

ETHICAL DILEMMA: Ethical Considerations When Using Generative Artificial Intelligence

Using generative artificial intelligence (GAI) can save you a lot of time and drudgery, when used correctly in your practice. But what are the ethical considerations?

BY SARAH E. PETERSON

Question

My firm is exploring using generative artificial intelligence (GAI) to gain efficiencies in our representation of clients. What special ethical considerations should we think about when deciding whether to use GAI?

Answer

The increased use of GAI tools in the practice of law has spurred robust discussions about how lawyers should navigate their ethical responsibilities when employing GAI.

In July 2024, the American Bar Association (ABA) issued Formal Opinion 512,¹ providing an in-depth analysis and discussion of rules lawyers should consider when evaluating whether to use GAI and which GAI tool to use.

The central message regarding the intersection of ethics and GAI is this: Lawyers' core ethical responsibilities are unchanged, just as they were unchanged with the introduction of the use of computers and the internet in the practice of law.

What is GAI? LexisNexis defines *artificial intelligence*, the "AI" in GAI, as "[c]omputer software and systems that learn, plan, reason or process natural language as they go rather than only relying on pre-programmed tasks, i.e., speech recognition, computer vision, translation between (natural) languages, as well as other mappings of inputs."

The article defines *generative artificial intelligence* as "an algorithm that generates new outputs based on the data it has been trained on. ... Generative AI creates new content in the form of images, text, audio, and more."²

Competence

SCR 20:1.1 requires lawyers to provide "competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment 8 to that rule states: "To 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."

Certainly, the requirement that a lawyer maintain competence in relevant technology applies to GAI. A lawyer can neither ignore GAI altogether nor use it without first understanding



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it. The ABA opinion explains:

“Over time, other new technologies have become integrated into conventional legal practice in this manner. 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. As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.”

The duty of competence also requires lawyers who use GAI to carefully review the original content created by GAI and exercise independent professional judgment in assessing the content’s accuracy and efficacy. In other words, artificial intelligence is not a substitute for real intelligence. As the ABA opinion explains:

“A lawyer’s reliance on, or submission of, a GAI tool’s output – without an appropriate degree of independent verification or review of its output – could violate the duty to provide competent representation as required by Model Rule 1.1. While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.”

Confidentiality

SCR 20:1.6 prohibits a lawyer from revealing “information relating to the representation of a client unless the client gives informed consent, except for disclosures impliedly authorized in order to carry out the representation.”³ The duty of confidentiality extends to former clients (SCR 20:1.9) and prospective clients (SCR 20:1.18).

Before inputting any confidential client information into a GAI tool, the lawyer must be aware of the risk of that information being disclosed to or accessed by other people. When using commercially available GAI tools, the

information might be used by the tool to teach itself and then disclosed when answering another user's prompt. Even if a firm has a proprietary GAI tool, there is a risk that confidential information input into the tool may be disclosed in response to another lawyer's prompt and the information passed on to another client of the firm.

The ABA opines that because of those risks, it is necessary to obtain a client's informed consent before entering confidential information into a GAI tool:

"Because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool. When consent is required, it must be informed. To obtain informed consent when using a GAI tool, merely adding general, boilerplate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient."

The ABA opinion also discusses the information a lawyer needs to evaluate the risk that confidential information will be accessed or disclosed:

"As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies. Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information."

Communication

Even if a lawyer concludes that there is no risk of revealing confidential client information by use of a GAI tool, a lawyer must consider whether the communication rule, SCR 20:1.4, requires the lawyer to disclose to the client the use of a GAI tool.

Particularly relevant is SCR 20:1.4(2), which requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." In determining whether it is necessary to disclose the use of GAI to a client, the ABA recommends the lawyer consider "the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work."

The ABA opinion goes on to state: "Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a

logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation."

If a client asks whether a lawyer uses or intends to use GAI, the lawyer must answer honestly. If a client requests that a lawyer not use GAI, the lawyer must abide by the client's wishes. If a lawyer and a client disagree on the use of GAI in a representation, and the lawyer believes the client's position will prevent the lawyer from providing diligent and competent representation to the client, the lawyer should discuss the concerns with the client and, if necessary, withdraw from the representation.⁴

Fees and Billing

If a lawyer and a client agree on the use of GAI, they must also agree on the fees and expenses associated with its use. The requirement under SCR 20:1.5(a) that fees and expenses be reasonable applies to the use of GAI, just as it does to more

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SCR 20:1.5(b) requires that the rate and basis for any fees and expenses be communicated to the client; in some situations, the communication must be in writing. The ABA opinion offers several general considerations for firms when they are setting billing policies around the use of AI:

- Lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time.

- To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance.

- Lawyers must remember that they cannot charge clients for time necessitated by their own inexperience. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively.

The use of GAI in the practice of law will likely result in significant changes in the way firms bill clients. If the total fees and expenses are reasonable and the client is informed of the rate and basis of the fees and expenses, firms are free to develop new methods of billing, such as unit billing or value billing.

Meritorious Claims & Contentions and Candor Toward the Tribunal

In addition to ethical obligations to their clients, lawyers also have ethical obligations to the court. Those obligations must

be considered when using GAI.

Output from a GAI tool needs to be carefully reviewed to ensure a lawyer's submission to the court is not frivolous (SCR 20:3.1), does not knowingly make a false statement of law or fact (SCR 20:3.3), and does not make an unintentional representation (SCR 20:8.4(c)).

The ABA opinion gives examples of situations in which these rules have been implicated and discusses how courts are managing such situations:

- Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.

- Some courts have responded by requiring lawyers to disclose their use of GAI. As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, failure to include controlling legal authority, and misleading arguments.

Lawyers should be aware of local court rules or policies that regulate the use of GAI tools.

Supervisory Responsibilities

SCR 20:5.1 and SCR 20:5.3 require managerial lawyers to make reasonable efforts to ensure that the firm uses measures that provide reasonable assurance that all lawyer and nonlawyer staff conform to the Rules of Professional Conduct. This responsibility extends to

any vendor a law firm contracts with to perform work on behalf of the firm.

The ABA opines the following for firms that choose to use GAI tools:

“Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools. Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained, including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use. Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.”

Because of the ever-changing nature of GAI, it is likely that firms will need to regularly update policies on the use of GAI and conduct ongoing training in its use.

Promises and Pitfalls

This article is not an exhaustive examination of ethical considerations when using GAI. Lawyers have a duty to comply with all Rules of Professional Conduct at all times.

The use of GAI tools in the practice of law is full of promises and pitfalls. Lawyers should continually educate themselves and their staff on the appropriate and ethical use of such tools. **WL**

ENDNOTES

¹This article examines only the analysis and discussion found in ABA Formal Opinion 512. Several other jurisdictions have issued opinions or guidelines regarding the use of GAI. See Preliminary Guidelines on New Jersey Lawyers' Use of Artificial Intelligence (Jan. 24, 2024); Florida Bar Ethics Opinion 24-1 (Jan. 19, 2024); State Bar of California Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (Nov. 16, 2023); Pennsylvania Bar Association and Philadelphia Bar Association Joint Formal Opinion 2024-200 (May 22, 2024); New York State Bar Association Report and Recommendations of the State Bar Association Task Force on Artificial Intelligence (April 2024).

²“AI Terms for Legal Professionals: Understanding What Powers Legal Tech,” LexisNexis Legal Insights, March 23, 2023.

³Wisconsin Formal Ethics Opinion EF-17-02 discusses the breadth of information covered by SCR 20:1.6(a). SCR 20:1.0(f) defines *informed consent* as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

⁴SCR 20:1.16 (a), (b). **WL**