Ethical Rules for Using Generative AI in Your Practice
Steve Herman

At the risk of stating the obvious, we are still in the early days of what we believe to be an "AI Revolution" in the way that goods and services, including legal services, are and will be provided. That means that we do not, at this point, have much in the way of formal guidance*. The best we can do is identify potential issues that could be seized upon by our clients, Disciplinary Counsel, and/or the Courts as an arguable violation of the ethical and professional standards and rules. At the same time, we must recognize that as these services continue to develop very rapidly, a technological advance (or, perhaps, a change in a provider's Terms of Use or Privacy Policy) could, in a short period of time, either obviate or complicate further some of these potential issues and concerns.

With those *caveats,* some of the principal questions that have been raised in terms of an attorney's use of (and, potentially, failure to use) services like ChatGPT and other Generative AI (GAI) technologies have generally fallen into two broad categories: (**1**) maintaining a general competence in understanding the risks and the benefits of the technology, and ensuring that the ultimate work product is reliable and consistent with an acceptable legal, ethical and professional standard of care; and (**2**) ensuring that attorney-client privileged and other legally protected information remains confidential and secure.

Is your firm using (or not using) ChatGPT or other Generative AI? Below we examine various Professional Rules[1] and other legal requirements that could potentially be implicated.

> *(**Note:** Since I first began presenting on this topic in October 2023, some preliminary guidance has started to emerge. For example, the California State Bar issued a Practical Guidance for the Use of Generative Artificial Intelligence,[2] the Florida Bar issued Advisory Ethics Opinion No. 24-1,[3] the Supreme Court of New Jersey issued Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers,[4] and the D.C. Bar issued Ethics Opinion No. 388,[5] which are referenced further herein. The Louisiana Supreme Court has also issued a letter re "The Emergence of Artificial Intelligence".[6])

<u>Competence</u>
Model Rule 1.1 of the ABA Model Rules of Professional Conduct requires general competence in the representation of a client.[7] Official Comment [8] to the Rule advises that "a lawyer should keep abreast of changes in the law and its practice, including a reasonable understanding of the benefits and risks associated with relevant technology the lawyer uses to provide services... or transmit information." [8] As official statements on AI integration are released, the recurring message is that "the core ethical responsibilities of lawyers are unchanged"[9] and careful engagement with the disruptive technology is advised to avoid any ethical violations.

While most of the focus has centered on the responsibility to understand and account for limitations in the use of ChatGPT and other similar services, some have suggested that the Rule also implies an affirmative duty to use appropriate AI technologies where the benefits outweigh the risks. For example, in terms of cost-savings to the client or even quality.

With respect to the risks, many have focused on what are sometimes called "hallucinations" – i.e., responses to prompts, which, while having all the objective signs of reliability, are factually

inaccurate. Lawyers must be aware that "GAI products are not search engines that accurately report hits on existing data in a constantly updating database."[10] GAIs are trained on datasets and are thereby limited by the information within them. Information, therefore, that may be out of date, biased, or incomplete. Additionally, GAI is not programmed to provide accurate reports of the information it has; rather, it is trained to create new content. "In the case of a request for something in writing, GAI uses a statistical process to predict what the next word in the sentence should be. That is what the 'generative' in GAI means: the GAI generates something new that has the properties its dataset tells it the user is expecting to see." [11]

For example, in the highly publicized case *Mata v. Avianca, Inc.*, a law firm was sanctioned when the lawyers "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations"[12] created by ChatGPT. Notably, the lawyer in that case specifically asked ChatGPT whether the cases he cited from the ChatGPT response were real or fake, and ChatGPT replied that it had supplied "real" decisions that could be found through Westlaw, LexisNexis and the Federal Reporter.[13]

One oft-quoted authority in this area is David Curle, Director of the Technology and Innovation Platform at Thomson Reuters, who advises that: "If lawyers are using tools that might suggest answers to legal questions, they need to understand the capabilities and limitations of the tools, and they must consider the risks and benefits of those answers in the context of the specific case they are working on."[14]

Some have also pointed to Official Comment [5] to Model Rule 1.1 and suggested that over-reliance on an AI tool for legal research and analysis may violate the professional duty of "inquiry into and analysis of the factual and legal elements of the problem." [15]

Concerning over-reliance on an AI product or service that might only provide a neutral or objective treatment of the law, Official Comment [1] to Model Rule 1.3 states that lawyers must "act with commitment and dedication to the interests of the client and with zeal and advocacy upon the client's behalf." [16]

Candor to the Court
Related to the general responsibility to understand and account for any limitations in the technology is the responsibility of candor to the court. Model Rule 3.3, in this regard, prohibits lawyers from knowingly:

- *Mak[ing] a false statement of fact or law to a tribunal, or failing to correct a false statement of material fact or law previously made to a tribunal by the lawyer; and/or,*
- *Failing to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.* [17]

Rule 11 of the Federal Rules of Civil Procedure addresses representations to the court.[18] The sanction of the lawyers in *Mata v. Avianca, Inc.*, premised on Rule 11, was based largely on the law firm's refusal to correct the record after the lawyers became aware of the fact that the citations provided by ChatGPT did not exist.[19]

With respect to subsection (a)(2) of Model Rule 3.3, it has also been noted that if a lawyer relies too much on an AI service's response to a particular prompt, he or she may not be able to know whether there is adverse legal authority in the jurisdiction. This is especially true when the prompt only seeks support for the client's position.

Supervision of Associates and Non-Lawyer Assistance
Model Rules 5.1 and 5.3 places an affirmative duty on a supervising attorney[20] to undertake reasonable efforts to ensure that associates, paralegals, and other staff working under their direction conform to the ethical and professional obligations of the attorney.[21]

In this regard, it is likely a good idea to establish, periodically review, and enforce internal policies and protocols regarding the use—and/or limitation and restrictions on use—of ChatGPT and other AI products by lawyers and other employees at the firm. This should also be done, where appropriate, for local counsel and other co-counsel. [22]

At the same time, Model Rule 5.3—with respect to nonlawyer assistance—may additionally be interpreted to impose a duty concerning information generated by the AI product or service itself. The title of the Rule was updated in 2012 to include the word "nonlawyer", which made clear the rule encompassed any type of assistance, whether human or not.[23]

Confidentiality
Perhaps the most serious concerns that have been raised regarding the use of ChatGPT and other AI systems surround the security of privileged and other legally protected information. Under Model Rule 1.6, an attorney is not only generally prevented from disclosing "information relating to the representation of a client," but is also charged with an affirmative duty to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." [24]

Using ChatGPT to analyze a client's legal documents that contain privileged or other confidential information can pose a risk that such information could be misused or exposed. [25] Generative AI programs that are 'self-learning' continue to develop responses as they receive additional inputs, adding those inputs to their existing parameters. The use of these kinds of programs creates a risk that client information may be stored within the program and revealed in response to future inquiries by third parties.[26]

In March of 2023, for example, there was a data leak at ChatGPT that allowed its users to view the chat history titles of other users.[27] Outside of such data breaches, chat history can be accessed and reviewed by ChatGPT or other Generative AI company employees and may also be provided to third-party vendors and affiliates.[28]

In addition to attorney-client privileged information and/or work product, one also must be cognizant of other legal protections and requirements that might apply to client information, including:

- HIPAA (Health Insurance Portability and Accountability Act of 1996)[29]
- The European Union's General Data Protection Regulation (GDPR)[30]
- The California Consumer Privacy Act (CCPA)[31] (and/or other State Privacy Laws)

- Trade Secret Protection[32] (which may be compromised by "disclosure" to the AI service)
- Contractual Non-Disclosure Agreements and Obligations

The Florida Ethics Opinion regarding the use of Generative AI advises that existing ethics opinions regarding prior technological advances (such as cloud computing, electronic storage disposal, remote paralegal services, and metadata) have "addressed the duties of confidentiality and competence and are particularly instructive" and generally conclude that a lawyer should:

- *Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;*
- *Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and*
- *Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.* [33]

The California Practical Guidance for the Use of Generative Artificial Intelligence reinforces this responsibility and further suggests that a lawyer who intends to use confidential information in a generative AI solution should anonymize client information as well as "ensure that the provider does not share information with third parties or utilize the information for its own use in any manner, including to train or improve its product."[34] These measures should include reviewing consulting with an IT professional as well as reviewing the program's Terms of Use.

In the Terms of Use dated March 14, 2023, OpenAI advised that:

> *If you use the Services to process personal data, you must provide legally adequate privacy notices and obtain necessary consents for the processing of such data, and you represent to us that you are processing such data in accordance with applicable law. If you will be using the OpenAI API for the processing of "personal data" as defined in the GDPR or "Personal Information" as defined in CCPA, please fill out this form to request to execute our Data Processing Addendum.*[35]

The updated Terms of Use, promulgated in November of 2023 and effective as of January 31, 2024, simply state that:

> *You are responsible for Content, including ensuring that it does not violate any applicable law or these Terms. You represent and warrant that you have all rights, licenses, and permissions needed to provide Input to our Services.*[36]

ClaudeAI's Acceptable Use Policy similarly prohibits users from "violating any natural person's rights, including privacy law" as well as "inappropriately using confidential or personal information." [37]

Natalie A. Pierce and Stephanie L. Goutos of Gunderson Dettmer Law Firm note that challenges to the responsible use of GAI systems are actively being addressed by legal entities, from academic institutions to law firms, through methods such as "employee training, AI governance policies, and the formation of specialized AI task forces." The authors emphasize the importance of recognizing existing countermeasures that aim to help mitigate risks associated with confidentiality concerns, while the framework for a lawyer's responsible AI use continues to develop. For example, OpenAI's April 2023 policy change allows users to disable chat history in ChatGPT. The company's August 2023 update introduced an "enterprise-focused model that offers enhanced security protocols, sophisticated data analysis, and bespoke customization capabilities." As the technology in Artificial Intelligence continues to evolve, Pierce and Goutos predict that a "majority of law firms and organizations will adopt custom experiences powered directly into their own applications, as well as prohibit the input of any confidential information into public GAI tools, which will substantially alleviate breach of confidentiality concerns." [38]

A lawyer's affirmative duty to reasonably communicate with his or her client is also implicated in this context. Model Rule 1.4 requires an attorney to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and to explain relevant matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." [39] To the extent use of ChatGPT and other AI services in connection with the representation of a client is contemplated, it is therefore important to discuss the potential risks and benefits with the client, so that an informed decision can be made.[40]

Other Potential Issues and Concerns
Several other potential legal and ethical concerns surround AI in the legal field, including, but not limited to, the following:

- ***Copyright (and Patent) Issues***
Can the AI-generated material be copyrighted (and/or patented) by either the user or the owner and operator of the AI? What happens if the AI-generated material includes content that is subject to an underlying copyright claim? Is there some other common law or contractual property right in favor of either the owner or the user of the AI?

The U.S. Copyright Office will not register a work if "the traditional elements of authorship were produced by a machine." For a work containing AI-generated material to be considered eligible for copyright, it must contain sufficient human authorship to support a copyright claim. Concerning AI-generated material, what constitutes sufficient human authorship varies. For example, according to the Office, "When an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the 'traditional elements of authorship' are determined and executed by the technology—not the human user." However, a work containing AI-generated material will contain sufficient human authorship if the AI material is selected, arranged, or modified "to such a degree that the modifications meet the standard for copyright protection." In such cases, the parts that will be protected are the "human-authored aspects of the work, which are 'independent' and do 'not effect' the copyright status of the AI-generated material itself." [41]

In August of 2023, the D.C. District Court rejected a copyright claim by an AI owner and operator over a visual work of art autonomously generated by his machine. The court noted that the

"increased attenuation of human creativity from the actual generation of the final work will prompt challenging questions regarding how much human input is necessary to qualify the user of an AI system as an 'author' of a generated work, the scope of the protection obtained over the resultant image, how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works, how copyright might best be used to incentivize creative works involving AI, and more." [42] The Federal Court of Appeals held that an AI software system cannot be an "inventor" for purposes of obtaining a patent under the Patent Act. [43]

According to OpenAI's Terms of Use: "As between the parties and to the extent permitted by applicable law, you own all Input. Subject to your compliance with these Terms, OpenAI hereby assigns to you all its right, title, and interest in and to Output." However, the Terms also expressly prohibit a user's attempt to "represent that output from the Services was human-generated when it is not." [44]

- ***Model Rule 1.5***

Model Rule of Professional Conduct 1.5 from the ABA addresses fees. According to the Rule, a lawyer's fees must be reasonable. The first factor to be considered in determining the reasonableness of a fee is the "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly."

What fee is "reasonable" considering the time and skill either saved by using, or wasted by not using, available AI technology?

- ***"Black Box" Concerns***

Could either the information submitted to an AI service and/or the "training" of the AI service directly or indirectly benefit a litigant or other party whose interests are adverse to the client for whom the AI service is procured? (And/or another former or existing client of the firm?) [45]

- ***Model Rule 1.7(a)(2), 1.8(a) and/or 1.8(b)***

Section (a)(2) of Model Rule 1.7 identifies the existence of a concurrent conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." [46]

Model Rule 1.8(a) prohibits a lawyer from knowingly acquiring an "ownership, possessory, security, or other pecuniary interest adverse to the client." Exceptions are allowed if there is comprehensive, understandable, written disclosure to the client who is then advised to seek independent advice before giving informed consent, in writing.

Model Rule 1.8(b) forbids a lawyer from using information relating to the representation of a client to "the disadvantage of the client" without written consent. [47]

How do these Rules apply to the extent that the lawyer or another principal in the law firm might have an ownership or other interest in the AI-related product, service, or company?

- ***Unauthorized Practice of Law***

Both in the sense that: (**1**) Are some of these services that are not owned, maintained, or supervised by an attorney offering what is effectively "legal advice" without a license? and/or (**2**) Is an attorney who is hosting, supervising, maintaining, or otherwise administering some of these services effectively providing legal advice to clients and/or regarding matters in States where he or she does not maintain a license?

Note that, as per Official Comment [2] to Model Rule 5.5, "the definition of the practice of law is established by the law and varies from one jurisdiction to another." [48]

In *Lola v. Skadden Arps,* the Second Circuit Court of Appeals held that a contract lawyer exclusively performing document review "under such tight constraints that he exercised no legal judgment whatsoever" was not engaged in "the practice of law" within the State of North Carolina.[49] This decision marked a turning point in how the "practice of law" will be defined in the coming years as technology continues to advance. According to this decision, "if a lawyer is performing a particular task that can be done by a machine, then that work is not practicing law." [50]

In *Janson v. LegalZoom.com, Inc.*, the District Court for the Western District of Missouri denied the defendant's motion for summary judgment as to the unauthorized practice of law where "LegalZoom's internet portal offers consumers not a piece of self-help merchandise, but a legal document service which goes well beyond the role of a notary or public stenographer." [51] Regarding legal self-help, "courts, state legislatures, and bar associations in the near term will have to decide whether increasingly sophisticated services such as DoNotPay constitute the unauthorized practice of law."[52]

- *Model Rule 8.4(g)*

Model Rule of Professional Conduct 8.4(g) asserts that it is professional misconduct for a lawyer to engage in conduct that is harassment or discrimination. So, the question has been raised:

Given the bias that exists in some of these products and services, might the use of such AI technology result in potential "discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law"? [53]

Conclusion

As the use of GAI in the legal field grows, it will continue to change the practice of law. While this change has the potential to be positive, the use of Advanced AI technology's advancement raises significant ethical concerns. At present, formal guidelines specific to AI are sparse, leaving us to anticipate potential issues that clients, Disciplinary Counsel, and the Courts might view as breaches of ethical and professional standards. Technological advancements in services like ChatGPT and other Generative AI can rapidly alter or complicate these concerns. Therefore, while exploring the implications for law firms under Professional Rules and legal requirements, it is crucial to maintain competence in understanding these technologies' risks and benefits, ensuring the reliability and ethical integrity of legal work, as well as safeguarding client confidentiality and data security.

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[1] ABA Model Rules of Professional Conduct

[2] California Practical Guidance for the Use of Generative Artificial Intelligence

[3] Florida Advisory Opinion 24-1

[4] Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers;

[5] DC Bar Ethics Opinion No. 388 (April 2024)

[6] Letter from the Louisiana Supreme Court re "The Emergence of Artificial Intelligence" dated January 22, 2024)

[7] Rule 1.1: Competence

[8] Official Comment [8]: Maintaining Competence

[9] Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers

[10] DC Bar Ethics Opinion No. 388 (April 2024)

[11] *Id.*

[12] *Mata v. Avianca Inc.*, No-22-1461, 2023 WL 41149

[13] *Id.*, at ¶ 45

[14] *See, e.g.,* David Lat, "The Ethical Implications of Artificial Intelligence" *Above the Law: Law2020,* (available at: https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/, as of Oct. 27, 2023).

[15] Official Comment [5]: Thoroughness and Preparation

[16] Official Comment [1]: Client-Lawyer Relationship

[17] Rule 3.3: Candor Toward the Tribunal

[18] Rule 11: Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

[19] *Mata v. Avianca, supra*, 2023 U.S.Dist.LEXIS 108263 at **2-3

[20] Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

[21] Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

[22] Official Comment [1]: Law Firms and Associations

[23] Natalie A Pierce and Stephanie L. Goutos, *Why Lawyers Must Responsibly Embrace Generative AI* 2023 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4477704)

[24] ABA Model Rule of Professional Conduct 1.6(a) and (c)

[25] Mostafa Soliman, *Navigating the Ethical and Technical Challenges of ChatGPT* 2023 (available at: https://nysba.org/navigating-the-ethical-and-technical-challenges-of-chatgpt/)

[26] Florida Advisory Opinion 24-1

[27] Andrew Tarantola, *OpenAI Says a Bug Leaked Sensitive ChatGPT User Data* 2023 (available at: https://www.engadget.com/openai-says-a-bug-leaked-sensitive-chatgpt-user-data-165439848.html)

[28] Open AI Privacy Policy

[29] 42 U.S.C. §§ 1320d, *et seq.,* and 45 C.F.R. ¶¶ 164.500, *et seq.*

[30] Available at: https://gdpr.eu/tag/gdpr/

[31] Cal. Civ. Code, §§ 1798.100, *et seq.*

[32] *See, e.g.,* 18 U.S.C. §1839(3).

[33] Florida Advisory Opinion 24-1

[34] California Practical Guidance for the Use of Generative Artificial Intelligence

[35] OpenAI Terms of Use, No.5(c) (updated March 14, 2023) (available at: https://openai.com/policies/terms-of-use, as of Oct. 27, 2023)

[36] OpenAI Terms of Use, (updated Nov. 14, 2023) (eff. Jan. 31, 2024) (available at: https://openai.com/policies/terms-of-use, as of March 30, 2024).

[37] ClaudeAI's Acceptable Use Policy (available at: https://www.anthropic.com/legal/archive/4903a61b-037c-4293-9996-88eb1908f0b2, as of March 30, 2024).

[38] Pierce and Goutos, *supra,* at pp.15-16.

[39] Rule 1.4: Communications

[40] California Practical Guidance for the Use of Generative Artificial Intelligence; Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers; Florida Advisory Opinion 24-1

[41] U.S. Copyright Office, *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence,* 88 Federal Register 16190-16194 (March 16, 2023)

[42] *Thaler v. Perlmutter,* No.22-1564, 2023 WL 5333236, 2023 U.S.Dist.LEXIS 145823 (D.D.C. Aug. 18, 2023)

[43] *Thaler v. Vidal,* 43 F.4th 1207 (Fed. Cir. 2023)

[44] OpenAI Terms of Use

[45] *See generally*: ABA Model Rules of Professional Conduct 1.6 – 1.9.

[46] Rule 1.7: Conflict of Interest: Current Clients

[47] Rule 1.8: Current Clients: Specific Rules

[48] Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

[49] *Lola v. Skadden Arps,* 620 Fed.Appx. 37 (2nd Cir. 2015)

[50] Simon, Lindsay, Sosa & Comparato, *Lola v. Skadden and the Automation of the Legal Profession,* 20 Yale J.L. & Tech. 234, 248 (2018)

[51] *Janson v. LegalZoom.com, Inc.,* 802 F.Supp.2d 1053 (W.D.Mo. 2011)

[52] Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law,* 70 Hastings L.J. 173, 178 (2018)

[53] Rule 8.4: Misconduct