



ADventures *in LAW*

The Use of AI and Legal Ethics

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BakerHostetler

Defining AI & Uses of AI in Law

- Artificial intelligence has been defined as “the capability of a machine to imitate intelligent human behavior.”
- How is AI used in the practice of law?
 - Electronic Discovery/Predictive Coding
 - Litigation Analysis/Predictive Analysis
 - Contract Management
 - Due Diligence Reviews
 - “Wrong Doing” Detection
 - Legal Research
 - AI to Detect Deception
 - [Document Assembly Software](#)



Uses of AI in Law

- AI-powered extraction of key terms
- With AI-powered extraction of key contractual terms, you can improve visibility into your final agreements and identify and flag potential risks and obligations.
 - Save and track key terms
 - Compare obligations, dates, trigger language, and more across multiple agreements



Defining AI & Uses of AI in Law

Michael Cohen says he unwittingly sent AI-generated fake legal cases to his attorney

DECEMBER 30, 2023 8:20 AM ET

By The Associated Press



The Ethical Implications of AI

- **ABA Formal Opinion 512** – Generative AI (July 29, 2024) covers:
 - Duty of Competence
 - Duty of Confidentiality
 - Duty to Communicate
 - Meritorious Claims and Duty of Candor
 - Duty to Supervise
 - Fees
- Other Considerations
 - Diversity & Inclusion



Duty of Competence

Rule 1.1: Competence

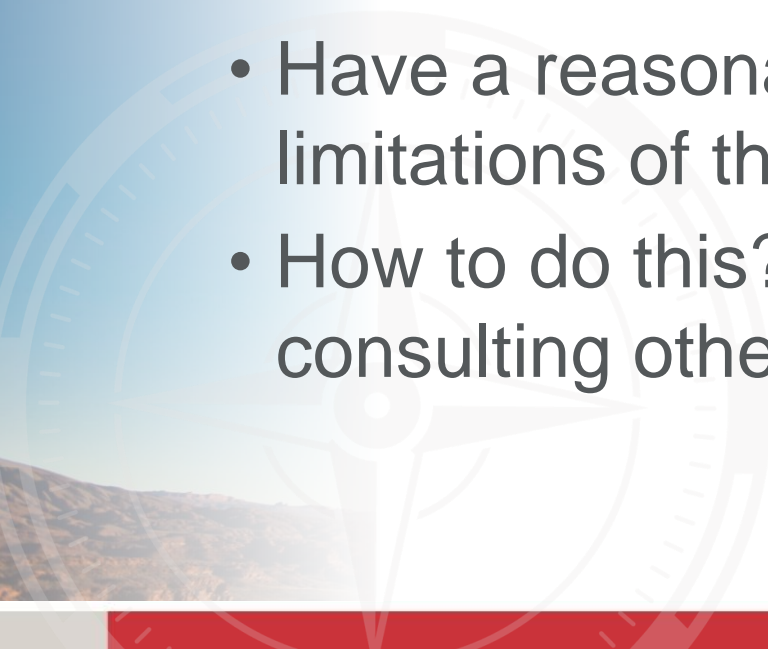
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.



Duty of Competence

■ Rule 1.1

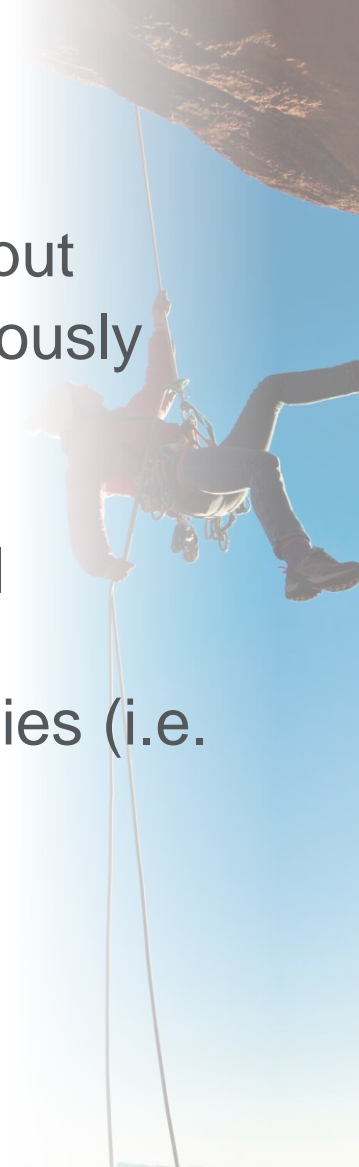
- “[t]o maintain the requisite knowledge and skill, lawyers should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...”
- Need not become AI experts
- Have a reasonable understanding of the capabilities and limitations of the specific AI technology the lawyer might use
- How to do this? Professional reading, CLE programs and consulting others who are proficient



Duty of Competence

■ Rule 1.1

- Also, avoid uncritical reliance on AI output
 - Have an appropriate degree of independent verification of AI output
 - Prior experience that an AI tool is accurate can suffice (i.e., previously verified that AI tool can summarize contracts)
 - AI can be a springboard for legal work but ...
 - Do not rely solely on AI to perform tasks that require professional judgment
- Finally, lawyers are required to have awareness of certain technologies (i.e. email)
- Not there yet with AI
 - “It is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients”



Duty to Communicate

Rule 1.4: Communications

- a) A lawyer shall:
- 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - 2) **reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
 - 3) keep the client reasonably informed about the status of the matter;
 - 4) promptly comply with reasonable requests for information; and
 - 5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- b) **A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

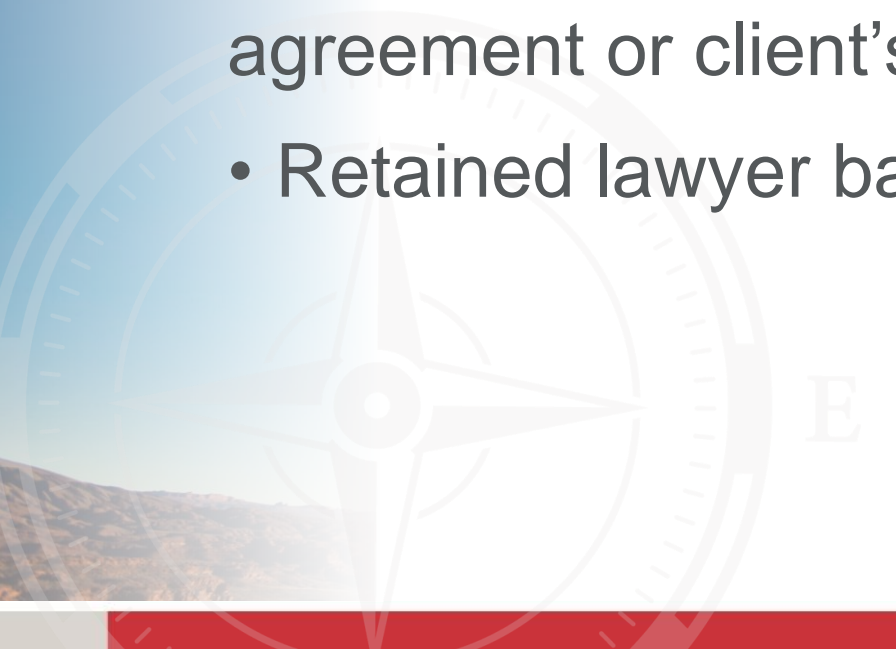
Duty to Communicate

■ Rule 1.4

- Fact-specific determination whether lawyer needs to disclose use of AI to patients or obtain informed consent
- Best practice – If a lawyer intends to use AI in the provision of legal services, he or she has an obligation under this rule to discuss that decision with clients
- Should discuss the risks and limitations of any AI that the lawyer is contemplating using
- Must consult clients when the use of AI is relevant to the basis or reasonableness of a lawyer's fee

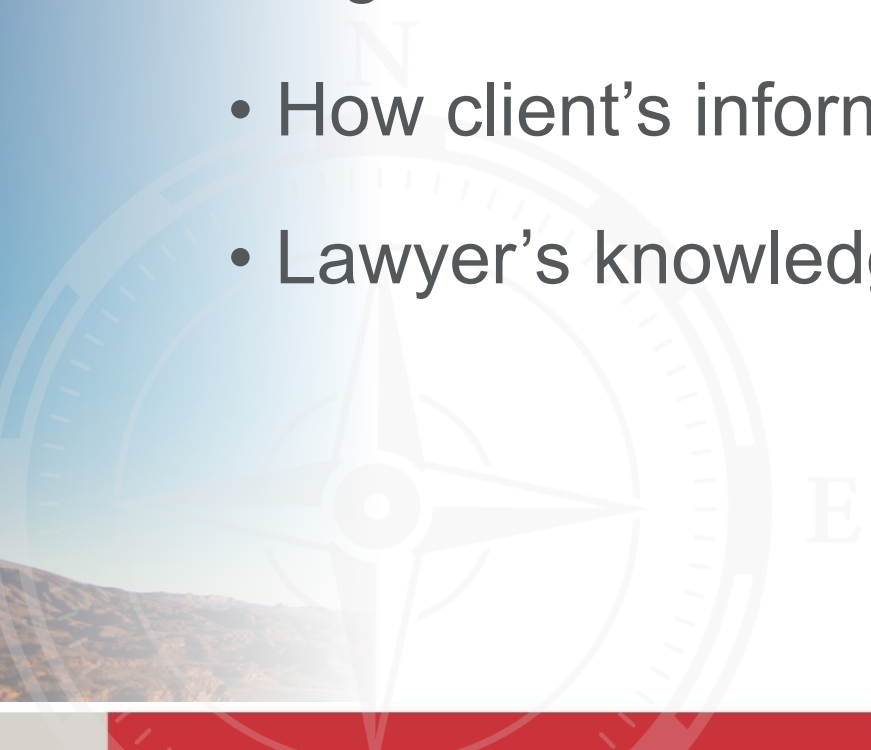
Duty to Communicate

- If AI output will influence a significant decision, clients must be consulted (e.g., using AI to evaluate potential litigation outcomes or jury selection)
 - Independent judgement vs. reliance on AI tool
- When would the use of AI violate terms of an engagement agreement or client's reasonable expectations?
 - Retained lawyer based on particular skill or judgment



Duty to Communicate

- Other relevant considerations:
 - Importance for a particular task
 - Significance of task in course of overall representation
 - How client's information will be processed
 - Lawyer's knowledge about the use of AI



Duty of Confidentiality

Rule 1:6: Confidentiality of Information

- a) A lawyer 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 by paragraph (b).
- b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - 1) to prevent reasonably certain death or substantial bodily harm;
 - 2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - 3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Duty of Confidentiality

Rule 1:6: Confidentiality of Information

- 4) to secure legal advice about the lawyer's compliance with these Rules;
 - 5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - 6) to comply with other law or a court order; or
 - 7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Duty of Confidentiality

■ Rule 1.6

- Lawyers must take steps to ensure that their clients' information is appropriately safeguarded
- Factors to consider:
 - Likelihood of disclosure
 - Unauthorized access
 - Sensitivity of information
 - Difficulty of implementing safeguards and how those safeguards may impact lawyer's ability to engage in effective representation



Duty of Confidentiality

- A lawyer contemplating the use of AI should consider discussing confidentiality concerns with the third-party provider and should inquire about:
 - What type of information is going to be provided?
 - How that information will be stored?
 - What security measures are in place with respect to storage of the information?
 - Who is going to have access to the information (e.g., third parties or other lawyers at the firm?)
- Also consider, who inside the firm has access?
 - Ethical wall
 - Use of proprietary AI tool & unintentional disclosure

Duty of Confidentiality

- Consent means **informed consent**
- What does consent mean in the context of AI?
- What the client needs to know:
 - Why is the tool being used?
 - Risk level
 - Detailed information on what client information will be disclosed
 - How information could be used against client interests
 - How AI improves representation



Duty to Supervise

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

- a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a **law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**
- b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Duty to Supervise

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

- c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
- 1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - 2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Duty to Supervise

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - 1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - 2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

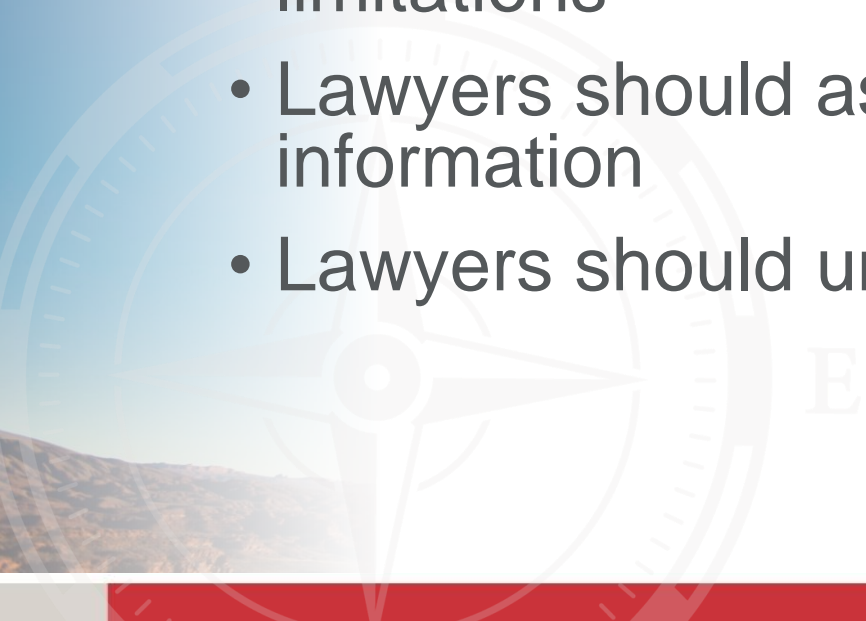
Duty to Supervise

■ Rule 5.1 & Rule 5.3

- Rules 5.1 and 5.3 address requirements for lawyers who have supervisory/managerial responsibilities over lawyer and non-lawyers
 - Lawyers “may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client” provided that the lawyer “make[s] reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.”
- How does AI impact this duty?
 - Lawyers should establish clear policies related to the use of AI
 - Training should be conducted for lawyers and non-lawyers on AI, ethical issues in use of AI, best practices for data security, privacy and confidentiality
- The supervisory duty includes making sure that the work product produced by AI is accurate and complete and does not create a risk of disclosing client confidential information

Duty to Supervise

- ABA Opinion notes that earlier Ethics opinions related to technologic innovations are instructive when considering AI:
 - AI tool should be configured to preserve confidentiality & security of information & lawyer should be immediately informed of any disruption/breach
 - Lawyers should investigate reliability of AI tool and its limitations
 - Lawyers should assess whether the AI tool retains any information
 - Lawyers should understand pitfalls of AI



Duty to Supervise

- Other Concerns
 - Since lawyers are more risk averse, the greater danger might very well be underutilization of, rather than overreliance upon, artificial intelligence
 - Work product and conclusions reached by AI cannot replace human judgment



Fees

- Rule 1.5

- Rule 1.5 on fees is very detailed, but the simplest definition is:
Fees must be REASONABLE
- Requires lawyers to consult with their clients about the means they choose in pursuit of their client's goals
- Communication must occur before or within a reasonable time after representation begins (should be in writing)



Fees

- How does AI impact fees?
 - AI can increase speed and efficiency of lawyers & lawyers should only bill for actual time spent
- Flat fee vs. hourly rate charge when using AI
- Should cost of AI be charged to clients?
 - Sometimes (e.g., use of third party to review thousands of contracts)
- General use of in-house AI tool can be passed on as “reasonable charges (similar to reasonable charges for printing, etc.)”
 - Consider incorporating this into your agreement
- Lawyers should never charge for their own inexperience – get up to speed on your own time



Diversity & Inclusion

- “If you have a system that’s reliant on hundreds of thousands or millions of human decisions, and those humans had biases, there’s a risk that the same bias will occur in AI.”
- To make sure that AI tools are not unfairly biased, it’s important to have diverse teams working on these tools
- There is a trend towards “explainable AI” – Where we develop the models to be clear about how they generate their answers
 - This is especially important in the legal field, where the customers want to know: What are the factors that went into a given decision? Why did Westlaw recommend this particular case?
 - Explainability has the potential to become a legal requirement

Pitfalls of Generative AI: Data Privacy and Security

- The use of generative AI in document formation, analysis and management must prioritize data privacy and security to protect client information from breaches or unauthorized access
 - The more information that an attorney inputs into generative AI, the more exposure and risk of malpractice for the attorney.
- **Risk of Hallucination**
 - **Definition:** Completely making up content while delivering it in a confident, matter of fact manner.
 - One cannot assume that all information returned as output is accurate and output may also be based on outdated information.

Pitfalls of Generative AI: Data Privacy and Security

▪ Scraping

- Definition: The act of pulling data from one website and placing it into another website in a new format.
 - Scraped information may include generated data such as behavioral “cookie” type data, or information entered by the user
- Scraping could violate particular statutes if it involves certain personal information or is not stored or deleted accordingly
 - Ex. General Data Protection Regulation

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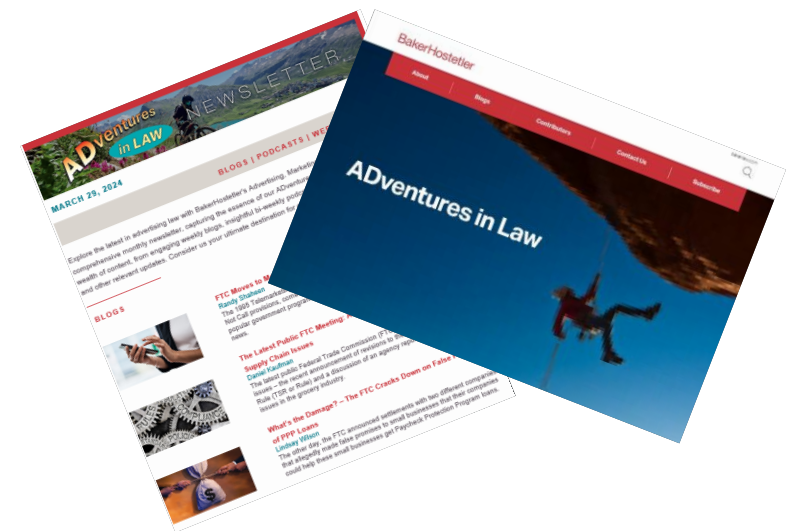
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