not an attorney will use generative AI to further a client’s objectives must be discussed with the client.

The duty of transparency does not end with open communication around the decision to use generative AI. Attorneys must also exercise transparent billing practices under Rule 1.5, which includes prompt disclosure of any AI expenses for which the client will be responsible. Additionally, the use of generative AI opens the door for new ways in which attorneys can inadvertently engage in the unethical practice of double billing or charging more than one client for work completed at the same time. While generative AI can create efficiencies in a legal practice that free up time for attorneys to focus on more meaningful work, attorneys must ensure they do not charge for more hours than they worked. For instance, an attorney who has prompted a generative AI program to prepare the first draft of a brief and then uses that time to telephone another client on a different matter cannot bill for both the drafting and the client call.

As generative AI options become more common in the legal practice, the question of who pays for such use will also need to be addressed. Just as different states and law firms have taken different approaches to the expenses associated with the use of legal research providers, such as LexisNexis and Westlaw, so too will State bar associations and law firms must grapple with the question of whether generative AI is an overhead expense or a chargeable cost. The comments to Rule 1.5 state that “a lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or... telephone charges.” It is possible that some will interpret this rule to include charges associated with the use of generative AI, but attorneys should be aware that clients may view this differently.

Meaningful Supervision

Other considerations for attorneys include the requirement for meaningful supervision under Rules 5.1 and 5.3. In the context of generative AI, this means that attorneys must be aware of the use of generative AI by associates and staff. If an attorney relies on research prepared by others, and, unbeknownst to that attorney, some of that research included hallucinations fabricated by generative AI, lack of knowledge is no defense. As discussed in the Accuracy section above, the now infamous case of *Mata v. Avianca, Inc.*, the first instance of sanctions involving fake cases cited by generative AI, included a discussion of this very situation. Judge P. Kevin Castel wrote in that matter that “in researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis,” and “there is nothing inherently improper about using a reliable artificial intelligence tool for assistance.”⁹ However, he explained in no uncertain terms that attorneys serve a gatekeeping role and need to ensure the accuracy of their filings, even if the citations were pulled by others.

A recent case from Massachusetts appears to have involved that exact scenario. Four fake cases were found to have been cited in an opposition to a motion to dismiss filed in *Smith v. Farwell, et al.*¹⁰ Reportedly, the sanctioned attorney admitted that the arguments had been drafted by a trusted associate and two recent law graduates, and while he reviewed the drafts for style and grammar, he did not check the accuracy of the citations. While the attorney reportedly expressed contrition and quickly corrected the record, he had nevertheless failed to make the “reasonable efforts” required under Rule 5.1 to ensure that those under his supervision were conforming to the Rules of Professional Conduct, and he received a monetary sanction of \$2000 accordingly.

When it comes to partners and other supervisors, attorneys must not forget the language of Rule 11, which states that “by presenting to the court a pleading, written motion, or other paper...an attorney... certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances... the claims, defenses, and other legal contentions are warranted by existing law.” In the context of the growing number of sanctions orders involving fake cases generated by AI hallucinations, this means that attorneys must exercise meaningful supervision over the research that is done by junior attorneys and staff and must review the case citations in every brief that he or she signs.

Copyright Issues

Finally, while confidentiality concerns require caution in what an attorney puts into generative AI, attorneys must also exercise caution with respect to what comes out of it. Questions around copyright ownership and infringement in the realm of generative AI are very much unsettled, and attorneys must be prepared to advise their clients on the risks.

To start, attorneys must understand what is protectable. Take, for instance, the example of a law firm that wants to protect its website or other marketing materials, but the content was written

⁹ *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC), (S.D.N.Y. Jun. 22, 2023).

¹⁰ *Smith v. Farwell, et al.*, (Lawyers Weekly No. 12-007-24) (16 pages) (Davis, J.) (Suffolk Superior Court) (Civil Action No. 2282CV01197) (Feb. 12, 2024).

by generative AI. As the law presently stands, no protection can exist in that written work. As the U.S. Copyright Office recently explained, “when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the ‘traditional elements of authorship’ are determined and executed by the technology — not the human user.”¹¹ As a result, that material is not protected by copyright. While the Copyright Office left the door open for copyright protection in the human selection and arrangement of AI-created materials, attorneys must understand (and educate their clients) that they cannot expect to own anything that is generated by AI.

That lack of being able to claim ownership does not equate to a lack of infringement, however. Copyright infringement occurs when original expression from a valid copyright is copied without permission. In the case of generative AI, the technology is trained by scraping up large amounts of data, in some cases from the Internet at large. Therefore, lawyers who use generative AI to generate legal documents or advice may face questions about whether such content infringes the intellectual property rights of third parties if the generative AI incorporates or copies existing works without authorization or attribution.

Courts are already addressing a mounting number of cases involving claims of copyright infringement by generative AI programs that trained on copyrighted works without the copyright holder’s permission. In one case against the AI art generating programs Stability AI, Midjourney, and Deviant Art, a group of artists alleged that the programs “copied and scraped” billions of images, including those the plaintiffs originally created, to train an AI tool without consent or compensation.¹² Although the judge presiding over the case dismissed most of the plaintiffs’ claims without prejudice, the artist with registered copyrights who could point to evidence that they had been used in the AI platform’s training had a sufficient basis for her claim to proceed¹³

Thus, while it remains to be seen how successful copyright holders will be in proving specific instances of infringement, it is clear that there is merit to the theory that the training of generative AI programs on works without permission can amount to copyright infringement. Therefore, users of generative AI may run the risk of violating someone else’s intellectual property by using content created by generative AI. Accordingly, attorneys should advise their clients to proceed with caution when using any content produced by generative AI and to always reword and edit such content to match the user’s own voice.

Conclusion

While there are significant ethical concerns surrounding the use of generative AI, it is also the case that attorneys cannot bury their heads in the sand. As noted above, Rule 1.1 includes Comment 8, which requires attorneys to maintain “technological competency,” meaning they must “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Generative AI is growing and expanding rapidly, and legal providers

¹¹ 88 FR 16190 - Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence; *see* <https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>.

¹² *Sarah Andersen, et al., v. Stability AI LTD., et al.*, 3:23-cv-00201 (N.D. Cal.).

¹³ Order on Motions to Dismiss and Strike, *Andersen v. Stability AI Ltd.*, 23-cv-00201-WHO, (N.D. Cal. Oct. 30, 2023).

that are already integral to the legal industry are eagerly developing AI offerings. In fact, LexisNexis and Westlaw both now offer generative AI solutions, which are only likely to expand as time goes on. In sum, this article lays out many of the current risks and benefits of using generative AI from an ethical standpoint, but the world of generative AI is a rapidly changing landscape, and attorneys must stay on top of these developments and always remember to apply the applicable rules of professional conduct when it comes to new technologies.

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