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THE REAL ETHICS OF ARTIFICIAL INTELLIGENCE— CONSIDERATIONS FOR LEGAL PROFESSIONALS

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§ 28.01   Introduction[*]

"Artificial intelligence is changing the practice of law in exciting ways, allowing lawyers to focus on high-value tasks and deliver better outcomes for clients."[1]

"The future of law belongs to those who can leverage AI to enhance their legal practice and provide more efficient, accurate, and cost-effective services."[2]

"AI will not replace lawyers, but lawyers using AI will replace those who do not."[3]

These are just a few of the many observations and predictions about artificial intelligence (AI) and how it continues to revolutionize the legal landscape, presenting both opportunities and ethical challenges for lawyers, law firms, and corporate legal departments.

While AI certainly will not eliminate the need for lawyers, it does signal the end of lawyering as we know it.[4] Many clients, especially those facing complex or unusual legal issues, will continue to need lawyers who can offer expertise, judgment, and counsel, but those lawyers increasingly will need AI tools and applications to deliver those services efficiently and effectively.[5]

As organizations and law firms increasingly deploy AI technologies to streamline operations, enhance decision-making processes, and mitigate legal risks, it also becomes imperative for legal professionals to understand and navigate the intricate ethical considerations that accompany this

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[1]Brian Kuhn, Leader of IBM's Watson Legal Practice.

[2]Richard Susskind, Attorney and Legal Technology Expert.

[3]Zach Warren, Technology and Innovation Insights Lead at Thomson Reuters.

[4]Andrew Perlman, "The Implications of ChatGPT for Legal Services and Society," *The Practice* (Harv. L. Sch. Ctr. on the Legal Prof. Mar./Apr. 2023).
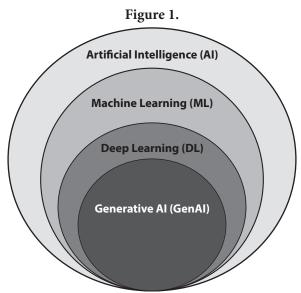
[5]*See id.*

transformative technology. Like any technology used in the legal profession, AI and its derivatives must be employed in a manner that conforms to a lawyer's professional responsibilities. However, unlike many earlier technologies used by lawyers, AI tools present unique challenges, including their use of large volumes of data, the lack of clarity as to how they work, and the risks of false outputs because of the designed purpose for some AI tools to generate responses even if they are not accurate.

This chapter discusses the intersection of AI technology and professional conduct, exploring the ethical issues faced by lawyers and firms in adopting and implementing AI systems. By examining the implications of AI integration into legal practice, this chapter aims to equip legal professionals with the knowledge and guidance necessary to uphold ethical standards, while harnessing the incredible power of AI.

§ 28.02 What Is Artificial Intelligence?

Before one can fully understand the benefits and potential risks associated with AI tools and applications, it is first necessary to understand the technology underlying AI, including the more advanced technologies of machine learning, deep learning, and generative AI. These computer science terms often are used interchangeably, but there are important distinctions between the technology underlying these different types of AI systems.

Figure 1.

[1] Artificial Intelligence

"Artificial intelligence" is the overarching term commonly used to describe all technologies that have the ability to mimic cognitive human

functions such as learning, reasoning, and problem solving.[6] Through AI, computer systems use math and logic to simulate the reasoning that people use to learn from new information and make decisions.[7] AI is capable of problem solving, reasoning, adapting, and generalized learning. It also can use speech recognition to facilitate human functions and resolve human curiosity.[8] AI often is best used for completing complex human tasks with speed and efficiency.

An early example of an AI machine was IBM's Deep Blue, a chess-playing computer that beat World Chess Champion Garry Kasparov in 1997.[9] Deep Blue could "decide" its next chess move based on algorithms[10] and an extensive library of possible moves and outcomes. But the computer was purely reactive to its opponent's chess moves. For Deep Blue to improve at playing chess, programmers had to add more variables, probabilities, and outcomes to the algorithms.

Today, AI technology is used in a wide array of products and services—many of which have been in use for decades. The predictive text feature used to complete sentences in text messages is AI, as are the algorithms in a streaming app that suggest the next movie to watch based on the user's prior selections or those of other similar users. In the legal industry, AI programs that use predictive coding[11] have been used for many years to search for relevant emails and business records during litigation discovery. Online legal research platforms that search for words or phrases in documents, such as Westlaw and LexisNexis, also use AI and have been available to the legal profession since the mid-1970s.[12]

Most everyday AI applications are computational in nature, producing results based on predefined sets of operations.[13] At its most common level, AI really is a sophisticated *imitation* of human intelligence, as the machines

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[6]Hon. Bernice Bouie Donald (Ret.) et al., "Generative AI and Courts: How Are They Getting Along?," *PLI Chron.*, at 2 (Sept. 2023).

[7]Clara Piloto, "Artificial Intelligence vs. Machine Learning: What's the Difference?," *MIT Pro. Educ. Blog* (Dec. 26, 2022).

[8]*Id.*

[9]Larry Greenemeier, "20 Years After Deep Blue: How AI Has Advanced Since Conquering Chess," *Sci. Am.* (June 2, 2017).

[10]An algorithm is a set of "if-then" logic rules that govern how a machine or computer behaves.

[11]Predictive coding refers to computer algorithms that are trained by human reviewers to help identify relevant documents within a dataset.

[12]Bill Voedisch, "WESTLAW . . . an Early History," *Legal Publ'g* 1 (2015).

[13]Donald et al., *supra* note 6, at 3.

are not actually "thinking," but instead are matching patterns in sets of data.[14]

[2] Machine Learning

Machine learning (ML) is a more advanced subset of AI that autonomously enables a machine or computer to learn and improve from experience. Instead of explicit programming by humans, ML technology uses advanced algorithms to extract patterns from large sets of structured and semi-structured data, learn from the insights, and make informed predictions based on statistical probability. The performance of ML algorithms improves over time as the algorithms are trained and exposed to more data.

Fourteen years after IBM's Deep Blue computer beat the World Chess Champion, IBM's more advanced computer—known as Watson—beat two Jeopardy champions in an exhibition match using ML technology.[15] The IBM programmers fed Watson thousands of "question-answer" pairs, as well as examples of correct responses. When given just an answer, Watson was programmed to come up with the most probable matching question. If it got the question wrong, programmers would correct it. This allowed Watson to modify its algorithms, or in a sense "learn" from its mistakes.[16] By the time Watson faced off against the Jeopardy champions, it could parse through 200 million pages of information and generate a list of possible answers in a manner of seconds, ranked by how likely they were to be correct—even if it had never seen the particular Jeopardy clue before.[17]

ML systems are not "thinking" systems, but instead are better described as language "prediction" systems. For example, many ML tools are designed to predict missing words in a sequence. When humans review those predictions for accuracy, the predictions are given an accuracy score. The machine uses those scores to improve its predictions the next time.[18]

ML technology is widely used in various applications, such as language translation programs, facial and voice recognition programs, recommender systems, and weather prediction models.[19] It also can be used to automate tasks, make data-driven decisions, and uncover insights from

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[14]*Id.*

[15]Coursera Staff, "Deep Learning vs. Machine Learning: A Beginner's Guide," *Coursera* (Apr. 1, 2024).

[16]*Id.*

[17]*Id.*

[18]Thomson Reuters, "Stepping into the Future: How Generative AI Will Help Lawyers Improve Legal Service Delivery," at 4 (Aug. 2023).

[19]Donald et al., *supra* note 6, at 3.

large datasets. In the legal industry, ML technology is used in applications for tasks such as automated contract drafting, electronic discovery, due diligence, and compliance monitoring.

[3] Deep Learning

Deep learning (DL) is a subset and evolution of ML. While ML algorithms generally need human intervention to correct erroneous results, DL algorithms can improve their outcomes through repetition, without human involvement. DL is a technology that layers ML algorithms and computing units—or neurons—into an artificial neural network.[20] These deep neural networks can mimic the learning process of the human brain. Using these multiple layers of artificial neural networks, DL systems can extract high-level features from raw input data, simulating the way human brains perceive and understand the world.

Today, there are DL systems that also play human games, though these DL systems are more sophisticated than Deep Blue or the earlier versions of Watson. AlphaGo is a DL system that was first trained to play Go—a board game that originated in China more than 3,000 years ago and is much more complicated than chess.[21] The creators of AlphaGo began by introducing the DL program to several games of Go to teach it the mechanics. Then AlphaGo began playing against different versions of itself thousands of times, learning from its mistakes after each game. AlphaGo eventually became so good at Go that the best human players in the world are known to study its inventive moves.[22] The latest version of the AlphaGo algorithm—known as MuZero—can master games like Go, chess, and Atari video games without even needing to be instructed on the rules.[23]

[4] Generative AI

Generative AI (GenAI) is a subset of ML and DL technologies that *generates new and original content*, like text, images, or code, rather than simply recognizing or analyzing existing data. GenAI models use a combination of DL neural networks and ML algorithms to create new content. These algorithms are trained on large datasets of existing content, including large language models (LLMs) that are specifically focused on language-based tasks such as summarization, text generation, classification, open-ended conversation, and information extraction. Founded on these LLMs, the GenAI models learn the patterns and characteristics of that data. Once the

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[20]Coursera Staff, *supra* note 15.

[21]*Id.*

[22]*Id.*

[23]*Id.*

algorithm has been trained, it can then be used to create new and unique content that is based on the patterns it has learned.

Beginning on November 30, 2022, GenAI quickly became a worldwide phenomenon after OpenAI released a chatbot called "ChatGPT"[24] to the public. Within five days of its public launch, ChatGPT already had reached one million users, which was a small fraction of the time it took for any other popular online offering to reach a million users, including Instagram (2.5 months), Spotify (5 months), and Facebook (10 months).[25] Two months after its public release, ChatGPT had reached 100 million users![26]

ChatGPT's popularity is partially derived from the fact that it is freely available for anyone to use[27] and it creates surprisingly human responses to questions (and other prompts) based on publicly available information from the internet and other sources. ChatGPT is not limited to publicly available data and can consume and synthesize information supplied from other sources, including data provided by other users. Following the release of ChatGPT, other companies introduced their own GenAI tools for public use, including Microsoft's Bing Chat (now known as Copilot) and Google's Bard (now known as Gemini).

The accuracy of the results from ChatGPT and other GenAI tools has improved at an astounding pace. For example, an earlier version of ChatGPT took the Uniform Bar Examination, earning passing scores in evidence and torts, but failing other parts of the exam. A later version of ChatGPT retook the bar exam and earned a score approaching the 90th percentile of all test-takers.[28]

To illustrate how ChatGPT works, we asked the latest version—known as ChatGPT-4o—to define GenAI. It replied in a few seconds with the response:

> Generative AI refers to a type of [AI] that is capable of generating new content, such as images, text, or even music, without direct human input. These AI systems use algorithms to create original output based on patterns and data they have been trained on. It has applications in areas like creative writing, artwork generation, and even human-like conversational agents.

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[24]The "GPT" in ChatGPT stands for "Generative Pretrained Transformer."

[25]Thomson Reuters, *supra* note 18, at 3.

[26]*Id.*

[27]The free version of ChatGPT originally was built on the GPT-3.5 LLM and has since been upgraded to GPT-4 for paid subscribers, providing the tool with a new level of accuracy.

[28]Debra Cassens Weiss, "Latest Version of ChatGPT Aces Bar Exam with Score Nearing 90th Percentile," *ABA Journal* (Mar. 16, 2023).

ChatGPT's answer to our query highlights a key distinction between GenAI and the earlier technologies from which it is derived. AI can crunch massive volumes of words and numbers to find answers, while ML can learn as it goes with various feedback mechanisms.[29] GenAI goes one step further and presents its findings as newly generated images, text, music, charts, graphs, audio, video, and even legal articles.[30] As GenAI continuously improves with more data and feedback from users, its presentations become difficult, if not impossible, to distinguish from human-generated presentations.[31]

An important point to emphasize about GenAI is the distinction between its technology and the technology underlying traditional search engines such as Google, Westlaw, and LexisNexis. GenAI operates on a different model and presents different results.[32] Using a traditional search engine, a lawyer might want to find cases or documents that use the phrase "rule of capture" or "rule w/3 of capture." The search engine will return citations or links to the cases and documents that meet those criteria.

GenAI, on the other hand, can be prompted to create *new* text summarizing the legal concept of the "rule of capture" by assembling all the words relevant to that term, drawn from a large dataset of text, based on statistical probability, arranged in sentences and paragraphs that follow appropriate grammatical and stylistic rules.[33] In other words, GenAI can write a summary of the rule of capture. It does not present a list of court decisions or law review articles to read (unless specifically prompted to do so), but creates what appears to be a polished description of the topic.

As an example, we asked ChatGPT-4o to answer the question: *What is the rule of capture?* It replied:

> The "rule of capture" is a legal principle related to property rights, specifically concerning natural resources like groundwater and oil. It establishes that a person who captures a natural resource from a certain location has ownership rights over that resource, regardless of its source or origin. This rule is often applied to situations where multiple parties can extract resources from a shared underground reservoir, and the rule of capture determines who has the legal right to the resources they extract.

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[29] Donald et al., *supra* note 6, at 3.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *See id.* at 4.

§ 28.03   Uses of AI Tools in the Legal Industry

For the legal industry, GenAI and other AI-based tools may result in an even greater seismic shift than other technological advancements, such as the internet, Google's search engine, or Apple's iPhone. A significant part of a lawyer's work takes the form of written words—in emails, memos, motions, briefs, pleadings, discovery requests and responses, and transactional documents.[34] Existing technology has made the generation of these words easier in some respects, such as allowing lawyers to use templates and automated document assembly tools. In comparison, GenAI tools, such as ChatGPT, are dramatically altering how law professionals generate a much wider range of legal documents and information.[35]

Goldman Sachs issued a report in 2023 that evaluated the potential impact of AI on jobs in numerous industries.[36] Because it is a profession that focuses primarily on data and documents, the legal field is considered to be one of the industries in which AI will complement or replace a larger share of the work than many other industries.[37] Although some current manual tasks will be automated by these AI tools, the technology presents an enormous opportunity for the legal profession because so much of what lawyers do today can be further enhanced with AI, resulting in improved client outcomes.

Due to the enormous value and benefits these tools can provide to the legal profession, GenAI and other AI-based applications are rapidly being adopted and utilized by law firms and corporate legal departments. According to a 2024 LexisNexis survey, GenAI was being used for legal matters by 50% of the Fortune 1000 company legal departments and 45% of the Am Law 200 law firms.[38] In addition, 28% of the Fortune 1000 companies and 43% of the Am Law 200 law firms had dedicated budgets for GenAI investments in 2024,[39] and the vast majority of those who responded to

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[34] Perlman, *supra* note 4.

[35] *See id.*

[36] Goldman Sachs, "Navigating the AI Era: How Can Companies Unlock Long-Term Strategic Value?" (2023).

[37] *Id.* at 2 (listing "Legal" as one of the industries that has the highest percentage of employment exposed to automation by AI, trailing only "Office & Administrative Support" and "Architecture & Engineering").

[38] LexisNexis, "2024 Investing in Legal Innovation Survey: The Rise of GenAI at Top Firms & Corporations," at 6 (2024).

[39] *Id.* at 7.

the survey expected their investments in GenAI technologies to increase moderately (64%) or significantly (26%) over the next five years.[40]

[1] GenAI Assistants

GenAI Assistants are advanced AI systems that leverage LLMs and natural language processing (NLP) models to engage in human-like dialogue and perform a wide range of tasks. These AI-powered virtual assistants go beyond traditional rule-based chatbots by using generative capabilities to produce original, contextually relevant responses and content. GenAI Assistants can comprehend complex human queries and instructions given in natural language.[41] They also can maintain context throughout conversations and create various types of content, including text, images, and code based on prompts or requests.[42] By analyzing user data and past interactions, which improve their performance and expand their knowledge over time, these GenAI Assistants can provide tailored responses and recommendations.[43]

The integration of GenAI Assistants into corporate legal departments and law firms offers several advantages. These GenAI-powered tools can significantly reduce the time spent on routine tasks or in searching for specific information within the company or firm, which in turn allows legal professionals to focus on higher-value activities.[44] GenAI Assistants also can automate various processes for law firms and corporate legal departments, which can lower costs, improve resource allocation, and reduce human error.[45]

Several law firms have developed their own internal GenAI Assistants to enhance their legal services and improve efficiency. A notable example is Troutman Pepper, which was among the first large law firms to build and deploy a GenAI Assistant called Athena.[46] Among its many uses, Athena assists users in summarizing documents, analyzing legal work, drafting content, brainstorming ideas, visualizing timelines, and creating

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[40] *Id.* at 8.

[41] Marcin Pędich, "Ten Business Use Cases for Generative AI Virtual Assistants," *Medium* (June 4, 2024).

[42] *Id.*

[43] *Id.*

[44] Ankita, "Generative AI: A Guide for In-House Corporate Legal Departments," *MatterSuite* (June 26, 2024).

[45] *Id.*

[46] "One Year Later: How Troutman Pepper's Generative AI Assistant Athena Has Transformed Legal Services Delivery," *Troutman Pepper Insights* (Aug. 21, 2024).

images. Athena also can streamline processes, effectively reducing the time attorneys spend on routine tasks so they can focus more on strategic legal work.[47]

In addition to GenAI Assistants that are developed internally by law firms and legal departments for their own enterprise use, several GenAI Assistants customized for the legal industry are commercially available, including CoCounsel.[48] This GenAI-powered tool can assist with document review, legal research, deposition preparation, and document summarization at a postgraduate level according to its developer. Another commercially available GenAI Assistant is Harvey AI, which is built on a version of OpenAI's GPT-4 and is trained using general legal data (e.g., case law, rules, and statutes) and a law firm's own work products and templates to specifically support legal work.[49]

[2] Legal Research

A foundational necessity for lawyers is legal research. AI-enhanced research platforms, utilizing intelligent search and document analysis capabilities, can save time, improve results, and provide advice and litigation strategy.[50] These AI research tools can review a lawyer's or opposing counsel's brief, compare it with arguments from past cases, identify weaknesses, and suggest additional highly relevant citations.[51] They also can warn litigators about citing cases that have been implicitly overruled or abrogated but have no direct citations flagging them as invalid.[52]

Traditional legal research platforms that were introduced in the 1970s required users to enter searches for precise words and phrases and then analyze the cases that resulted from those search terms. Today, many legal research platforms have enhanced question and answering capabilities so that research has become less of a search-and-retrieve process and more of a dialog between the lawyer and the computer, with more opportunity for nuance and focus on search results.[53] Some of the popular GenAI

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[47] *Id.*

[48] CoCounsel is a GenAI Assistant developed by Casetext and OpenAI using GPT-4. Casetext was acquired by Thomson Reuters in 2023 and is now part of the Thomson Reuters suite of AI products.

[49] *See* https://www.harvey.ai/products/assistant.

[50] Thomson Reuters, *supra* note 18, at 12.

[51] *Id.*

[52] *Id.*

[53] *Id.*

products in this legal research category include Casetext,[54] Lexis+AI,[55] Westlaw Precision with AI-Assisted Research,[56] and Harvey AI.[57]

[3] Litigation Analytics

AI tools are revolutionizing litigation analytics. These research tools—informed by court dockets, case rulings, and other legal information—can display statistical information by judge, lawyer, law firm, company, and case type. They also can identify and analyze factors that impact case out-comes—such as patterns in past cases—to predict outcomes in similar situations and help guide legal strategy. Because AI-powered technology can access more relevant data at faster speeds, it is better equipped to predict the outcome of proceedings, ensuring lawyers are empowered to provide the best possible strategic and tactical advice.[58] Some of the commercially available AI products designed for legal analytics include LexisNexis Context,[59]

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[54] *See* https://casetext.com/. Casetext is an AI-powered legal research platform that can assist attorneys in finding case law, statutes, and legal articles to support their arguments in legal briefs.

[55] *See* https://www.lexisnexis.com/en-us/products/lexis-plus-ai.page. Lexis+AI claims to be the fastest legal GenAI research tool, with conversational search, drafting, summarization, and document analysis functions, and hallucination-free linked legal citations to LexisNexis's database of case opinions and other legal documents.

[56] *See* https://legal.thomsonreuters.com/en/products/westlaw-precision. Westlaw Precision with AI-Assisted Research is another legal research tool offered by Thomson Reuters. It combines GenAI technology with the legal content of Westlaw to deliver faster and more precise search results compared to traditional research methods.

[57] *See* https://www.harvey.ai/products. Harvey AI has partnered with OpenAI in offering an integrated GenAI platform for professionals in law, tax, and finance. In addition to its GenAI Assistant, another product offered by Harvey AI is a legal research tool that can provide answers to complex research questions across multiple domains in legal, regulatory, and tax. The answers are grounded in the original source material with citations to the most relevant sections.

[58] Thomson Reuters, *supra* note 18, at 13.

[59] *See* https://www.lexisnexis.com/pdf/context/Context-Overview_Experts-Judges-Courts.pdf. LexisNexis Context uses ML technology and NLP across LexisNexis's database of case law documents to help attorneys structure legal briefs, analyze legal issues, and identify legal authorities for their arguments. The product also contains court analytics to suggest specific language and court decisions a particular judge has relied on in prior cases.

Lex Machina,[60] Bloomberg Law's Litigation Analytics,[61] and Casetext's CARA A.I.[62]

[4] E-Discovery

Electronic discovery (e-discovery) is a critical phase in the litigation process where the parties involved exchange electronically stored information (ESI) in formats such as emails, digital documents, databases, and other electronic records. In the last few decades, the explosion of ESI maintained on company servers or "in the cloud" has made e-discovery harder and more expensive for litigants.

ML technology has enhanced the e-discovery process using predictive coding, including technology assisted review (TAR), to identify relevant ESI contained in massive datasets. These e-discovery programs identify patterns in existing data and learn from feedback provided by legal professionals who review the results for relevancy and accuracy. The programs can perform these document review tasks in a fraction of the time, and generally much more accurately, than manual review, making the e-discovery process more efficient and less costly. Some of the leading

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[60] *See* https://lexmachina.com/. Lex Machina is another legal analytics platform offered by LexisNexis. It also uses ML technology and NLP to analyze court documents and identify trends and patterns in litigation. Lawyers can access reports and visualizations that highlight key metrics, such as win rates, time to trial, and damages awarded, enabling them to develop more effective legal strategies.

[61] *See* https://www.bloomberglaw.com/external/document/X4C0P3L0000000/litigation-overview-using-litigation-analytics. Bloomberg Law's Litigation Analytics tool provides data-driven analytical information about federal district courts, federal district court judges, companies, law firms, and lawyers. It can analyze a judge's rulings by motion outcomes, appeal outcomes, length of cases, law firm/attorney appearances, and case types. It also can research a particular law firm or attorney to gather information about that firm's or lawyer's clients, case types, where they have litigated, and litigation history.

[62] *See* https://help.casetext.com/en/articles/1971642-what-is-cara-a-i-and-how-do-i-use-it. CARA (Case Analysis Research Assistant) A.I. is another AI tool from Casetext that helps lawyers find relevant cases and other authorities for their legal research. CARA A.I. can analyze legal documents, such as briefs, complaints, or memos, to identify facts, legal issues, and jurisdictional considerations. It then customizes search results based on the context of the research, ranking cases in order of relevance.

AI products for litigation e-discovery are RelativityOne,[63] DISCO,[64] and Reveal's Brainspace.[65]

[5]   Enhancing Depositions and Trial Testimony

Depositions and trial testimony are another important aspect of litigation. AI-powered tools can assist trial lawyers with the thorough preparation of witnesses for their depositions and trial testimony by analyzing past deposition transcripts and identifying potential areas of vulnerability or questions likely to be posed. AI products also can help craft strategic questions for lawyers who are taking depositions or cross-examining witnesses at trial. Using ML technology and NLP models, AI tools can analyze prior deposition transcripts to determine effective questioning techniques, enabling attorneys to formulate questions that are precise, relevant, and conducive to eliciting vital information.[66] Additionally, some AI tools can help predict how a witness might answer certain questions based on their past statements or behavior patterns, allowing attorneys to better prepare for the deposition.[67] Some of the commercial AI products in this category

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[63] *See* https://www.relativity.com/ediscovery-software/relativityone/. RelativityOne is an e-discovery platform that uses advanced analytics and AI-driven tools, including active ML and TAR, to prioritize document review and identify relevant information more quickly than traditional document review procedures.

[64] *See* https://www.csdisco.com/offerings/ediscovery. DISCO offers AI-powered e-discovery solutions that include advanced search capabilities, predictive coding, and data visualization tools to enhance the review and analysis process of e-discovery.

[65] *See* https://www.revealdata.com/use-case/litigation. Brainspace is an AI tool offered as part of Reveal's e-discovery suite of products. Brainspace uses ML algorithms to enhance e-discovery tasks such as data clustering, predictive coding, and relationship analysis, thereby providing deep insights into large datasets.

[66] Esquire Deposition Solutions, "Computer: Will ChatGPT Be Useful for Discovery Depositions?" (Apr. 4, 2023).

[67] *Id.*

include Harvey AI,[68] CARA A.I.,[69] LexisNexis Advance,[70] Everlaw,[71] and Kira Systems.[72]

[6] Contract Review, Drafting, and Management

One of the more efficient uses of GenAI in the legal industry is that of automated contract review, drafting, and management. Reviewing and analyzing legal documents and contracts is both time-consuming and critically important. The stakes are high, and mistakes can be costly. GenAI contract management systems enable lawyers to draft better contracts faster and simplify the review and analysis process by identifying critical risks, opportunities, obligations, and rights in agreements.[73] GenAI can process thousands of contracts to identify commonalities or gaps to assess risk and recommend updated contract clauses.[74] It also can be used to summarize complex legal language in "plain English" so that parties better understand their contracts or other legal documents.[75]

Several vendors have introduced products that leverage ML technology and NLP to automate the drafting of contracts and other legal documents. These AI tools can generate standard legal documents such as contracts, agreements, and letters based on the input and preferences of the lawyer. They also improve efficiency by reducing time, minimizing errors, and maintaining consistency in legal drafting. Some of the more popular commercial AI products designed for legal document drafting and management

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[68] Harvey AI has an AI product that can synthesize large numbers of deposition and trial transcripts into key themes by topic and witness.

[69] With its CARA A.I. technology, Casetext can analyze past deposition transcripts and other legal documents to identify relevant case law and common themes. This can help in understanding areas of vulnerability and preparing for likely questions.

[70] See https://www.lexisnexis.com/pdf/LexisNexis-Expert-Witness-Research-via-Lexis-Advance.pdf. LexisNexis Advance offers advanced analytics and AI-driven insights that can help identify key issues and vulnerabilities related to expert witnesses in a case. LexisNexis claims that this product also can help find the best experts for a case or evaluate the credibility of opposing experts by leveraging data on more than 330,000 expert witnesses.

[71] See https://support.everlaw.com/hc/en-us/articles/360038816412-Deposition-3-of-4-Summary-Transcript-and-Testimony. Everlaw incorporates ML and predictive coding to assist in document review and analysis. By reviewing past deposition transcripts, Everlaw can help identify trends and potential vulnerabilities that may need to be addressed.

[72] See https://kirasystems.com/. Kira offers an AI-powered contract analysis tool that also can be applied to the review and analysis of past deposition transcripts, helping identify key areas of concern.

[73] Thomson Reuters, *supra* note 18, at 11.

[74] Donald et al., *supra* note 6, at 4.

[75] *Id.*

include Kira Systems,[76] Luminence,[77] Microsoft 365 Copilot,[78] Lawgeex,[79] Casetext,[80] Henchman,[81] and Evisort.[82]

[7] Due Diligence and Compliance

AI-powered tools also have transformed due diligence and compliance tasks within corporate legal departments. Leveraging various technologies such as ML, NLP, and data analytics, these AI-powered tools are reshaping

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[76] *See* https://kirasystems.com/. Kira offers an AI-powered contract drafting tool and analysis platform that assists lawyers in contract review, analysis, and extraction of information. Kira uses ML algorithms and NLP to identify and extract clauses, provisions, and data points from contracts and other legal documents. Kira reports that the data comes from more than 1,400 contract clauses and data points to find critical provisions in the legal document.

[77] *See* https://www.luminance.com/. Luminance is an AI-powered platform built on a proprietary legal LLM and designed specifically for legal contract management and analysis. Its key capabilities include contract generation and drafting, contract analysis, contract negotiation, an AI-powered central repository for all of the customer's contracts, and analytics that can ensure contract compliance through automated monitoring.

[78] *See* https://learn.microsoft.com/en-us/copilot/microsoft-365/microsoft-365-copilot-overview. Although Microsoft Copilot is not specifically designed for the legal industry, it is an AI-powered add-on tool available for Microsoft 365 applications, such as Word, Excel, PowerPoint, Outlook, and Teams, to assist users by generating text, creating summaries, automating tasks, and providing suggestions based on the context of the work. Because of its LLM and DL capabilities, Copilot can provide drafting assistance by providing prompts and outlines for various legal documents like contracts, non-disclosure agreements (NDAs), or legal briefs. Copilot can then generate boilerplate language and suggest relevant clauses, saving lawyers significant time and effort.

[79] *See* https://www.lawgeex.com/. Lawgeex is a contract review automation (CRA) tool that has built-in GenAI functionality. The CRA technology uses AI to help in-house legal teams automate the contract review process during the pre-signature phase. Lawgeex claims it can diagnose, redline, and fix contractual issues during live negotiation and can be deployed for routine, high volume agreements, including NDAs, service-level agreements, statements of work, framework agreements, supply agreements, and others.

[80] In addition to its AI-powered legal research and brief drafting tools, the Casetext platform also can be used for contract drafting by in-house legal teams. It can upload proposed contracts and corporate policies, and then identify the relevant clauses, conflicts, and risks related to the proposed contract.

[81] *See* https://henchman.io/. Henchman is a GenAI-powered contract drafting program that interacts with the Document Management System (DMS) of a law firm or corporation, indexing the organization's precedent documents at the clause level, and making the data available for contract insights and drafting. Its technology works with legal-specific DMS providers and general enterprise content management systems. In June 2024, it was announced that LexisNexis had agreed to acquire Henchman.

[82] *See* https://www.evisort.com/product/draft-and-negotiate. Evisort is an AI-powered contract drafting system with configurable tools that are claimed to automate contract intake, drafting, redlining, approvals, execution, reporting, and renewals. It can populate a contract clause library using AI-extracted language from historical contracts, modify contracts with an in-app documents editor, and group documents by counterparty, date, and custom logic.

the way legal professionals approach due diligence and compliance across various legal practices, including mergers and acquisitions, real estate transactions, sanctions monitoring, and corporate governance.

Examples of these AI-powered tools include products that can quickly analyze vast amounts of data from various sources to identify relevant information for due diligence processes. These products also can flag potential risks by analyzing patterns and anomalies within datasets, which helps in identifying compliance breaches or irregularities that may require further investigation. In addition, AI tools can continuously monitor regulatory changes, update compliance protocols accordingly, and provide real-time alerts about potential compliance violations. Some prominent AI-driven products in this category include Kira Systems,[83] Thomson Reuters' CLEAR,[84] LexisNexis's Bridger Insight XG,[85] and Reciprocity ZenGRC.[86]

§ 28.04 Risks of Present AI

While AI technology offers many benefits to legal professionals, there also are several risks and considerations associated with its use. One of these risks is related to a GenAI phenomenon commonly called "hallucinations." This term, however, is a misnomer because GenAI systems are not search engines like Google or Bing. The intended purpose of GenAI tools like ChatGPT is to produce human-like verbal responses to natural-language questions.[87] They are not designed to give a factually "correct" or "true" answer to an inquiry. Because a GenAI tool generates answers based on a predictive method, it potentially will create a combination of words

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[83] In addition to its AI-powered contract review and drafting tools, Kira also uses ML to analyze and extract relevant information from contracts and documents, streamlining the due diligence process in mergers, acquisitions, and other transactions.

[84] *See* https://legal.thomsonreuters.com/en/products/clear. Thomson Reuters's CLEAR product utilizes AI technology to enhance investigative due diligence and compliance by screening and monitoring vendors, suppliers, customers, business partners, and other persons of interest across various proprietary and public record databases.

[85] *See* https://risk.lexisnexis.com/global/en/products/bridger-insight-xg-global. Lexis Nexis's Bridger Insight XG is a compliance and risk management platform designed to help organizations conduct due diligence, comply with global regulations, and reduce fraud risks. Bridger can screen against global sanctions lists, politically exposed persons (PEPs) lists, enforcement lists, and other watch lists, and provide access to WorldCompliance Data for extensive global risk intelligence.

[86] *See* https://reciprocity.com/product/zengrc-2/. Reciprocity ZenGRC is an AI-powered Governance, Risk, and Compliance (GRC) product that supports an organization's unique GRC needs. It can proactively monitor various standards and regulations for content changes, such as updates or revisions, and publish notification memos and guidance on the changes.

[87] Anne H. Gibson, "Optimism, Caution for Integration of Generative AI into Legal Profession Abound at AALL 2023," *Wolters Kluwer Strategic Perspectives* (July 1, 2023).

that look accurate but are not true at all—such as realistic looking case citations that it has created based on how real case citations look.[88]

Another significant risk associated with the use of AI is the potential violation of data privacy regulations such as the General Data Protection Regulation (GDPR) in Europe or the Health Insurance Portability and Accountability Act (HIPAA) in the United States. AI systems must comply with these regulations to ensure the protection of personal data. If personal data is transferred across national borders for processing by AI systems, compliance with international data protection laws, such as the GDPR's restrictions on data transfers outside the European Economic Area, must be ensured. Legal consequences also could result if individuals have not given valid consent for the processing of their personal data by AI systems.

Security breaches also are a significant risk associated with AI tools. Open GenAI products are not secure. Information entered in a query might be stored in the system and used by the AI providers as future training material. This information could be vulnerable to security breaches, cyber-attacks, hacking, or even regurgitated in responses provided to other users.[89] Client data and other confidential information should never be included in an open GenAI prompt and compliance with cybersecurity best practices is essential to mitigate these risks.

Bias and discrimination are other risks associated with GenAI products. If "biased" data is used to train GenAI models, these biases can be perpetuated and amplified in discriminatory outputs. For example, a company or firm may train an AI résumé filter to identify the best candidates for a position based on previous recruiting patterns. Using historical data, the GenAI tool may "learn" that white males from prestigious universities are the best candidates, while overlooking qualified non-traditional candidates. Legal challenges may arise when biased GenAI systems violate anti-discrimination laws or ethical principles. This raises concerns about biased or discriminatory outcomes in legal documents, contracts, or analyses generated by GenAI systems. Compliance with anti-discrimination laws is crucial to avoid legal risks associated with biased GenAI decision making.

§ 28.05 Ethical Considerations Regarding the Use of AI

[1] Competence

Rule 1.1 of the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) imposes a duty of competence on lawyers. This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness

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[88] *Id.*

[89] *Id.*

and preparation reasonably necessary for the representation."[90] Comment [8] to Model Rule 1.1 advises that this duty requires lawyers to "keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*."[91] Lawyers ordinarily may achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[92]

Comment [8] was added to Model Rule 1.1 in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology.[93] The ABA Commission on Ethics 20/20 issued a report explaining that

> in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment [8]. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document.[94]

To competently use GenAI tools in representing a client, lawyers need not become GenAI experts. Rather, lawyers must have a *reasonable understanding* of the capabilities and limitations of the specific GenAI technology that the lawyers might use.[95] The State Bar of California's Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (California GenAI Guidance) explains that "[a] lawyer must ensure competent use of the [AI] technology, including the associated benefits and risks."[96] It goes on to advise that "[b]efore using [GenAI], a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product."[97] Although there is no single best way to keep up with GenAI developments, lawyers

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[90] Model Rules of Pro. Conduct r. 1.1 (ABA 2023).

[91] *Id.* r. 1.1 cmt. [8] (emphasis added); *see also* Tex. Disciplinary Rules of Pro. Conduct r. 1.01 cmt. [8] ("[E]ach lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology.").

[92] ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (Generative Artificial Intelligence Tools), at 2 (2024) (ABA Formal Opinion 512) (citing Model Rules r. 1.1 cmts. [1], [2], [4]).

[93] ABA Comm. on Ethics & Pro. Resp., Formal Op. 477R (Securing Communication of Protected Client Information), at 2–3 (2017) (ABA Formal Opinion 477R).

[94] ABA Comm. on Ethics 20/20, Report 105A (Aug. 2012).

[95] ABA Formal Opinion 512, *supra* note 92, at 2–3 (emphasis added).

[96] State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law," at 2 (2024) (California GenAI Guidance).

[97] *Id.*

should consider reading about GenAI tools targeted at the legal profession, attending relevant continuing legal education programs, and consulting with others who are proficient in GenAI technology.[98]

A lawyer's duty of competence under Model Rule 1.1 has not changed in more than four decades, but the minimum requirements for technical competence are rising as the legal industry increases its use of advancing AI technology. Lawyers have a duty to reasonably understand how the technology works, as well as its limitations, and to remain vigilant about the fast-paced evolution of the technology.

[2] Confidentiality

Perhaps the biggest barrier to implementing AI into the legal profession is ensuring the confidentiality of information entered into the software. Under Model Rule 1.6(a), lawyers have a duty of confidentiality, and are not allowed "to reveal information relating to the representation of a client unless the client gives informed consent."[99] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information.

Under Model Rule 1.6(c), lawyers are required to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[100] Factors to be considered in determining the reasonableness of a lawyer's efforts include

> the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[101]

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[98] ABA Formal Opinion 512, *supra* note 92, at 3 (citing Model Rules r. 1.1 cmt. [8]; Melinda J. Bentley, "The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems," 76 *J. Mo. Bar* 1 (2020) (identifying ways for lawyers to acquire technology competence skills)).

[99] Model Rules r. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."); *see also* Tex. Disciplinary Rules of Pro. Conduct r. 1.05(b) ("a lawyer shall not knowingly: reveal confidential information of a client or a former client to (i) a person that the client has instructed is not to receive the information; or (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.").

[100] Model Rules r. 1.6(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.").

[101] Model Rules r. 1.6 cmt. [18]; *see also* ABA Formal Opinion 477R, *supra* note 93, at 4–5 (Counsel are obligated to conduct a "fact-based analysis" to these "nonexclusive factors to guide [us] in making a 'reasonable efforts' determination.").

Attorneys using AI in practice should understand that entering client information into an open GenAI system is the disclosure of client information to a third party, which implicates a lawyer's duties to obtain the client's "informed consent" and "make reasonable efforts to prevent the inadvertent or unauthorized disclosure" of the client information. Open GenAI software like ChatGPT utilizes the user's entered information, including prompts and uploaded documents or resources, to train the system. When ChatGPT initially was launched, it did not have confidentiality protections. Instead, when ChatGPT users entered data, it could be used without restriction if needed by ChatGPT when responding to queries submitted by other users. OpenAI recognized that ChatGPT's lack of confidentiality protections limited its use by professionals. In April 2023, OpenAI updated its privacy options for ChatGPT and now allows users to select a private conversation option.[102] When the private conversation option is used, the information entered cannot be used to train ChatGPT. The information is held for 30 days and then deleted.[103]

The California GenAI Guidance warns that a "lawyer must not input any confidential information of the client into any [GenAI] solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client."[104] In addition, a "lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols."[105]

The ABA also has recommended "reasonable efforts" that lawyers can take when sharing confidential client information with vendors providing technology services.[106] These steps include due diligence into the vendor's (1) reference checks and credentials, (2) security policies and protocols, (3) hiring practices, (4) use of confidentiality agreements, and (5) conflict check system to screen for adversity.[107] When engaging an AI vendor to assist on a legal matter, the lawyer should ensure that the vendor agreement contains terms limiting use of the client's information to the express purpose of the agreement.

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[102] Ashley Capoot, "ChatGPT Users Can Now Turn Off Their Chat History, OpenAI Announces," *CNBC* (Apr. 25, 2023).

[103] *Id.*

[104] California GenAI Guidance, *supra* note 96, at 2.

[105] *Id.*

[106] ABA Comm. on Ethics & Pro. Resp., Formal Op. 08-451 (2008).

[107] *Id.* at 3.

[3] Diligence

Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[108] The comments to Model Rule 1.3 explain that "[a] lawyer should ... take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor"[109] and "[a] lawyer's work load must be controlled so that each matter can be handled competently."[110] Model Rule 1.3 raises the question as to whether a lawyer has an *affirmative duty* to use AI tools, if by doing so, the lawyer is better able to represent the client with reasonable diligence and promptness by producing work product more timely and efficiently.

While the use of AI tools may assist a lawyer in fulfilling her duty of diligence, the California GenAI Guidance cautions about the overreliance on AI tools:

> Overreliance is inconsistent with the active practice of law and application of trained judgment by the lawyer. AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of [GenAI] to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. A lawyer should take steps to avoid over-reliance on [GenAI] to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.[111]

[4] Communication

Under Model Rule 1.4(a)(2), a lawyer "shall reasonably consult with the client about the means by which the client's objectives are to be accomplished."[112] This is a lawyer's duty of communication.

If a lawyer intends to use an AI tool as part of her representation of a client, the duty of communication under Model Rule 1.4 requires the lawyer to explain the tool and obtain the client's *informed consent* for the use of client data and the use of the tool in general. Lawyers must clearly explain how the AI tool works, its purpose, the information that will be used in its deployment, the value it adds to the legal matter at hand, and what the lawyer will do with the information. A lawyer's explanation should be

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[108]Model Rules r. 1.3.

[109]*Id.* r. 1.3 cmt. [1].

[110]*Id.* r. 1.3 cmt. [2].

[111]California GenAI Guidance, *supra* note 96, at 2–3.

[112]Model Rules r. 1.4(a)(2).

sufficient to allow the client to participate intelligently in decisions concerning the objectives of the representation and the means by which they are pursued.[113]

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GenAI practices to clients or obtain their informed consent to use a particular GenAI tool.[114] Lawyers should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with GenAI use, the scope of the representation, and the sophistication of the client. To that end, lawyers should consider disclosing to their client that they intend to use GenAI technology in the representation, including how it will be used, and the benefits and risks of such use. Lawyers also should review any applicable client instructions or guidelines that may restrict or limit the use of GenAI. In this regard, a client may request the lawyer to use GenAI as a means of minimizing legal costs. If so, lawyers should have a clear upfront understanding with the client as to the appropriate scope and limitations of its use. Lawyers and law firms also should have a clear internal policy of their own.

[5] Independent Professional Judgment

Under Model Rule 2.1, "a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."[115] The California GenAI Guidance explains that "[a] lawyer's professional judgment cannot be delegated to [GenAI] and remains the lawyer's responsibility at all times."[116] Thus, a lawyer may not replace her own independent professional judgment with arguments or conclusions rendered by AI tools that do not account for the client's interests and situation.

[6] Supervision

Model Rule 5.1(b) requires lawyers with direct supervisory authority over other lawyers to "make reasonable efforts to ensure that the other

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[113]Model Rules r. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *see also id.* r. 1.4 cmt. [5] ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.").

[114]ABA Formal Opinion 512, *supra* note 92, at 8.

[115]Model Rules r. 2.1; *see also* Tex. Disciplinary Rules of Pro. Conduct r. 2.01 ("In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid legal advice.").

[116]California GenAI Guidance, *supra* note 96, at 3.

lawyer conforms to the Rules of Professional Conduct."[117] Under Model Rule 5.3, this supervisory responsibility also applies to non-lawyers employed, retained, or associated with the lawyer, including third parties that assist with a lawyer's representation of the client.[118] It therefore is a lawyer's responsibility to reasonably supervise her entire team's use of AI tools, including third-party vendors that may be supplying the tools.

[7] Fees

Model Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating the reasonableness of a fee or expense.[119] In addition, Model Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing.[120] Therefore, a client's fee agreement should explain the basis for all fees and costs, including those associated with the use of GenAI or other AI tools.

GenAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients based on an hourly rate for time spent on a task must only bill for their actual time.[121] A lawyer who agrees to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually expends on the client's behalf.[122] If a lawyer uses a GenAI tool to draft

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[117]Model Rules r. 5.1(b); *see also* Tex. Disciplinary Rules of Pro. Conduct r. 5.01 ("A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if the lawyer . . . has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.").

[118]Model Rules r. 5.3; *see also* Tex. Disciplinary Rules of Pro. Conduct r. 5.03(a) ("With respect to a nonlawyer employed or retained by or associated with a lawyer, 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.").

[119]The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

[120]Model Rules r. 1.5(b).

[121]ABA Formal Opinion 512, *supra* note 92, at 12.

[122]ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-379, at 6 (1993) (ABA Formal Opinion 93-379).

a pleading and expends 15 minutes to input the relevant information into the GenAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness.[123] As explained in ABA Formal Opinion 93-379, "[i]f a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[124] because "[t]he client should only be charged a reasonable fee for the legal services performed."[125] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[126]

In addition to legal fees, Model Rule 1.5(a) also requires that disbursements, out-of-pocket expenses, or additional charges must be reasonable.[127] Lawyers may not bill clients for general office overhead expenses, including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[128] In the absence of a contrary disclosure to a client in advance of the engagement, such overhead expenses should be "subsumed within" the lawyer's charges for professional services.[129] To the extent a particular AI tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider her cost to be overhead and not charge the client for the expense absent a contrary disclosure to the client in advance.[130] As explained in ABA Formal Opinion 512, when a lawyer uses a GenAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead.[131] In contrast, when a lawyer uses a third-party provider's GenAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it ordinarily would be reasonable for the lawyer to bill

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[123] ABA Formal Opinion 512, *supra* note 92, at 12.

[124] ABA Formal Opinion 93-379, *supra* note 122, at 6.

[125] *Id.* at 5.

[126] *Id.*

[127] Model Rules r. 1.5(b).

[128] ABA Formal Opinion 93-379, *supra* note 122, at 7.

[129] *Id.*

[130] ABA Formal Opinion 512, *supra* note 92, at 13.

[131] *Id.*

the client as an expense for the actual out-of-pocket expense incurred for using that tool.[132]

[8] Candor

Attorneys also owe a duty of candor to the courts, which prohibits a lawyer from 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."[133] A lawyer's duty of candor also is implicated by Federal Rule of Civil Procedure 11(b), which requires a reasonable inquiry before an attorney makes any legal contentions to the court.[134]

As applied to the use of GenAI tools, this duty of candor that lawyers owe to the courts was highlighted in a highly publicized case from the U.S. District Court for the Southern District of New York captioned *Mata v. Avianca, Inc.*[135] In *Mata*, two lawyers representing the plaintiff, Roberto Mata, were sanctioned for citing fake cases in a legal brief. The cases they cited purportedly were published in the Federal Reporter, Federal Supplement, and Westlaw, but in reality the cases did not exist.[136]

In responding to Mata's legal brief, lawyers for the defendant, Avianca, Inc. (Avianca), stated that

> [a]though Plaintiff ostensibly cites to a variety of cases in opposition to this motion, the undersigned has been unable to locate most of the case law cited in Plaintiff's [brief], and the few cases which the undersigned has been able to locate do not stand for the propositions for which they are cited.[137]

Despite the serious nature of Avianca's allegations about the non-existent cases, Mata's lawyers did not seek to withdraw their brief or provide any explanation to the court as to how a case purportedly published in the Federal Reporter or Federal Supplement could not be found. The court then conducted its own search for the cited cases, but was unable to locate multiple authorities cited in the brief.[138]

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[132] *Id.*

[133] Model Rules r. 3.3(a); *see also* Tex. Disciplinary Rules of Pro. Conduct r. 3.03(a)(1) ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal . . . .").

[134] Fed. R. Civ. P. 11(b)(2) ("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 . . . (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.").

[135] 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

[136] *Id.* at 450.

[137] *Id.*

[138] *Id.* at 450–51.

At the hearing on a motion for sanctions against Mata's lawyers, it was revealed that one of the lawyers, Steven A. Schwartz, had used ChatGPT for researching the arguments in the brief, including the fabricated cases.[139] This "hallucination" was caused by the AI software that invented case law out of thin air because it had not yet learned the necessary information to answer the lawyers' legal questions. In explaining what he had done, Schwartz testified at the sanctions hearing that when he reviewed the brief, he was:

> operating under the false perception that this website [i.e., ChatGPT] could not possibly be fabricating cases on its own. . . . I just was not thinking that the case could be fabricated, so I was not looking at it from that point of view. My reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up.[140]

U.S. District Judge P. Kevin Castel sanctioned Mata's lawyers, ordering them to pay $5,000 and write letters to each of the real judges falsely identified as the authors of six fake opinions cited in the filed brief. As a basis for ordering these sanctions, Judge Castel cautioned:

> 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. Technological advances are commonplace and there is nothing inherently improper about using a reliable [AI] tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings. Rule 11, Fed. R. Civ. P. [The respondents] abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the [AI] tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.
>
> Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.[141]

Some observers have cited *Mata* and other similar cases as a potential barrier for implementing GenAI into the legal industry because of the questionable accuracy and quality of the AI-generated work product. The duty implicated by these concerns, however, is no different from the

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[139] *Id.* at 451.

[140] *Id.*

[141] *Id.* at 448–49 (footnote omitted).

existing duty placed on lawyers to ensure the quality and accuracy of any other work product submitted to the court. Experienced lawyers have a duty under ABA Model Rules 5.1(b) and 5.3 to review work performed by less experienced lawyers and non-lawyers to ensure completeness and accuracy. As noted by Judge Castel, "existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings,"[142] regardless of whether the content of those filings was generated by a less experienced lawyer or by a GenAI tool.

[9] Disclosure Requirements

Several courts and judges have implemented their own local rules or standing orders regarding the use of AI. Some judges require attorneys to disclose whether AI was used at all in the preparation of documents that are filed, while others require more specific disclosures as to whether GenAI was used.

For example, U.S. District Judge Matthew J. Kacsmaryk in the U.S. District Court for the Northern District of Texas requires a mandatory certification regarding the use of GenAI. The certification requires all attorneys and pro se litigants appearing in his court to attest that:

> either that *no portion of any filing will be drafted by* [*GenAI*] *(such as Chat-GPT, Harvey.AI, or Google Bard) or that any language drafted by* [*GenAI*] *will be checked for accuracy, using print reporters or traditional legal databases, by a human being.* These platforms are incredibly powerful and have many uses in the law . . . [b]ut legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, [GenAI] is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether [GenAI] drafted any portion of that filing.[143]

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[142] *Id.* at 448.

[143] https://www.txnd.uscourts.gov/judge/judge-matthew-kacsmaryk (emphasis added). Judge Brantley Starr in the U.S. District Court for the Northern District of Texas had a similar standing order regarding the use of GenAI for the preparation of court filings but recently withdrew his order.

Another example of a similar standing order was issued by Magistrate Judge Gabriel A. Fuentes in the U.S. District Court for the Northern District of Illinois. Judge Fuentes' Standing Order states that "[a]ny party using any [GenAI] tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used."[144] The Standing Order goes on to state:

> Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that . . . . This mission is too important for me to allow you to jeopardize it." 2001: A SPACE ODYSSEY (MetroGoldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes "bogus judicial decisions" cited for substantive propositions of law.[145]

In contrast to the standing orders issued by Judge Kacsmaryk and Magistrate Judge Fuentes, which are specific to the use of *GenAI*, Senior District Judge Michael Baylson in the U.S. District Court for the Eastern District of Pennsylvania has a standing order that applies to *any AI*, generative or not. Under Judge Baylson's standing order, if an attorney has used any type of AI in the preparation of any complaint, answer, motion, brief, or other paper filed with the court, the lawyer "MUST, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and CERTIFY, that each and every citation to the law or the record in the paper, has been verified as accurate."[146] As observed by the co-authors (including two retired federal judges) of a recent paper on GenAI's use in the courts, the standing order issued by Judge Baylson, perhaps unwittingly, "directs counsel to reveal the use of seemingly innocuous programs like Grammarly."[147]

Not all courts and judges have negative views on the use of AI for conducting legal research and assisting with document drafting. In a recent federal appellate decision, *Snell v. United Specialty Insurance Co.*, Judge Kevin Newsom of the U.S. Court of Appeals for the Eleventh Circuit not only admitted to using ChatGPT, but actually wrote a concurring opinion outlining exactly how he had done it.[148] In explaining his use of ChatGPT

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[144]https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev'd%205-31-23%20(002).pdf.

[145]*Id.* (citing *Mata*).

[146]https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf.

[147]Donald et al., *supra* note 6, at 6.

[148]102 F.4th 1208, 1221–35 (11th Cir. 2024) (Newsom, C.J., concurring).

to assist with the analysis of a key issue in an insurance coverage appeal, Judge Newsom encouraged the legal community to also consider its use.

Snell involved an in-ground trampoline, and the decision came down to whether a specific wooden "cap" fell under the ordinary meaning of the word "landscaping," which was not defined in the insurance policy at issue. After spending what he characterized as "hours and hours (and hours) laboring over the question" whether the term "landscaping" applied in this case,[149] Judge Newsom said he decided to take another approach:

> And it was midway along that journey that I had the disconcerting thought that underlies this separate writing: *Is it absurd to think that ChatGPT might be able to shed some light on what the term "landscaping" means?* Initially, I answered my own question in the affirmative: *Yes, Kevin, that is positively absurd.* But the longer and more deeply I considered it, the less absurd it seemed.[150]

According to Judge Newsom, the first definition of "landscaping" that ChatGPT provided was "more sensible" and "less nutty" than he expected and squared with his own impression, leaving his interest "piqued."[151] From there, he asked ChatGPT the pivotal question in the case: "Is installing an in-ground trampoline 'landscaping'?"[152] Judge Newsom noted that, "for good measure," he also posed the same question to Google's Bard (since replaced by Gemini), with similar results.[153] The answers from both GenAI models indicated that the trampoline-related work at issue in the case "just might *be* landscaping."[154]

The issue on appeal ultimately was decided without reliance on the definition of "landscaping." Nonetheless, Judge Newsom believed it was a valuable enough exercise to share.

> [M]y own process of working through the plain-language issue was a valuable one, if only because it got me thinking about what was to me a previously unimaginable possibility: Might LLMs be useful in the interpretation of legal texts? Having initially thought the idea positively ludicrous, I think I'm now a pretty firm "maybe." At the very least, it seems to me, it's an issue worth exploring.[155]

Judge Newsome ended his concurring opinion by acknowledging that the judiciary is still in the early stages of determining if, and how, to

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[149] *Id.* at 1222.

[150] *Id.*

[151] *Id.* at 1225.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

properly use GenAI, saying that he agrees with Chief Justice John Roberts's observation that the "use of AI requires caution and humility."[156]

> But—and this is my bottom line—I think that LLMs have promise. At the very least, it no longer strikes me as ridiculous to think that an LLM like ChatGPT might have something useful to say about the common, everyday meaning of the words and phrases used in legal texts.
>
>   Just my two cents.[157]

In June 2024, the U.S. Court of Appeals for the Fifth Circuit announced that it was not adopting what would have been a first-of-its-kind rule at the appellate level regulating the use of GenAI by lawyers appearing before it.[158] The court said that it had decided to not adopt a rule it first proposed in November 2023 after taking into consideration the use of AI in the legal practice and public comments from lawyers, which largely had been negative.[159] The proposed rule would have required lawyers to certify that, to the extent an AI program was used to generate a filing, citations and legal analysis were reviewed for accuracy. Lawyers who misrepresented their compliance with the proposed rule would have faced sanctions and the prospect of their filings being stricken. In announcing the decision to not adopt the proposed AI rule, the Fifth Circuit reminded parties and counsel that they remained "responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require."[160]

Although the Fifth Circuit declined to issue a rule on the use of AI in court filings, many courts and judges are issuing such rules and standing orders. Lawyers appearing before a judge in a specific court should check to see if there are any specific requirements, including disclosures or certifications, regarding the use of AI technology.

§ 28.06   Conclusion

AI technology and its derivatives, including GenAI, are becoming increasingly prevalent in the legal industry. These technologies are continuing to develop at an astonishing pace, and there certainly are questions that need to be addressed as AI-powered tools become more widely used

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[156]*Id.* at 1234 (quoting Chief Justice John G. Roberts, Jr., "2023 Year-End Report on the Federal Judiciary," at 5 (Dec. 31, 2023)).

[157]*Id.*

[158]Nate Raymond, "5th Circuit Scraps Plans to Adopt AI Rule After Lawyers Object," *Reuters* (June 11, 2024).

[159]*Id.*

[160]*Id.*

by lawyers, firms, and legal departments. Legal professionals who use AI technology should consider the following non-exclusive list of issues.[161]

(1) Before using an AI product, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms and policies governing the product's use and exploitation of confidential data and information provided by the user. To that end, lawyers should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer inputs confidential information adheres to stringent security, confidentiality, and data retention protocols. Lawyers who intend to use confidential information in an AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.

(2) When using AI tools, a lawyer should not input any confidential information if the tool lacks adequate confidentiality and security protections. Even with these protections in place, a lawyer should anonymize client information and avoid entering details that can be used to identify the client.

(3) AI-generated outputs can be used as a starting point in preparing attorney work product but should be carefully scrutinized. A lawyer should critically review, validate, and correct both the input and the output of GenAI tools for accuracy and bias to ensure that the content accurately reflects and supports the interests and priorities of the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results.

(4) A lawyer's professional judgment cannot be delegated to AI—it remains the lawyer's responsibility at all times. Lawyers should take steps to avoid over-reliance on GenAI to such a degree that it hinders the lawyer's critical analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and analysis using print reporters or traditional legal databases.

(5) Law firms, legal departments, and supervisory lawyers should establish clear policies regarding the permissible uses of GenAI and make reasonable efforts to ensure that the lawyers and non-lawyers

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[161] Many of these issues are discussed in ABA Formal Opinion 512 and the California GenAI Guidance.

within the firm or legal department comply with the policies when using GenAI tools. This includes providing training on the ethical and practical aspects and pitfalls of any GenAI use. In addition, a subordinate lawyer should not use GenAI tools at the direction of a supervisory lawyer if the use would violate the established policies of the firm or legal department, or if it would violate the subordinate lawyer's professional responsibility and obligations.

(6) When using AI technology during a client representation, a lawyer should evaluate the communication obligations owed to the client throughout the representation based on the facts and circumstances, including the novelty of the technology, the risks associated with GenAI use, the scope of the representation, and the sophistication of the client. A lawyer should consider disclosure to the client if the lawyer intends to use GenAI tools in the representation, including how the technology will be used and the benefits and risks of such use. If a client provides instructions or guidelines that may (a) restrict or limit the use of GenAI tools or (b) require the use of GenAI tools, the lawyer should understand and abide by those instructions and guidelines to the extent they do not violate the lawyer's duties of professional responsibility.

(7) Lawyers using AI to create client work product more efficiently may charge for the actual time spent (e.g., crafting or refining GenAI inputs and prompts, or reviewing and editing GenAI outputs). However, lawyers may not charge hourly fees for the time saved by AI. Costs associated with AI may be charged to the client for actual out-of-pocket expenses incurred for using the tools, but not for general technology needed to equip and maintain a legal practice. Client fee agreements should explain the basis for all fees and costs, including those associated with the use of AI.

(8) Before a document containing any GenAI-created information is submitted to a court or other tribunal, the lawyer submitting the document should review all GenAI outputs, including the analysis and citations to authority, for accuracy. If a lawyer later determines that a submitted document contains errors or misleading statements, the lawyer should immediately notify the court or tribunal and withdraw or correct the document. A lawyer also should check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of AI or GenAI.

By embracing a proactive and ethical approach to the use of AI tools, lawyers can harness the transformative power of the technology, while safeguarding the ethical principles that underpin the legal profession,

including the duties of competency, confidentiality, diligence, open communications, independent judgment, supervision, and candor. Ultimately, navigating the complex intersection of AI and ethics will require a lawyer's commitment to continuous learning, ethical reflection, and responsible innovation to shape a future where AI technology serves as a powerful tool for providing efficient, accurate, and cost-effective legal services.