

[AI and Legal Ethics: What Lawyers Need to Know](#)

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This practice note discusses ethical issues litigators must be aware of when considering using generative artificial intelligence (AI) technology in their practice and covers topics such as the many ways litigators may use AI and the specific professional ethics rules that apply.

AI represents an exciting opportunity for lawyers to streamline their practices, save their clients' money, and provide better quality representation. It is also fraught with ethical risks. For this reason, lawyers should exercise caution in entrusting tasks to AI and, if and when they do, scrutinize the work it produces. The rules of professional responsibility do not require that lawyers shun AI technology—in fact, the rules encourage its use in some circumstances. But it is the role of a lawyer to ensure that AI work is checked and verified, and to exercise their own independent judgment on complex legal matters.

For additional resources on generative AI, see [Generative Artificial Intelligence \(AI\) Resource Kit](#).

For more on AI in litigation, see [Evaluating The Legal Ethics Of A ChatGPT-Authored Motion](#) and [Litigators Should Approach AI Tools With Caution](#).

Opportunities Offered by AI

AI programs currently marketed to lawyers claim to be able to perform or assist with nearly every aspect of legal work. One of the most popular uses for AI in the legal profession is for document review. AI can streamline the document review process using programs like Technology-Assisted Review (TAR). TAR analyzes documents that human reviewers have marked responsive or nonresponsive, and feeds the reviewers documents of the same type. See Casey, Cat. [How to Use Human-Centered AI in Legal Document Review, Reveal-Brainspace](#). Reveal-Brainspace, 2 Feb. 2023. This allows lawyers to accelerate their review. After the AI has been "trained" to a certain level, lawyers can choose to have TAR finish the job—making its own determinations as to which documents are responsive and unresponsive.

Similar technology can be used to identify key documents, make privilege determinations, and group documents by category. In addition, AI can be used for the following:

- Searching discovery documents for relevant evidence
- Reviewing case documents to draft deposition questions –and–
- Reviewing legal bills
- Assisting in contract drafting and brief writing

See, e.g., Lohr, Steve. [A.I. Is Coming for Lawyers, Again](#). New York Times, 10 Apr. 2023.

ChatGPT, a popular AI chatbot, can perform a variety of legal tasks, including analyzing a legal scenario and providing the available causes of action. In fact, GPT-4, the most recent version of ChatGPT, has such a thorough understanding of legal concepts that it was able to pass the July 2022 bar exam, outperforming 90% of new lawyers taking the exam. Weiss, Debra Cassens. [Latest version of ChatGPT aces bar exam with score nearing 90th percentile](#). ABA J., 15 Mar. 2023.

Attorney Skepticism

The majority of lawyers remain unconvinced as to the benefits of AI. A recent LexisNexis survey found that only 10% of lawyers believe that generative AI tools, like ChatGPT, will have a transformative impact on law practice and 60% of lawyers have no plans to use the technology at this time. E, Rachel. [Shock survey reveals most lawyers shunning game-changing AI technology](#). JD J. 27, Mar. 2023.

The reticence is not borne of ignorance: the survey found that 88% of lawyers and law students are aware of the technology, compared to 57% of consumers. Not only are they aware of the technology, but they would also like to use it for:

- Research (59%)
- Drafting documents (53%)
- Streamlining work (46%) –and–
- Document analysis (40%)

The gulf between those who want to use AI in their practice but do not have immediate plans to do so can potentially be explained by the cloud of ethical uncertainty surrounding the use of AI.

Lawyer's Obligation to Be Competent

Rule 1.1 requires that all lawyers provide competent representation to a client. Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 2023) (Model Rule 1.1). One aspect of providing competent representation is possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Id.

To date, more than 30 states have adopted a comment to the Model Rules of Professional Conduct that states that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Model Rule 1.1 cmt. [8]; see also [Litigation Technology Competence State Law Survey](#).

AI is perhaps the single most "relevant technology" of our time. It, and related technologies, can help lawyers identify common mistakes like:

- Citing overturned statutes
- Misquoting legal authority –or–
- Using terms inconsistently in a contract

As these issues and others can be spotted with the click of a button, lawyers may increasingly find themselves having to defend their refusal to use AI. And as a practical matter, a lawyer who insists on doing all aspects of their work manually may lose out on work in favor of lawyers who can use AI assistance to do the same tasks at a fraction of the cost. Lawyers may therefore find themselves in an increasingly fraught situation, where the ethical rules encourage use of AI, but also impose discipline for the various ways it can be misused.

Lawyers Must Oversee Any Work Done by AI

Without proper oversight, relying on AI can be problematic at best and catastrophic at worst. As legal services AI continues to refine and develop each day, it is crucial to exercise diligence when using it.

As noted above, lawyers must be competent in their practice of law under Rule 1.1 of the Model Rules of Professional Conduct (and the corresponding rule in each jurisdiction). Inherent in that responsibility is the obligation to ensure that work product generated by AI is coherent, defensible, and consistent, reflecting sound

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legal knowledge. Relying upon AI-produced or informed work product that does not meet this standard is likely to be deemed a violation of Rule 1.1.

To ensure that they are only utilizing AI systems that meet this standard, lawyers need to understand how AI operates and, where training the system is required, play an active role in the training. It is incumbent on a lawyer to proactively inquire with the vendor offering the AI system about how the technology operates, common pitfalls, and tips for optimal, accurate outcomes.

One challenge is that AI often operates in a so-called "black box," where users are left in the dark as to why AI reached a conclusion or drafted an answer. Rouse, Margaret, [What Does Black Box AI Mean?](#) Techopedia, 10 Mar. 2023. ChatGPT, for example, can analyze a factual scenario and provide causes of action to pursue based on those facts, but it cannot, as of today, tell you why it reached that answer. Without understanding why the question was answered in a particular way, a lawyer cannot assess the accuracy of the answer. At a minimum, competent representation means that you can tell a client how you reached an answer—the inputs, the weight of the factors, the countervailing arguments. Relying on "black box" AI fails to meet that requirement.

Because AI systems may misinterpret context or confuse words with multiple meanings, it is important that a lawyer ensure that any information fed to the system for training or AI learning purposes is accurate and unlikely to result in misinterpretation. This means that based on a task's complexity, potential for misinterpretation, or materiality, a lawyer may properly conclude that the project is better suited for a human lawyer than an AI system.

In the same way that lawyers in a supervisory role are required to "make reasonable efforts to ensure that the [lawyers that they supervise] conform[] to the Rules of Professional Conduct," lawyers are responsible for the quality of the results generated by AI systems. Model Rules of Pro. Conduct r. 5.1(b) (Am. Bar Ass'n 2019) (Model Rule 5.1). Simply blaming mistakes, inconsistencies, or conclusions informed by improper context on an AI system will not cut it. The same is true if a lawyer attempts to evade responsibility by claiming to lack knowledge about how the AI system generally operates or how its conclusions are reached.

Work product and conclusions reached by AI cannot replace human judgment and must be reviewed by lawyers for completeness and correctness. In conjunction with a lawyer's Rule 5.1 supervisory obligations, a lawyer who supervises other lawyers needs to know whether those other lawyers are using AI to perform legal tasks. See Model Rule 5.1(b). It behooves a lawyer to conduct a thorough review to validate results reached by an AI system and ensure that they are consistent and replicable. For example, if AI is used for document coding and review at the discovery stage, a lawyer should consider reviewing a sample set of documents to validate the results generated by AI. Similarly, if AI is used to generate a legal document, a lawyer should closely review the language and the law implicated to ensure that both the relevant facts and law were considered.

Confidentiality Concerns

Protection of client confidences is perhaps the most fundamental duty in the legal profession. After all, the authority to practice law "is the true privilege, not the right, to be entrusted with a client's confidences, aspirations, freedom, life itself, property, and the very means of livelihood" [Baird v. State Bar of Ariz., 401 U.S. 1, 20 \(1971\)](#) (Blackmun, Harlan, & White, JJ., dissenting). Lawyers owe a duty of confidentiality to their clients, which means that they

shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted [under certain circumstances, including "when appropriate in carrying out the representation"].

Model Rules of Pro. Conduct r. 1.6 cmt. [5] (Am. Bar Ass'n 2023) (Model Rule 1.6); Model Rule 1.6(a).

This rule naturally applies when a lawyer is using AI in the course of representing a client.

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In order to use AI to code documents, formulate legal conclusions, generate legal documents, or for a multitude of other pursuits, a lawyer must necessarily provide client information to the AI system. The client information provided to the AI system is generally viewable to the system vendors and/or developers. By way of example, ChatGPT stores personal user and conversation data, which can be viewed by developers and used to improve the system. See Natalie, [What is ChatGPT](#). Open AI, last visited 7 Apr. 2023.

Similarly, all documents uploaded to a document review platform—which could easily comprise millions of documents in a large-scale litigation—are subject to whatever security measures, strong or weak, the platform has in place. When using an AI program to generate legal documents, such as wills, incorporation documents, real estate documents, loan agreements, promissory notes, contracts, or a plethora of other documents, the application collects and stores highly sensitive personal or business information in order to construct the finished product.

All lawyers should take precautionary measures to understand the AI system's operative security policies, including the extent to which documents are retained, the time frame for which they are preserved, any encryption technology, what departments or parties employed by the AI vendor can view the information, and plans in the event of a data breach. You should also request and retain copies of the system's data privacy policies—if a client's information is ever compromised as a result of a data breach, you will be glad that you have it. Any information that you learn from vendors about the system's security features should be memorialized in writing for the same purpose.

To comply with the Model Rule governing confidentiality, a lawyer must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Model Rule 1.6(c). By proactively educating yourself about an AI system's privacy policies and response to a data breach, you will be better equipped to demonstrate your compliance with the rule if you ever find yourself in a less-than-ideal situation involving AI technology.

Duty to Communicate

The Model Rules contemplate that, as a general matter, the client chooses the objectives of the representation and the lawyer chooses the strategy to achieve those objectives. But lawyers are required to "consult with the client" about the means they choose in pursuit of their client's goals. Model Rules or Pro. Conduct r. 1.4(a)(2) (Am. Bar Ass'n 2023) (Model Rule 1.4). That means that if AI is writing legal documents, a client must be told, and given the opportunity to object. It follows that when a lawyer plans to use AI, including document review or generation technology, or other analysis tools, the client should be kept apprised of such plans so that the client can "make informed decisions regarding the representation." Model Rule 1.4(b).

In many situations, the costs related to use of an AI system will be passed along to the client, and the lawyer may license or otherwise sign an agreement to use the AI technology on the client's behalf. It is crucial that a lawyer include their client in those conversations. Some clients, including those with cost sensitivities or heightened privacy concerns, may prefer not to pay for additional technology or assume additional privacy risks inherent in using AI products.

In consulting with the client, the lawyer should explain:

- The objective that AI involvement would achieve
- The anticipated costs –and–
- Any benefits or drawbacks to using AI over lawyer (or support staff) labor

See Model Rule 1.4(a)(2) (providing that lawyer should "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

The potential benefits include increased accuracy, speed, cost savings, and replicability. Of course, if a client has more specific inquiries about how their data will be secured by the AI vendor or the protections that would be offered in the event of a privacy breach, the lawyer should consult with the vendor to adequately address such

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questions. Also keep in mind that work produced by AI as part of a case must be preserved as part of the client file. See Model Rules of Pro. Conduct r. 1.15 (Am. Bar Ass'n 2023).

Conclusion

AI is a tool with the potential to transform the legal industry by making lawyering more productive and efficient. It also has potential for misuse. By understanding the ethical limitations on the use of AI, lawyers can feel more confident incorporating it into their practices. If a lawyer has questions about their obligations under the rules of professional conduct related to the use of AI or otherwise, they can and should get confidential legal advice to ensure compliance with the rules. See Model Rule 1.6 cmt. [9] ("In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.").

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