

# Legal Ethics of Using Artificial Intelligence/ Generative AI

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# What Does It Mean To Use AI in Legal Practice?

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The legal industry has been using AI for many years, but generative AI is a new entry to our technological portfolios.

Attorneys are increasingly using AI and generative AI tools to boost efficiencies and reduce costs when performing certain legal tasks, including:

- Legal research.
- The drafting of legal memoranda and other routine legal documents.
- The review and analysis of court orders, opinions, and jury verdicts to form litigation strategy.
- Contract review and analysis.
- E-discovery.
- Brief writing.
- Correspondence.
- Legal Operations.

# Today's Goals:

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- Ethical Implications of AI
  - Ethics Rules
  - Ethics Opinions
  - Case Law
  - Risk Management
- Best Practices

# Jurisdictions are issuing AI guidance

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- Texas: Standing order in N.D. Tex. And amendment to E.D. Tex. Local Rules
- Florida: 24-1 (January 19, 2024)
- California: Committee on Professional Responsibility and Conduct (COPRAC), Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law
- New York: NYCBA Formal Op. 2024-05 (2024)

# Rule 1.1: The Duty of Competence

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

- The ABA amended this rule in 2012 to emphasize that the duty of competence requires that an attorney have a reasonable understanding of the benefits and risks associated with relevant technology.
- To fulfill this obligation, attorneys must keep abreast of changes in the law and legal practice, including how technology like AI affects their provision of legal services to their clients (see Comment 8 to Model Rule 1.1).

# How to Become Competent?

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- To satisfy their duty of competence, attorneys may acquire sufficient learning and skill about using AI in their practices by attending continuing legal education (CLE) programs or other courses about the proper use of AI technology.
- Although only Florida, North Carolina, and New York require that attorneys licensed in those states take some technology-related CLE courses, more states are likely to require technology-specific training in the future with attorneys' increased reliance on AI and other technology tools.

# How to Become Competent?

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- In addition to taking relevant CLE classes, attorneys may satisfy their duty of competence by consulting with other professionals who are knowledgeable about using AI tools.
- However, if an attorney associates with or consults a non-attorney technical consultant to instruct or assist the attorney when using an AI tool, the attorney must supervise the nonlawyer consultant in compliance with ABA Model Rule 5.3, which imposes a duty to supervise nonlawyer assistance.

# Rule 1.4: Communication

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*Requires a lawyer to:*

- *“Reasonably consult with the client about the means by which the client's objectives are to be accomplished”*
- *“Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”*

Must a lawyer disclose the use of AI to a client and secure consent?

# Rule 1.6: Confidentiality

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*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).*

# Rule 1.6: Confidentiality

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To comply with the attorney's duty to maintain confidentiality, when deciding whether to use AI technology or any other kind of technology that stores or processes client data, an attorney should consider:

- The attorney's ability to assess the level of security the technology affords.
- Whether reasonable precautions may be taken when using the technology to increase the level of security.
- Limitations on who may monitor the technology's use.

# Rule 1.6: Confidentiality, cont.

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- The legal ramifications to third parties of intercepting, accessing, or exceeding authorized use of another's electronic information.
- The degree of sensitivity of the information collected, processed, or stored by the technology.
- The possible effects on the client of an inadvertent disclosure of confidential information, including waiver of privileges.
- The urgency of the situation. In an emergency, the situation may require the attorney to use certain technology even if that use involves a degree of risk.
- Client instructions to either use or not use the technology.

# Rule 1.6: Confidentiality

## Cybersecurity Considerations

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As part of their duty to maintain the confidentiality of client information, attorneys should make reasonable efforts to protect that information from inadvertent disclosure and unauthorized access, including a cyberattack, by:

- Ensuring that only authorized parties have access to the systems on which the confidential information is shared.
- Taking reasonable steps to prevent and detect a data breach by monitoring:
  - The technology and office resources connected to the internet.
  - External data sources.
  - External vendors providing data-related services, such as e-discovery services.

# Rule 5.1: Supervising other Lawyers

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- Under ABA Model Rule 5.1(a), an attorney with supervisory authority over a law firm has a duty to make reasonable efforts to ensure that entire firm complies with the RPCs.
- Under ABA Model Rule 5.1(b), an attorney with supervisory authority over other lawyers has a duty to make reasonable efforts to ensure that those lawyers comply with the RPCs.

# Rule 5.3: Nonlawyer Assistance

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- Under ABA Model Rule 5.3(b), an attorney with supervisory authority over a nonlawyer has a duty to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the attorney's professional obligations.
- In the past, a nonlawyer under this rule meant a person. However, in 2012, the ABA amended this rule's title from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."

# Rule 5.3: Nonlawyer Assistance, cont.

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As a result of this title change, the definition of nonlawyer assistance under ABA Model Rule 5.3 has expanded to include outside service providers and technology services, including:

- Database and document management services.
- Printing or scanning services.
- Internet-based information storage services.

(See Comment 3 to ABA Model Rule 5.3.)

# Rule 5.3: Using AI Tools

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When an attorney uses an AI tool to complete a legal task without supervising the process or verifying the tool's output, that conduct likely violates ABA Model Rule 5.3. Accordingly, to avoid violating this Rule, an attorney should:

- Enlist the assistance of the organization's IT personnel or an outside service provider.
- Ensure that a reputable person or company developed the technology being used by checking the outside service provider's:
  - Credentials
  - Hiring practices
  - Conflict-checking system

# Rule 5.3: Using AI Tools, cont.

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- Ensure that outside service providers:
  - Have reasonable procedures in place to protect the client confidential information to which they have access.
  - Understand their confidentiality obligations.
  - Provide a written statement of their assurance of confidentiality in the service agreement with the attorney or in a separate confidentiality agreement.
- Understand how the AI tool works, including its limitations. This is especially important to avoid the problem of biased or skewed results.
- Provide clear, unbiased instructions to the AI tool.
- Carefully review any results.

## Rule 5.3: Using AI Tools, cont.

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Even if an attorney takes all necessary precautions when using an AI tool, if the tool fails to complete the assigned task, makes an error, or inadvertently discloses client data, it is the attorney that is ultimately responsible to the court and the client.

# Rule 5.5: Unauthorized Practice of Law

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*A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.*

Brand new problems?

No.