SQUIRE PATTON BOGGS

The Sound of Ethics

Professional Conduct Program

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I. The No Contact Rule.

A. Rule 4.2 of the ABA Model Rules of Professional Conduct sets forth the no contact rule.

1. It states that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

B. There are a number of policy goals underpinning Rule 4.2.

1. To prevent attorneys from exploiting the disparity in legal skills between the attorney and lay people.

2. To prevent inadvertent disclosure of privileged information.

3. To facilitate settlement by channeling disputes through lawyers accustomed to the negotiation process.

C. General elements of the no contact rule.

1. Rule 4.2 applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

2. The rule applies even though the represented person initiates or consents to the communication—something to keep in mind.

3. Rule 4.2, however, does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.

4. Also, parties to a matter may communicate directly with each other.

D. A lawyer may counsel the client on communicating with a represented person.

1. Comment 4 to ABA Model Rule 4.2 states that a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

2. But the attorney cannot use the client as a puppet.

    a. The attorney cannot so script the communication that the lawyer is in fact making the communication.

    b. Comment 4 to Model Rule 4.2 reminds us that Rule 8.4 prohibits a lawyer from doing indirectly what the lawyer is prohibited from doing directly.

E. The no contact rule has a knowledge requirement.

1. A lawyer does not violate the rule unless the lawyer has actual knowledge that the person is in fact represented in the matter to be discussed.

2. Such actual knowledge, however, may be inferred from the circumstances.

3. A lawyer cannot evade the requirement of obtaining the consent of opposing counsel by ignoring the obvious.

F. Application of the no contact rule in the corporate context.

1. The no contact rule prohibits communications with a *constituent* of a company who supervises, directs, or regularly consults with the organization's lawyer concerning the matter, or has authority to obligate the company with respect to the matter or whose act or omission in connection with the matter may be imputed to the company for purposes of civil or criminal liability. *See* Comment 7 to ABA Model Rule 4.2.

2. Consent of the company's lawyer, on the other hand, is *not* required for communication with a *former* constituent.

3. Moreover, if a constituent of the company is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of Rule 4.2.

4. Comment 7 to ABA Model Rule 4.2 cautions that in communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization, in contravention of ABA Model Rule 4.4, which addresses respect for the rights of third persons.

5. The bottom line is that lawyers needs to be careful not to run afoul of Rule 4.2 in the corporate context.

G. Application of Rule 4.2 to in-house counsel.

1. The mainstream view is that it generally is fair game for opposing counsel to have ex parte contact with in-house counsel.

    a. But you should always check the ethics law in your particular jurisdiction before doing so because the law may vary.

2. One of the leading ethics opinions on this issue is ABA Formal Opinion 06-443.

    a. In its Formal Opinion, the ABA concluded that there is generally no requirement for the lawyer wishing to speak with inside counsel to first obtain permission of the organization's outside counsel.

    b. A number of courts and ethics authorities from around the country have agreed with the ABA's approach to Rule 4.2.

        i. In D.C. Opinion 331, the D.C. Bar Legal Ethics Committee concluded that a lawyer generally does not need prior consent from a company's

outside counsel before communicating with in-house counsel on the subject matter of the representation.

ii. In Opinion 2007-1, the New York City Bar Association concluded that the no contact rule does not prohibit a lawyer from communicating with an in-house counsel of a party known to be represented in that matter, so long as the lawyer seeking to make that communication has a reasonable, good faith belief that such an individual is serving as a lawyer for the entity.

iii. The Virginia Supreme Court concluded in 2021 that the no contact rule does not prohibit a lawyer from communicating directly with in house counsel for an organization that is represented by outside counsel.

3. In short, the mainstream view is that opposing counsel generally have the green light to contact in-house counsel directly.

   a. This view makes sense because in-house lawyers are usually seasoned lawyers.

   b. In-house lawyers are unlikely to be manipulated by opposing counsel to make harmful disclosures, so the need for the protections of the no contact rule is much less apparent.

4. But beware: Not all jurisdictions give the green light to opposing counsel to contact in-house counsel directly.

   a. There are ethics opinions from North Carolina and Philadelphia which have placed limits on communicating with an adverse party's inside counsel having managerial responsibility on behalf of the organization.

i. North Carolina State Bar Eth. Opinion 128 (1993).

ii. Philadelphia Bar Ethics Opinion 2001-11 (2001).

II. The Ethics Of Negotiation.

A. In general, a lawyer representing a client in negotiations cannot make a false statement of material fact to a third person.

B. The relevant rule is Rule 4.1 of the ABA Model Rules of Professional Conduct.

1. This rule states that in the course of representing a client, a lawyer may not:

a. make a false statement of material fact or law to a third person, or

b. fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client," unless disclosure is prohibited by the lawyer's duty of confidentiality under Rule 1.6.

C. Comment 1 to ABA Model Rule 4.1 explains that a misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

D. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

E. The general rule gets blurry in the negotiation context where lawyers are less than forthright about their clients' position.

1. Statements about a party's willingness to compromise or its negotiating goals ordinarily are not considered "false statements of material" fact under the ethics rules.

a. This includes statements such as, "this is our bottom line," or "you have one week to consider."

2. A lawyer may engage in posturing and "puffery" in negotiations without breaching the ethics rules.

a. A key ethics opinion is ABA Formal Opinion 06-439.

i. In Formal Opinion 06-439, the ABA expressly stated that remarks characterized as "posturing" or "puffing" are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely and must be distinguished from false statements of material fact.

ii. The ABA recognized that a party in a negotiation might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position, but such remarks do not violate Rule 4.1.

Example: A buyer of products or services might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating.

iii. The ethical line is crossed, however, when an attorney makes a false statement of material fact.

Example: Where a lawyer representing an employer in labor negotiations states to the union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee when in fact the lawyer knows it actually will cost only $20 per employee. This goes beyond mere "posturing."

F. Puffery and posturing during negotiations is not a breach of the ethics rules.

1. Statements about your client's negotiating goals or its willingness to compromise are not unethical misrepresentations of fact; they're seen as negotiation tactics.

2. As Comment 2 to ABA Model Rule 4.1 explains: "Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."

    a. In its Comment, the ABA attempts to distinguish between statements regarding how a counter-party values a claim—which are not an ethical violation—and statements about facts material to the claim—which are an ethical violation.

G. The bottom line: Negotiations can be fraught with ethical pitfalls for lawyers.

1. Consult with an ethics attorney if you think you're close to the ethical line.

III. Duty to Report Under Rule 8.3

A. ABA Model Rule 8.3 imposes a general duty on lawyers to report the misconduct of other lawyers.

B. The rule requires reporting when you witness conduct that raises "a substantial question" as to another lawyer's honesty, trustworthiness or fitness.

C. The rule does not expressly address out-of-state lawyers, and no ABA opinion has addressed the subject. The states ethics opinions are not uniform.

1. Ill. State Bar Ass'n, Opinion No. 94-23 (1995) (duty to report out of state attorney)

2. Mich. Standing Comm. on Pro. Ethics and Resp., Opinion RI-122 (1992) (lawyer should report out of state attorney).

3. Miss. State Bar, Ethics Opinion 221 (1994) (duty to report out of state attorney)

4. N.Y. Comm. on Prof. Ethics, Opinion 1091 (2016) (duty to report out of state attorney)

5. R.I. Sup. Ct. Ethics Advisory Panel, Opinion 93-63 (1993) (no duty to report).

D. The safest approach for a lawyer who witnesses misconduct by an out-of-state attorney is to report it, both in the reporting lawyer's home jurisdiction, and in the jurisdiction where the misbehaving lawyer is licensed.

IV. Overview of How AI is Being Used In The Practice of Law.

A. Electronic discovery.

1. Current e-discovery tools use a method of predictive coding to classify documents as relevant or irrelevant, among other classifications.

2. AI tools can be just as accurate as humans—if not more accurate.

3. AI drives efficiency and speed, and dramatically reduces costs for the client.

B. Preparing first drafts of discovery responses.

1. AI tools are specifically designed to evaluate discovery requests and produce first drafts of discovery responses.

2. These AI tools can save time and money and reduce administrative burden.

C. Legal research.

1. AI can use machine learning to detect similarities and differences among legal authorities.

2. AI also helps keep attorneys up to date on developments in the law that could impact their matters.

3. AI-assisted research tools ultimately allow lawyers to learn the law faster, easier, and more accurately.

D. Litigation analysis.

1. AI tools can analyze vast amounts of historical legal data, including case outcomes, judges' rulings, and legal precedents, to provide predictive insights.

2. AI can compare the facts of your case to other cases already decided by a court (or courts) to give you a prediction of how your case will fare.

E. Contract management.

1. AI-driven contract management tools are valuable to lawyers, especially inside counsel, who quickly need to identify important information in contracts.

2. AI tools can flag termination dates and alert the lawyer about deadlines for sending a notice of renewal.

3. The AI tools also can identify important provisions in contracts, such as indemnification obligations and choice of law provisions, among others.

F. Detecting wrongdoing within an organization.

1. AI can be utilized to search company records, such as emails, to detect bad behavior before it can surface.

2. AI is being used to sniff out bribery, fraud, compliance issues, even potential litigation – all based on the content of the company's own documents and data.

3. AI can summarize conversations and the ideas discussed, identify code words, note the frequency of the communications, and even identify the mood of the speakers.

G. Legal spend analysis.

1. AI is being used by in-house law departments for legal spend analysis.

2. The AI provides the capability to:

a. analyze what work was done by an outside law firm,

b. how it aligns with other work done by a firm,

c. how the work and efficiency compares with work provided by other firms engaged by the company or organization, and

d. how the work and efficiency compares to the market generally.

V. Ethical Issues in the Use of Generative AI in the Practice of Law.

A. What is generative AI?

1. An advanced AI tool that can produce human-like responses to questions posed by users.

2. It is capable of generating text, images, or other data using generative models, often in response to prompts.

3. "Generative" means that the AI tool learns as it goes; its knowledge base and outputs are not static, but change over time based on new information and data provided.

4. One of the most popular generative AI tools is ChatGPT, a chatbot developed by OpenAI and launched on November 30, 2022.

B. The use of generative AI in the practice of law raises several ethical issues.

1. Using generative AI tools could violate a lawyer's duty of confidentiality to the client.

a. To use a generative AI tool, a user must input data to generate a response, but it is not clear that the inputted data remains confidential.

b. More generally, AI tools may add information inputted by users to their collective data sets to improve their AI systems and even may share that inputted data with allied partners.

d. What this means is that lawyers who input confidential client information into a generative AI tool risk breaching their ethical duty of confidentiality.

e. Lawyers also potentially risk waiving the attorney-client privilege.

2. The problem of AI hallucination is another ethical issue raised by generative AI.

    a. AI hallucinations occur when AI tools fabricate information, but confidently behave as if they are spouting true facts.

    b. It has been well-documented that AI tools sometimes present facts in a misleading way or even present "facts" that are fabricated, such as made-up court cases, holdings, and legal concepts.

    c. AI tools are only as good as the information they are trained on, and the information is not always correct.

    d. What this means is that using generative AI tools in the practice of law may lead to false or misleading advice and work product.

    e. In 2023, a New York lawyer found himself in hot water for filing a brief that contained case citations generated by ChatGPT that were made up.

        i. Six of the cases that the lawyer cited were "bogus judicial decisions with bogus quotes and bogus internal citations"—a circumstance that the judge in that case called "unprecedented."

        ii. The New York lawyer at issue claimed that ChatGPT not only provided the legal sources, but also assured him of the reliability of the opinions and citations.

        iii. The New York lawyer told the court that he falsely assumed ChatGPT was "a super search engine," and he did not realize that it could fabricate cases and knowledge.

        iv. The judge imposed joint and several sanctions of $5,000 on the lawyers involved (one who wrote

the motion, and the other, his partner, whose name was on it). *See Mata v. Avianca, Inc.*, Case No. 1:2022cv01461 (S.D.N.Y. 2023).

3. The problem of bias in the use of generative AI is another well-documented problem that raises significant ethical concerns.

    a. A known problem with generative AI and all machine learning models is that the information and past transactions used to train AI systems may introduce racial, economic, or sexual bias in the AI system's output.

        i. Even a carefully created AI system can reflect the biases and prejudices of its developers and/or the information that is inputted.

        ii. For example, ChatGPT is trained on billions and billions of words—all sources of data scraped from the Internet that could be biased.

    b. Bias associated with the use of AI has ethical implications for lawyers.

        i. Rule 8.4(g) of the ABA Model Rules of Professional Conduct prohibits harassment and discrimination by lawyers against eleven protected classes.

        ii. Rule 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or 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."

iii. About 20 states have adopted some variation of ABA Model Rule 8.4.

iv. If a lawyer's use of AI leads to discriminatory outputs, or involves biased inputs, even unknowingly, the lawyer not only risks violating his or her ethical duty of competence, but also unwittingly may violate applicable ethical rules prohibiting discrimination.

v. The ABA has urged courts and lawyers to address the emerging ethical and legal issues related to the usage of AI in the practice of law, including:

(1) bias, explainability, and transparency of automated decisions made by AI.

(2) ethical and beneficial usage of AI.

(3) controls and oversight of AI and the vendors that provide AI.

See Resolution No. 112 of the American Bar Association House of Delegates adopted August 12-13, 2019.

VI. Overview of Ethical Obligations in Using AI in the Practice of Law.

A. Duty of competence.

1. One of the basic duties that lawyers owe to their clients is the duty of competence, which is embodied in Rule 1.1 of the ABA Model Rules of Professional Conduct.

    a. Under ABA Model Rule 1.1, a lawyer must provide competent representation to his or her client.

    b. Rule 1.1 states that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

2. The duty of competence also includes the duty of *technological* competence.

    a. Comment 8 to Rule 1.1 makes clear that the duty of competence includes keeping "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . ."

3. Lawyers and their staff must have a general understanding of the technology that is available to serve clients.

    a. This includes understanding the risks and benefits of technology relevant to one's practice.

    b. AI is becomingly increasingly mainstream, so the duty of competence increasingly will include understanding the capabilities and potential drawbacks of using AI.

    c. This does not mean that lawyers are expected to know all the technical intricacies of AI systems, but a lawyer's duty of competence does include having a basic understanding of how AI technology produces results.

B. Duty of supervision.

1. Lawyers also have a continuing duty to maintain controls and oversight of AI.

2. As a practical matter, the lawyer remains responsible for the use of AI in the practice of law.

3. Under ABA Model Rules 5.1 and 5.3, lawyers have an ethical obligation to supervise nonlawyers who are assisting them in the provision of legal services to ensure that their conduct complies with the Rules of Professional Conduct.

   a. As the Comments to Rule 5.3 make clear, the duty of supervision encompasses nonlawyers, not only within the law firm, but also outside the law firm, including, as an example, hiring a document management company to create and maintain a database for complex litigation.

   b. Thus, just as lawyers are required to supervise the work of their paralegals, secretaries, and other staff members, lawyers must maintain oversight of AI vendors and the AI used in client matters to ensure compliance with the ethics rules.

C. Duty of confidentiality.

1. ABA Model Rule 1.6 requires that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

2. The use of some AI tools may require client confidences to be shared with third-party vendors; thus, lawyers must take appropriate steps to ensure that their clients' information appropriately is safeguarded.

3. A lawyer should communicate with third-party providers about confidentiality concerns such as:

a. the type of confidential client information provided,

b. how the information will be stored,

c. who or what has access to the information, and

d. what safeguards the third-party provider has in place to preserve confidentiality.

D. Duty of communication.

1. Lawyers have an ethical duty of communication, which is embodied in ABA Model Rule 1.4.

2. Rule 1.4 requires a lawyer "to reasonably consult with the client about the means by which the client's objectives are to be accomplished."

3. Rule 1.4 also requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

a. Reasonableness under Model Rule 1.4 may be measured by the standard of competent representation under ABA Model Rule 1.1, which includes the duty of technological competence.

4. If a lawyer intends to use AI in providing legal services to clients, the lawyer may have an obligation under Rule 1.4 to discuss that decision with clients.

5. Furthermore, if a lawyer chooses not to use AI tools in a manner where it may be beneficial to the client to do so, the lawyer may arguably have an obligation under the duty of communication to discuss that with the client as well.

a. This is especially true if not using the technology will increase the costs to the client.

b. As AI becomes more mainstream, more and more clients will expect their lawyers to use AI, so communication with the client may increasingly be necessary to explain why efficient AI tools are not being used for a particular client matter.

E. Reasonableness of Fees.

1. ABA Model Rule 1.5 prohibits a lawyer from charging or collecting unreasonable fees or unreasonable amounts for expenses.

2. If using AI can significantly reduce the time it takes to perform legal services, then failing to use the technology may result in charging the client an unreasonable fee in violation of Rule 1.5.

3. And of course, the failure to use AI technology also could run afoul of the duty of competence under Rule 1.1.

a. This is not to say that an attorney should substitute AI for his or her own judgment.

b. Rather, the lawyer should consider AI as a way to potentially reduce legal spend with the client's approval.

4. In-house lawyers at major companies have already begun using cost-saving AI tools.

a. One major company's legal department implemented an AI-based contract drafting tool that has reduced the drafting time on some matters from 10 hours to about 15 minutes.

b. One major bank implemented an AI tool that reviews commercial loan agreements, saving an estimated 360,000 hours of manual work by lawyers and loan officers each year.

c. Other companies have taken different approaches:

i. Some have expressly banned the use of their data going into an AI program.

ii. Others require outside counsel to obtain written consent prior to using AI.

5. Using AI as a cost-saving measure may become the expected norm in the legal world.

a. One Canadian judge held that costs and fees can be excessive if attorneys fail to use AI tools.

b. In examining the reasonableness of legal research fees sought to be recovered by defendant's counsel, the Canadian judge observed that "if artificial intelligence sources were employed, no doubt counsel's preparation time would have been significantly reduced." *Cass v. 1410088 Ontario Inc.*, 2018 ONSC 6959.

VII. Preventing or Minimizing Bias in the Use of AI in the Practice of Law.

A. To comply with their ethical obligations while avoiding bias, lawyers should embrace AI technology that can explain its decision-making process in understandable terms.

B. Lawyers need AI systems that work as expected and produce transparent explanations for the decisions that they make.

C. Lawyers, in particular, should be cautious about using "black box" AI that cannot explain how an output was generated based on the input.

1. How AI produces results can be quite an enigma.

2. This is because many AI tools are "black box" models that arrive at conclusions or decisions without providing any explanation on how they were reached.

3. As one technical dictionary explains: "In black box models, deep networks of artificial neurons disperse data and decision-making across tens of thousands of neurons, resulting in a complexity that may be just as difficult to understand as that of the human brain. In short, the internal mechanisms and contributing factors of black box AI remain unknown." Yasar Kinza, Black Box AI, TechTarget, https://www.techtarget.com/whatis/definition/black-box-AI.

D. To prevent or minimize bias, lawyers should consider the following:

1. whether the AI tools were developed by diverse teams,

2. the nature of the data used to train the AI, including the volume, source, testing, and scientific acceptance of the data used,

3. whether the AI was tested for bias,

4. whether the AI is built with bias-detection systems, and

5. whether the decisions of the AI can be clearly traced or explained.

E. Real-life example of Amazon.

1. Several years ago, Amazon adopted an AI tool to automatically review job applicant resumes.

2. Amazon had to stop using the AI tool because it discovered that it was biased against women.

a. This happened because the AI tool had been trained to review potential job applicants by looking at patterns in resumes submitted in the past 10 years.

b. As it turned out, most of the resumes from the past 10 years were from men.

c. Thus, the AI tool learned that men were the desired job candidate.

F. Lawyers should strive to embrace AI technology that can explain its decision-making process in understandable terms—known as explainable AI.

1. With respect to black box AI tools such as ChatGPT, lawyers should be mindful of how outputs are generated and in which instances it is appropriate to make use of these outputs.

G. There is debate and discussion over whether AI tools can promote diversity, equity, and inclusion efforts.

1. Some supporters of AI tools argue that they can be used to circumnavigate the inherent bias and unpredictability of humans.

a. AI might be used to identify candidates from underrepresented groups without the limitations of human recruiting representatives.

b. AI also might be used to make language of job postings more inclusive.

i. For one company, AI analysis revealed that the phrase "prior experience" drew more male applicants, while the phrase "demonstrated ability" was more likely to attract female candidates.

c. AI is also relevant for current employees.

i. Law firms, for example, might use AI to evaluate compensation policies or to design targeted retention programs for diverse employees.

2. Lawyers, however, must be mindful that AI tools can be biased and therefore can undermine diversity, equity, and inclusion efforts.

H. Lawyers are responsible for the quality, accuracy, and absence of prohibited discrimination in their ultimate legal advice to clients and communications to courts and other third parties.

VIII. Overview of Recent Ethics Opinions Addressing the Use of Generative AI in the Practice of Law.

A. In the past year or so, a number of jurisdictions have issued ethics opinions or "guidance" on the use of generative AI in the practice of law.

1. ABA Formal Opinion 512 (July 29, 2024)

2. D.C. Bar Ethics Opinion 388 (April 11, 2024)

3. Florida Bar Ethics Opinion 24-1 (January 19, 2024)

4. New York State Bar Association AI & Generative AI Guidelines (April 2024)

5. New Jersey Supreme Court "Preliminary Guidelines" on Use of AI by New Jersey Lawyers (January 25, 2024)

6. California "Practical Guidance" for Use of Generative AI in the Practice of Law (November 16, 2023)

B. The bottom line from the recent ethics authorities is that it is generally OK for lawyers to use generative AI.

1. There is nothing inherently improper about it.

2. But appropriate caution must be exercised.

C. There are some common themes that run through all the ethics opinions and guidelines to date.

1. Importance of protecting client confidentiality when using generative AI tools.

a. Florida Bar Ethics Opinion 24-1, for example, warns that lawyers must understand whether they're using so-called "self-learning" AI, which stores inputted data and possibly reveals it in response to future inquiries by

others, which risks loss of client confidentiality and potential waiver of the attorney-client privilege.

b. The D.C. Bar highlights a similar concern in its ethics opinion.

i. The D.C. Bar says that to protect client confidentiality, lawyers should ask two questions:

(1) Will the information I provide to the generative AI tool be visible to the AI provider or other strangers to the attorney-client relationship?

If the answer to this question is yes, that's at least a red flag, but it perhaps can be resolved by negotiating with the AI provider.

(2) Will my interactions with the generative AI affect answers that *later* users of the AI will get in a way that could reveal information I provided to the AI?

If they answer to this question is yes, the D.C. Bar suggests it may be more challenging to resolve. And the lawyer ultimately may need to refrain from using the generative AI tool.

2. Lawyers have a duty to supervise the use of generative AI for client-related matters.

a. This means lawyers must supervise outside vendors who provide generative AI services or tools to their law firm or legal department.

b. It also means that managerial and supervisory attorneys have duties when it comes to generative AI.

i. Managerial lawyers must establish clear policies regarding the permissible use of generative AI in their law firms or law departments.

ii. Supervisory lawyers must make reasonable efforts to ensure that the lawyers and nonlawyers comply with ethical obligations when using generative AI tools

iii. This includes proper training of subordinate lawyers and nonlawyers.

3. Reasonable fees under Rule 1.5.

a. The authorities uniformly agree on a basic point: AI tools allow lawyers to provide faster and more efficient legal services to clients, but lawyers may not charge hourly fees for the time saved by using generative AI.

i. The California Practical Guidance states that a lawyer must not charge hourly fees for the time saved by using generative AI.

ii. Florida Opinion 24-1 similarly makes clear that a lawyer may not use generative AI to engage in improper billing practices such as double-billing.

iii. D.C. Opinion 388 likewise states that lawyers may only bill for time they actually spend, even if the generative AI reduces the time the lawyers devote to the client matter.

D. ABA Formal Opinion 512.

1. The ABA opinion is perhaps the most influential ethics opinion on generative AI to date.

2. Much of the ABA's guidance is consistent with the prior ethics opinions and guidance from D.C., Florida, New York, New Jersey, and California.

3. The ABA, however, did offer some new guidance that is drawing criticism.

4. Highlights of the ABA's ethics opinion.

    a. The duty of competence under Rule 1.1.

        i. The ABA says what all the other ethics opinions to date have said: Lawyers have an ethical duty of competence when it comes to AI.

        ii. This doesn't mean that lawyers must become AI experts, but it does mean that lawyers should have a reasonable understanding of the generative AI technology that lawyers use.

        iii. To keep up with AI developments, the ABA says that lawyers should read about generative AI tools targeted at the legal profession and attend relevant CLE programs.

        iv. The ABA also warns that lawyers must be aware of the problem of AI hallucination, which occurs when generative AI produces nonsensical or incorrect outputs, but does so very convincingly.

        v. The ABA warns lawyers that lawyers must independently verify, or review for accuracy, generative AI outputs; otherwise they could violate their duty of competence.

        vi. This is in harmony with what other states, including California and Florida, have already said: Lawyers may not delegate their professional judgment to AI.

b. Duty of confidentiality under Rule 1.6.

i. Lawyers have a duty to keep client information confidential before a client consents to its disclosure.

ii. Once again, the ABA's guidance on AI is similar to the guidance from the state ethics opinions.

iii. Before lawyers input client confidential information into a generative AI tool, they must evaluate the risk that the information will be disclosed or accessed by others outside the firm.

iv. The ABA concludes that if a lawyer intends to use self-learning AI in the representation of a client, the lawyer must obtain the client's informed consent to using it.

v. So, as a practical matter, the lawyer may well have to have a meaningful conversation with the client or equivalently effective communication; in this context, informed consent means explaining to the client the risk that later users of the generative AI tool may have access to client information.

vi. The requirement of informed consent for self-learning AI is the reason why the ABA opinion is raising eyebrows.

c. The lawyer's duty of communication under Rule 1.4.

i. The ABA notes that even if Rule 1.6 would not require client consent, the duty to communicate under Rule 1.4 could require a lawyer to disclose the use of generative AI to a client.

ii. In other words, there are times when a lawyer has two independent duties to tell the client about the use of generative AI.

iii. The ABA lists some examples of when the duty to communicate under Rule 1.4 may be triggered:

- if the client asks about AI use;
- if outside counsel guidelines require disclosure;
- if the output of the generative AI will influence a significant decision in the matter, such as jury selection; and
- if using generative AI would violate the client's reasonable expectations.

d. Meritorious claims and contentions under Rule 3.1 and candor to the tribunal under Rule 3.3.

i. The ABA cautions that outputs from a generative AI tool must be carefully reviewed to ensure that the statements made to a court are not false.

ii. This guidance overlaps and reinforces what the ABA says about a lawyer's duty of competence.

e. A lawyer's supervisory responsibilities.

i. Managerial lawyers must establish clear policies regarding their law firm's permissible use of generative AI.

ii. Additionally, supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers comply with their ethical duties when using generative AI tools and that the conduct of

nonlawyers is compatible with the professional obligations of the lawyers.

f. Reasonable fees under Rule 1.5.

i. The ABA recognizes what all other state bars have already recognized: Lawyers may only bill for time they actually spend, even if generative AI reduces the time the lawyers devote to the client matter.

ii. The ABA also says that lawyers may not charge clients for time required by their own AI experience, including time spent learning how to use a generative AI tool that the lawyer will regularly use for clients.

IX. AI Could Enhance The Delivery of Pro Bono Legal Services and Help Bridge the Justice Gap in the U.S.

A. The justice gap refers to the disparity between the legal needs of low-income individuals and the availability of affordable legal services.

1. Studies reveal that 80% to 90% of civil legal needs for the underserved communities go unmet.

2. Demand for free or low-cost legal assistance far exceeds the supply of lawyers able to provide it.

B. AI has the potential to democratize access to legal information and empower individuals who otherwise could not afford a lawyer.

C. AI also can support lawyers in their pro bono efforts by promoting efficiency of legal work by jumpstarting legal research, handling voluminous document review, and providing case analysis.

D. In April 2024, the New York State Bar Association published a report and set of guidelines for the ethical use of AI in the practice of law that also addresses the broader topic of how generative AI may impact access to justice by disadvantaged groups.

1. The report specifically highlights how generative AI tools have the potential to enhance the accessibility, efficiency, and affordability of pro bono legal services.

2. Generative AI can help organizations serve many more pro bono clients than they currently serve.

E. It is important that pro bono organizations and low-income individuals get access to AI technology to ensure that AI does not end up widening the justice gap.

X. The Bottom Line on the Use of AI in the Practice of Law.

A. AI promises to be disrupting technology for our personal and business lives, similar to how email, the Internet, and smartphones transformed the lives of legal professionals.

B. Lawyers understandably are beginning to consider how generative AI can improve their practices and make them more competitive in the legal marketplace.

C. Based on current ethics guidance to date, it is OK for lawyers to use generative AI—there is nothing inherently improper about it—so long as appropriate caution is exercised.

D. As the New Jersey Supreme Court put it: "In this complex and evolving landscape, lawyers must decide whether and to what extent AI can be used so as to maintain compliance with ethical standards without falling behind their colleagues."