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FROM CODING TO CODE OF CONDUCT: UNDERSTANDING THE ETHICAL DIMENSIONS OF LAWYERS' USE OF GENERATIVE AI

by Hon. John G. Browning

In his December 2023 Year End Report on the Federal Judiciary, U.S. Supreme Court Chief Justice John G. Roberts sounded a warning about “the latest technological frontier: artificial intelligence (AI).”¹ Even as this technology has “great potential to dramatically increase access to key information for lawyers and non-lawyers alike,” he noted, it also “risks invading privacy interests and dehumanizing the law.”² The use of AI, Roberts observed, “requires caution and humility,” and he predicted that “judicial work—particularly at the trial level—will be significantly affected by AI.”³

The work of lawyers is also being impacted by artificial intelligence. In March 2023, LexisNexis published a survey of lawyers, law students, and legal consumers, in which 64% of lawyers responded that they had not used generative AI for work or any other purpose.⁴ Only 10% of those surveyed felt that AI would have a “transformative” impact, while 29% felt it would have a “significant” impact, and 50% believed the technology would only have “some impact.”⁵ As far as what legal tasks the respondents felt AI could be used for, 59% saw it as a tool for research, 53% believed it might assist in drafting documents, and 40% regarded it as a potential help in document analysis.⁶

What a difference a year and a half can make! In the time since that survey’s results, there have been highly publicized incidents of lawyers misusing generative AI all over the country,⁷ and judges have demonstrated both a desire to regulate its use by lawyers,⁸ and a desire to experiment with the use of AI themselves.⁹ Lawyers’ attitudes toward generative AI have been changing as well. A Thomson Reuters Institute study, *Chat GPT and Generative AI Within Law Firms*, found that 82% of attorneys surveyed believed that generative AI *can* be applied to legal work, and only slightly more than half (51%) believed that it *should*.¹⁰ A Wolters Kluwer study of lawyers found that more than 80% of attorneys responding felt that generative AI “will create

¹ CHIEF JUSTICE JOHN G. ROBERTS, JR., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY, SUP. CT. U.S. (Dec. 31, 2023), <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>.

² *Id.*

³ *Id.*

⁴ Matt Reynolds, *Majority of Lawyers Have No Immediate Plans to Use Generative AI, LexisNexis Survey Finds*, ABA J. (Mar. 24, 2023), <https://www.abajournal.com/web/article/survey-finds-majority-of-lawyers-have-no-immediate-plans-to-use-generative-ai>.

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

⁸ See, e.g., *Judge Brantley Starr – Judge Specific Requirements: Mandatory Certification Regarding Generative Artificial Intelligence*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>.

⁹ *Snell v. United Specialty Ins. Co.*, No. 22-12581 (11th Cir. May 28, 2024) (Newsom, Jr. concurring).

¹⁰ CHAT GPT AND GENERATIVE AI WITHIN LAW FIRMS, THOMSON REUTERS INST. (2023), <https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2023/04/2023-Chat-GPT-Generative-AI-in-Law-Firms.pdf>.

transformative efficiencies” for legal tasks.¹¹ Litigation was listed among the practice areas that were described as “most likely to be affected by generative AI.”¹²

What is it about the use of generative AI by lawyers that make so many of us wary and ethically troubled? Without a doubt, the string of highly publicized cases that began with *Mata v. Avianca, Inc.* in the late spring of 2023 that led to a small landslide of judicial reactions (in the form of standing orders and amended local rules) had a great deal to do with it. Lawyers fear public embarrassment for ineptitude almost as much as they fear disciplinary action or sanctions.

Mata v. Avianca, Inc. was an airline personal injury case in which the plaintiff’s two New York lawyers filed an opposition to a motion to dismiss—but their opposition cited fictitious cases.¹³ After it became obvious that the cases had been fabricated by ChatGPT, the court held a sanction hearing in which the two plaintiff’s lawyers fell on their swords, admitting that using ChatGPT was their sole “research.”¹⁴ The court held that the attorneys had “abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.”¹⁵ Judge Kevin Castel sanctioned each lawyer \$5,000, ordered them to complete continuing legal education on technology competence and AI, ordered them to send a copy of the judge’s order to their client, and also ordered them to write letters of apology to each of the judges falsely identified by ChatGPT as having authored the fabricated cases.¹⁶

Unfortunately, *Mata v. Avianca, Inc.* was hardly the last of such embarrassing incidents.¹⁷ The wave of such “hallucination” cases teaches us that lawyers do not yet fully grasp the ethical ramifications of their use of generative AI. There are multiple areas of professional conduct that are impacted by a litigator’s use of AI: an attorney’s duty of competence in representation; the duty of confidentiality to clients; the duty to communicate; the duty of candor to the tribunal; the duty to supervise, and the duty to charge a reasonable fee. A number of jurisdictions have already provided ethics guidance to lawyers addressing these areas. This includes California,¹⁸ Florida,¹⁹

¹¹ *Generative AI in the Law: Where Could All This Be Headed?*, WOLTERS KLUWER (2023), <https://www.wolterskluwer.com/en/expert-insights/generative-ai-in-the-law-where-could-this-all-be-headed> [full report on file with author].

¹² *Id.*

¹³ *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, e.g., *Ex Parte Lee*, 673 S.W.3d 755 (Tex. App.—Waco 2023); *People v. Crabill*, 23 PDJ067 (Colo. Sup. Ct. Nov. 22, 2023), 2023 WL8111898; Order to Show Cause, *U.S. v. Cohen*, No. 1:18-cv-00602-JMF (S.D.N.Y. Dec. 12, 2023); *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024).

¹⁸ PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW, ST. B. CAL. STANDING COMM. ON PROF’L RESP. & CONDUCT (2024), <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>.

¹⁹ PROFESSIONAL ETHICS COMMITTEE OP. 24-1, FLA. ST. B. ASS’N (Jan. 19, 2024), <https://www.floridabar.org/etopinions/opinion-24-1/>.

Kentucky,²⁰ Washington, D.C.,²¹ Michigan,²² Missouri,²³ New Jersey,²⁴ and Pennsylvania.²⁵ Another jurisdiction, North Carolina, has issued a Proposed Formal Ethics Opinion on the “Use of Artificial Intelligence in a Law Practice,” and is soliciting comments on it until October 15, 2024.²⁶ Texas’ new ethics opinion on attorney use of generative AI is expected sometime in October; too. The ABA has recently weighed in as well.²⁷ A closer look at each of these ethical obligations and how they relate to a trial lawyer’s use of generative AI is warranted.

A. COMPETENCE

Under Rule 1.1 of the Model Rules of Professional Conduct, lawyers have an obligation to provide competent representation to their clients.²⁸ Comment 8 to this Rule makes it clear that this includes not only exercising the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” but also understanding “the benefits and risks associated” with technologies relevant to providing these services.²⁹ To date, forty of the fifty states have adopted some version of Comment 8 requiring technology knowledge and competence.³⁰ As ABA Formal Opinion 512 states, for lawyers using generative AI, this does not require them to become experts, but they must have “a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use.”³¹ Furthermore, this is not, as the opinion points out, “a static undertaking.”³² In light of the rapid pace of innovation, lawyers’ duties in this regard are ongoing. This includes being aware of the limitations of generative AI tools, including generating “false or inaccurate results” or “providing

²⁰ ETHICS OPINION KBA E-457, KENTUCKY B. ASS’N (Mar. 15, 2024),

[https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_\(Part_2\)/kba_e-437.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)/kba_e-437.pdf).

²¹ *Ethics Opinion 388: Attorneys’ Use of Generative Artificial Intelligence in Client Matters*, D.C.B. (Apr. 2024), <https://www.dcbbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-388>.

²² *Artificial Intelligence for Attorneys – Frequently Asked Questions*, MICH. ST. B. (May 2024), <https://www.michbar.org/opinions/ethics/AIFAQs>.

²³ *Informal Opinion No. 2024-11*, MO. OFFICE LEGAL ETHICS COUNSEL (Apr. 25, 2024), <https://mo-legal-ethics.org/informal-opinion/2024-11/>.

²⁴ *Notice – Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers*, N.J. SUP. CT. (Jan. 24, 2024), <https://www.njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey>.

²⁵ JOINT FORMAL OPINION 2024-200: ETHICAL ISSUES REGARDING THE USE OF ARTIFICIAL INTELLIGENCE, PENN. B. ASS’N COMM. LEGAL ETHICS & PROF’L RESPONSIBILITY AND PHIL. B. ASS’N PROF’L GUIDANCE COMM. (May 22, 2024), <https://www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf>.

²⁶ *Proposed 2024 Formal Ethic Opinion 1 – Use of Artificial Intelligence in a Law Practice*, N.C. B. (July 19, 2024), <https://www.ncbar.gov/for-lawyers/ethics/proposed-opinions/>.

²⁷ FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, ABA STANDING COMM. ETHICS & PROF’L RESPONSIBILITY (July 29, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf.

²⁸ MODEL RULES PROF’L CONDUCT R. 1.1 (2023).

²⁹ *Id.* Cmt. 8.

³⁰ Robert Ambrogi, *Tech Competence: 40 States Have Adopted the Duty of Technology Competence*, LAWSITES, <https://www.lawnext.com/tech-competence>.

³¹ FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27.

³² *Id.*

ostensibly plausible responses that have no basis in fact or reality.”³³ Because of this, a lawyer cannot rely on or submit the output of a generative AI tool without independently verifying or reviewing this output. Even if lawyers do not necessarily expect to use generative AI in a given matter, they should still be aware of the tools relevant to their work so that “they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.”³⁴

Mata v. Avianca, Inc. was a classic case of the lawyers’ breach of this duty of technology competence. The lawyers did not familiarize themselves with ChatGPT, and mistakenly assumed it was akin to a free legal research service.³⁵ They further operated “under the false assumption and disbelief that this website could produce completely fabricated cases.”³⁶

B. CONFIDENTIALITY

Formal Opinion 512 highlights a lawyer’s duty of confidentiality of client information under Model Rule 1.6, along with the responsibility to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”³⁷ However, as the opinion notes, the self-learning generative AI tools into which attorneys input client information “may disclose information relating to the representation to persons outside the firm who are using the same GAI tool,” or to people within the firm who are either “prohibited from access to said information because of an ethical wall,” or who “could inadvertently use the information from one client to help another client.”³⁸ Because of this, the opinion states that “a client’s informed consent is required prior to inputting information relating to the representation” into a generative AI tool.³⁹ Moreover, as the opinion elaborates, this requires actual informed consent, and not “merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use” generative AI.⁴⁰

C. COMMUNICATION

Model Rule 1.4 addresses a lawyer’s duty to communicate with the client, and in particular, Model Rule 1.4(a)(2) requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”⁴¹ For trial lawyers using generative AI, such communication would be required if the client expressly requires disclosure, in situations where “the lawyer proposes to input information relating to the representation into the GAI tool,” when the use of a generative AI tool “will influence a significant decision in the representation,” or “when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer’s fee.”⁴² Accordingly, trial lawyers would be well-advised to address and explain their use

³³ *Id.*

³⁴ *Id.*

³⁵ *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

³⁶ *Id.*

³⁷ MODEL RULES PROF’L CONDUCT R. 1.6.

³⁸ FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 6–7.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ MODEL RULES PROF’L CONDUCT R. 1.4, 1.4(a)(2).

⁴² FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 8–9.

of generative AI early (such as in the client engagement agreement) and throughout the attorney-client relationship.

D. CANDOR TO THE TRIBUNAL

Model Rule 3.3 states that lawyers may not knowingly make any false statements of law or fact to a tribunal, or fail to correct a material false statement of law or fact previously made to a tribunal.⁴³ Given the potential for generative AI tools to produce inaccurate information, this opinion reinforces the importance of lawyers’ ensuring the accuracy of their generative AI outputs, especially before they are incorporated into a filed motion or brief—or correcting mistaken information or citations after the motions or briefs have been filed. Despite this, lack of candor to the tribunal has been arguably the most frequent ethical lapse by trial attorneys using (or more accurately, misusing) generative AI. For example, in *Mata v. Avianca, Inc.*, the court dismissed the offending attorney’s protestations of innocence and found that the lawyer “knew before making a submission to the Court that the full text [of the opinions] could not be found but kept silent.”⁴⁴ As the court elaborated, “An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system.”⁴⁵

E. DUTY TO SUPERVISE

Under Model Rules 5.1 and 5.3, lawyers in managerial and supervisory roles have ethical obligations to the firm, other lawyers, and non-lawyers associated with the lawyer.⁴⁶ As Formal Opinion 512 demonstrates, those obligations include these individuals’ use of generative AI. According to the opinion, lawyers in managerial and supervisory roles should “establish clear policies” on the firm’s use of generative AI, and should also ensure that subordinate lawyers and non-lawyers are trained on such subjects as “the ethical and practical use of the GAI tools relevant to their work,” as well as the “risks associated with relevant GAI use.”⁴⁷

The Colorado “hallucination” case of *People v. Crabill* is one of multiple examples that illustrate what can happen when one or more lawyers breach the duty of supervision.⁴⁸ In *Crabill*, a newly-licensed attorney was assigned by his firm “to prepare a motion to set aside judgment in the client’s civil case,” even though he “had never drafted such a motion before.”⁴⁹ Crabill used ChatGPT, which cited fictitious caselaw, and Crabill never attempted to verify that the citations were accurate before filing the motion with the court.⁵⁰ Although he was confronted by the court about the fake cases, Crabill’s initial reaction was to falsely blame a legal intern. Crabill’s license was suspended for one year and one day.⁵¹

F. Fees

⁴³ MODEL RULES PROF’L CONDUCT R. 3.3.

⁴⁴ *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023) (emphasis added).

⁴⁵ *Id.*

⁴⁶ MODEL RULES PROF’L CONDUCT R. 5.1; MODEL RULES PROF’L CONDUCT R. 5.3.

⁴⁷ FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 10–11.

⁴⁸ *People v. Crabill*, 23 PDJ067 (Colo. Sup Ct. Nov. 22, 2023).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

Model Rule 1.5(a) requires a lawyer's fees and expenses to be "reasonable."⁵² Formal Opinion 512 states that this Rule applies to the use of generative AI and requires explaining charges related to the use of generative AI preferably either before the start of the representation or shortly thereafter.⁵³ In determining the reasonableness of fees, the opinion recommends that lawyers should account for its potential to be "a faster and more efficient way to render legal services."⁵⁴ The opinion also instructs lawyers to "analyze the characteristics of generative AI tools and how they will be used before deciding if each tool is part of the firm's overhead, or an out-of-pocket to be billed to the client."⁵⁵ Importantly, because of the attorney's duty of competence, attorneys may not charge clients for the time incurred in educating themselves about generative AI tools that they will "regularly use for clients" in the course of practice.⁵⁶

Will lawyers' use of generative AI ever reach the point of becoming an expectation, part of the attorney's reasonable standard of care? The profession is not there yet. However, as Formal Opinion 512 speculates, the:

establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.⁵⁷

The 21st century trial lawyer must ensure not only that AI-generated content is accurate, but also that the lawyer's own use conforms to the ethical standards of our profession. Chief Justice Roberts was correct to be concerned about the risk of AI "dehumanizing the law." With its immense potential to enhance efficiency and accuracy, generative AI is indeed transformative, but its output is no substitute for a lawyer's professional judgment and adherence to ethical duties.

⁵² MODEL RULES PROF'L CONDUCT R. 1.5(a).

⁵³ FORMAL OPINION 512: GENERATIVE ARTIFICIAL INTELLIGENCE TOOLS, *supra* note 27, at 12–14.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 5.