



# The Ethics of Using Generative AI in Legal Practice

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# Ethical Considerations in Using AI

- ▶ Competence: Understanding risks and benefits (MR 1.1)
- ▶ Duty of candor to the court (MR 3.3)
- ▶ Duty to communicate with clients (MR 1.4)
- ▶ Duty to supervise (MR 5.1-5.3)
- ▶ Confidentiality of client information (MR 1.6)
- ▶ Unauthorized practice of law (MR 5.5)
- ▶ Duty to exercise independent professional judgment (MR 2.1)
- ▶ Risk of bias
- ▶ Risk of violating IP laws

# Competence: Model Rule 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment:

[8] 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

# Competence: Knowing the Risks

- ▶ Using GAI for research: risk of hallucinations, errors: *People v. Zachariah C. Crabill*, Colorado November 22, 2023 (attorney suspended 90 days actual and one year total for submitting a brief that contained false case citations generated by ChatGPT; attorney falsely attribute the mistakes to a legal intern)
- ▶ *Mata v. Avianca, Inc.*, No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023)(submitting false citations generated by ChatGPT)
- ▶ *Ex Parte Lee*, 673 S.W.3d 755 (Tex. App. July 19, 2023)
- ▶ *United States v. Michael Cohen* (S.D. NY 12/18/23)(Cohen as client provided case citations obtained through Google Bard to lawyer who included them in brief without checking them)
- ▶ *U.S. v. Michel*, Case No. 19-148-1 (D.D.C., motion for new trial filed Oct. 16, 2023)(using GAI tool to prepare closing argument)

# Competence: Unlocking the Benefits

- ▶ Differentiate between different types of AI for different tasks
  - ▶ internal admin processes vs client work
  - ▶ summarizing or review tasks
  - ▶ document review
- ▶ Require lawyer review and exercise of judgment when appropriate
- ▶ Exercise robust quality control processes
- ▶ Utilize training to develop competence e.g. prompt engineering
- ▶ Capabilities are rapidly evolving

# Duty of Candor MR 3.3

- ▶ A lawyer shall not knowingly
  - ▶ Make a false statement of law or fact to a tribunal or fail to correct a false statement of law or facts previously made to the tribunal by the lawyer;
  - ▶ Fail 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

# Court Rules Require Disclosure of Use of AI

- ▶ Judge Brantley Starr, USDC N.D. Texas: “While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle.”
  - ▶ Requires attorney attestation that no portion of any filing was drafted by generative AI, or that any portion that was so drafted was checked for accuracy by a human using traditional databases
- ▶ Numerous other courts have adopted similar policies
- ▶ Other courts prohibit certain uses of GAI

# Rule 5.5: Unauthorized Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

## Comments

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

# Risk of GAI committing UPL?

- ▶ *The Florida Bar v. TIKD Services LLC and Christopher Riley, individually and as founder of TIKD*, No. SC 18-149 (10/14/21)(finding that TIKD Services engaged in UPL)
- ▶ *Upsolve, Inc. v. James*, No. 22-cv-627 (S.D.N.Y.) (PAC)(May 24, 2022)(granting on First Amendment grounds preliminary injunction against NY enforcement of UPL laws against nonprofit company assisting consumers with bankruptcy)gaged in UPL)
- ▶ *Faridian v. DoNotPay, Inc.*, Case No. CGC-23-604987 (San Francisco Superior Court filed 3/3/23)

# Evolving Guidance

- ▶ *See* Cal. Bar Standing Committee on Professional Responsibility and Conduct: Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law  
<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>
- ▶ Provides guidance for using generative AI based on ethical rules
- ▶ “A lawyer’s professional judgment cannot be delegated to generative AI and remains the lawyer’s responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing.”