

**THE NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

FORMAL OPINION 2024-5: ETHICAL OBLIGATIONS OF LAWYERS AND LAW FIRMS RELATING TO THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

TOPIC: The use of generative artificial intelligence by New York lawyers, law firms, legal departments, government law offices and legal assistance organizations.

DIGEST: This opinion provides general guidance on the use of tools that use generative artificial intelligence.

RULES: 1.1, 1.2(d), 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 3.1, 3.3, 5.1, 5.2, 5.3, 7.1, 7.3, 8.4

QUESTION: The availability of tools to assist lawyers in their practice that employ generative artificial intelligence has been dramatically expanding and continues to grow. What are the ethical issues that lawyers should consider when deciding whether to use these tools and, if the decision is made to do so, how to use them?

OPINION: When using generative artificial intelligence tools, a lawyer should take into account the duty of confidentiality, the obligation to avoid conflicts of interest, the duty of competence and diligence, the rules governing advertising and solicitation, the duty to comply with the law, the duty to supervise both lawyers and non-lawyers, the duty of subordinate attorneys, the duty to consult with clients, the duty of candor to tribunals, the prohibition on making non-meritorious claims and contentions, the limitations on what a lawyer may charge for fees and costs, and the prohibition on discrimination.

Introduction

Generative artificial intelligence (“Generative AI”), like any technology, must be used in a manner that comports with a lawyer’s ethical obligations. General-purpose technology platforms offer AI chatbots. Legal research platforms tout “legal generative AI” that can draft, analyze documents, and provide legal citations. Even data management vendors offer Generative AI-assisted review, analytic, and visualization capabilities. This summary of currently available tools will likely soon be outdated because of the rapid evolution of Generative AI. This guidance, therefore, is general. We expect that this advice will be updated and supplemented in years to come to cover issues not yet anticipated.

This Opinion provides guidance on the ethical obligations of lawyers and law firms relating to the use of Generative AI. It follows and is consistent with the format used by the Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law released by the California State Bar’s Standing Committee on Professional Responsibility and Conduct in November 2023.¹ This

¹ State Bar of Cal., Standing Comm. on Pro. Resp. & Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (Nov. 16. 2023) (“California Guidance”),

Opinion is in the same format as the California State Bar’s guidance and contains multiple quotations from that guidance. Like the California State Bar and other bar associations that have addressed Generative AI,² we believe that when addressing developing areas, lawyers need guardrails and not hard-and-fast restrictions or new rules that could stymie developments. By including advice specifically based on New York Rules and practice, this Opinion is intended to be helpful to the New York Bar.

Applicable Authorities	New York Guidance
<p>Duty of Confidentiality</p> <p>Rule 1.6</p>	<p>Generative AI systems are able to use information that is inputted, including prompts, uploaded data, documents, and other resources, to train AI. They may also share inputted information with third parties or use it for other purposes.³ Even if a system does not use or share inputted information, it may lack “reasonable or adequate security.”⁴</p> <p>Without client consent, a lawyer must not input confidential client information into any Generative AI system that will share the inputted confidential information with third parties.⁵ Even with consent, a lawyer should “avoid entering details that can be used to identify the client.”⁶ Consent is not needed if no confidential client information is shared, for example through anonymization of client information. Generative AI systems that keep inputted information entirely within the firm’s own protected databases, sometimes called “closed”</p>

<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>; see also Am. Bar Ass’n, Formal Op. 512 (2024); Fla. Bar Bd. Rev. Comm. on Pro. Ethics, Op. 24-1 (2024); D.C. Bar Ethics Op. 388 (April 2024); N.J. STATE BAR ASS’N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS (2024), <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>; N.Y. STATE BAR ASS’N, REPORT & RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ARTIFICIAL INTELLIGENCE (2024), https://www.nycbar.org/wp-content/uploads/2024/06/20221290_AI_NYS_Judiciary.pdf. (All websites last accessed on Aug. 5, 2024).

² In general, this Opinion is consistent with the ABA, California Bar, Florida Bar, District of Columbia Bar, and New Jersey Bar opinions cited in Footnote 1. However, the New York State Bar suggests adoption of certain rules to address Generative AI, which we believe is premature because of the rapid pace of technological development and change. See, e.g., N.Y. STATE BAR ASS’N, *supra*, at 53–56.

³ Generative AI systems that share inputted information with third parties are sometimes called “open” systems.

⁴ California Guidance at 2.

⁵ Lawyers may wish to obtain advance client consent to use Generative AI that will involve sharing of client information, but, because such consent must be knowing, the client must understand the potential consequences of such information-sharing for the consent to be effective. See N.Y. State Op. 1020 ¶ 10 (a lawyer “may post and share documents using a ‘cloud’ data storage tool” that does not provide “reasonable protection to confidential client information” only where “the lawyer obtains informed consent from the client after advising the client of the relevant risks”).

⁶ *Id.*

	<p>systems, do not present these risks. But a lawyer must not input any confidential information of the client into any Generative AI system that lacks adequate confidentiality and security protections, regardless of whether the system uses or shares inputted information, unless the client has given informed consent to the lawyer’s doing so. Even with closed systems, a lawyer must take care that confidential information is not improperly shared with other persons at or clients of the same law firm, including persons who are prohibited access to the information because of an ethical wall.⁷</p> <p>A lawyer or law firm⁸ should “consult with IT professionals or cybersecurity experts to the extent necessary for the lawyer or law firm to ensure that any Generative AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.”⁹</p> <p>A lawyer should review the system’s Terms of Use. “A lawyer who intends to use confidential information in a Generative AI product should ensure that the provider does not share inputted information with third parties or use the information for its own use in any manner, including to train or improve its product,” again without informed client consent.¹⁰ Terms of Use can change frequently and a lawyer’s obligation to understand the system’s use of inputs is continuing. Accordingly, lawyers should periodically monitor Terms of Use or other information to learn about any changes that might compromise confidential information.¹¹</p> <p>A law firm may wish to consider implementing policies and control procedures to regulate the use of confidential client information in Generative AI systems if the law firm is going to make use of such systems.</p>
Conflicts of Interest	<p>Where a Generative AI system uses client information, a law firm must ensure that the system implements any ethical screens required under the Rules. For example, if an ethical</p>

⁷ See Am. Bar Ass’n, Formal Op. 512 at 6-7 (2024).

⁸ Consistent with Rule 1.0(h), in this Opinion “law firm” includes a private firm as well as qualified legal assistance organizations, government law offices and corporations, and other entities’ legal departments.

⁹ California Guidance at 2.

¹⁰ *Id.*

¹¹ See N.Y. STATE BAR ASS’N, *supra*, at 58.

Rule 1.7; Rule 1.8; Rule 1.9; Rule 1.10; Rule 1.11; Rule 1.12	screen excludes a lawyer from any information or documents with respect to a client, the lawyer must be not exposed to such information or documents through the law firm's Generative AI systems.
Duties of Competence and Diligence Rule 1.1; Rule 1.3	<p>A lawyer should be aware that currently Generative AI outputs may include historical information that is false, inaccurate, or biased.</p> <p>“A lawyer must ensure the competent use of technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.”¹²</p> <p>“Before selecting and using a Generative AI tool, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable [T]erms of [U]se and other policies governing the use and exploitation of client data by the product.”¹³ A lawyer may wish to consider acquiring skills through a continuing legal education course. Consultation with IT professionals or cybersecurity experts may be appropriate as well.</p> <p>Generative AI outputs may be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must ensure that the input is correct and then critically review, validate, and correct the output of Generative AI “to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false [Generative AI] outputs.”¹⁴</p> <p>The use of Generative AI tools without the application of trained judgment by a lawyer is inconsistent with the competent and diligent practice of law. “A lawyer’s professional judgment cannot be delegated to [G]enerative AI and remains the lawyer’s responsibility at all times. A lawyer should take steps to avoid overreliance on Generative AI to such a degree that it hinders critical attorney analysis</p>

¹² California Guidance at 2. There have been claims that certain Generative AI tools violate intellectual property rights of third parties. A lawyer planning to use a Generative AI tool should keep abreast of whether there are any such risks associated with the tool the lawyer plans to use.

¹³ *Id.*

¹⁴ *Id.* at 3.

	fostered by traditional research and writing. For example, a lawyer must supplement any Generative AI-generated research with human-performed research and supplement any Generative AI-generated argument with critical, human-performed analysis and review of authorities.” ¹⁵
Advertising and Solicitation Rule 7.1; Rule 7.3	Lawyers must not use Generative AI in a way that would circumvent their responsibilities under the Rules regarding marketing and solicitation. For example, a lawyer must not use Generative AI to make false statements, to search the internet for potential clients and send solicitations that would otherwise be prohibited under the Rules, or to pose as a real person to communicate with prospective clients.
Duty to Comply with the Law Rule 8.4; Rule 1.2(d)	“There are many relevant and applicable legal issues surrounding [G]enerative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns.” ¹⁶ A lawyer must comply with the law and cannot counsel a client to engage in, or assist a client in conduct that the lawyer knows is, a violation of any law, rule, or ruling of a tribunal when using Generative AI tools.
Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers Rule 5.1; Rule 5.2; Rule 5.3; Rule 8.4	<p>“Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of [G]enerative AI and make reasonable efforts to ensure that the law firm adopts measures that give reasonable assurance that the law firm’s lawyers and non-lawyers’ conduct complies with their professional obligations when using [G]enerative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of [G]enerative AI use.</p> <p>A subordinate lawyer must not use Generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer’s professional responsibility and obligations.”¹⁷ A subordinate lawyer should disclose to a supervisory lawyer the use of Generative AI that is not generally understood to be routinely used by lawyers.¹⁸</p>

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Likewise, where a client provides citations to a lawyer, a lawyer must review the decisions to make sure that they are genuine and properly cited. *See United States v. Cohen*, No. 18-CR-602, 2024 WL 1193604 (S.D.N.Y. Mar. 20,

	<p>A lawyer using a Generative AI chatbot for client intake purposes must adequately supervise the chatbot.¹⁹ A high degree of supervision may be required if there is a likelihood that ethical problems may arise. For example, a chatbot may fail to disclose that it is not a lawyer or may attempt or appear to provide legal advice, increasing the risk that a prospective client relationship or a lawyer–client relationship could be created.</p>
<p>Communication Regarding Generative AI Use</p> <p>Rule 1.4; Rule 1.2</p>	<p>“A lawyer should evaluate ... communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with [G]enerative AI use, scope of the representation, and sophistication of the client.”²⁰</p> <p>A lawyer should consider disclosing to the client the intent to use Generative AI that is not generally understood to be routinely used by lawyers as part of the representation,²¹ particularly as part of an explanation of the lawyer’s fees and disbursements. The disclosure will depend on circumstances including how the technology will be used, and the benefits and risks of such use. A lawyer should obtain client consent for Generative AI use if client confidences will be disclosed in connection with the use of Generative AI.</p> <p>A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of Generative AI. We note that, because Generative AI currently is used routinely by lawyers, when a lawyer receives a request from a client that Generative AI not be used at all, the lawyer should consider discussing the request with the client before agreeing to it.</p>

2024) (criticizing an attorney-defendant and his counsel for citing “three cases that do not exist” where client provided citations hallucinated by Google Bard and counsel failed to check them).

¹⁹ See Fla. Bar Bd. Rev. Comm. on Pro. Ethics, *supra* (section on Oversight of Generative AI).

²⁰ California Guidance at 4.

²¹ Note that some Generative AI is routinely used. For example, Microsoft Word employs Generative AI in its auto-complete and grammar check functions. Westlaw, Lexis, and search engines also employ Generative AI. We do not mean to suggest that an attorney needs to disclose such uses of Generative AI. For a discussion of the importance of evaluating Generative AI tools based on intended users, see N.J. STATE BAR ASS’N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS 15–19 (2024) (discussing “AI Tools Intended for the Public” and “Tools Tailored for Legal Professionals”), <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>.

<p>Candor to the Tribunal; and Meritorious Claims and Contentions</p> <p>Rule 1.2(c); Rule 3.1; Rule 3.3; Rule 1.16</p>	<p>A lawyer should recognize the risks posed by Generative AI-generated content. Generative AI tools can, and do, fabricate or “hallucinate” precedent.”²² They can also create “deepfakes”—media that appear to reflect actual events but are actually doctored or manufactured.</p> <p>“A lawyer must review all [G]enerative AI outputs,” including but not limited to “analysis and citations to authority,” for accuracy before use for client purposes and submission to a court or other tribunal.²³ If the lawyer suspects that a client may have provided the lawyer with Generative AI-generated evidence, a lawyer may have a duty to inquire.²⁴ A lawyer must correct any errors or misleading statements made to adversaries, the public, or the court.²⁵</p> <p>“A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of [G]enerative AI.”²⁶</p>
<p>Charging for Work Produced by Generative AI and Generative AI Costs</p> <p>Rule 1.5</p>	<p>“A lawyer may use [G]enerative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining [G]enerative AI inputs and prompts, or reviewing and editing [G]enerative AI outputs).”²⁷ A lawyer must not charge hourly fees for the time that would otherwise have been spent absent the use of Generative AI.²⁸ Lawyers may wish to consider</p>

²² A Stanford University study found that Generative AI chatbots from OpenAI, Inc., Google LLC, and Meta Platforms Inc. hallucinate “at least 75% of the time when answering questions about a court’s core ruling.” Isabel Gottlieb & Isaiah Poritz, *Popular AI Chatbots Found to Give Error-Ridden Legal Answers*, Bloomberg L. (Jan. 12, 2024), <https://news.bloomberglaw.com/business-and-practice/legal-errors-by-top-ai-models-alarmingly-prevalent-study-says>. Courts are already grappling with parties’ citation to hallucinated precedents. *See generally* *Mata v. Avianca, Inc.*, No. 22-CV-1461, 2023 WL 4114964 (S.D.N.Y. June 22, 2023) (sanctioning attorneys for “submit[ing] non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT”); *Cohen*, 2024 WL 1193604; *see also* D.C. Bar, Ethics Op. 388 (2024) (discussing the dangers of hallucinations).

²³ California Guidance at 4.

²⁴ *See* N.Y. City Op. 2018-4 (discussing a lawyer’s duty to inquire when asked to assist in a transaction that the lawyer suspects may involve a crime or fraud); *see also* ABA Op. 491 (2020); Colo. Bar Ass’n Ethics Comm., Formal Op. 142 (2021). These same standards apply when a lawyer suspects that a client may have given the lawyer fabricated evidence.

²⁵ *See* Rule 3.3.

²⁶ California Guidance at 4.

²⁷ *Id.*

²⁸ *Id.*

	<p>developing alternative fee arrangements relating to the value of their work rather than time spent.</p> <p>Costs associated with Generative AI should be disclosed in advance to clients as required by Rule 1.5(b). The costs charged should be consistent with ethical guidance on disbursements and should comply with applicable law.²⁹</p> <p>A lawyer may wish to consider appropriate use of Generative AI tools to minimize client cost as the use of Generative AI becomes more widespread.</p>
<p>Prohibition on Discrimination</p> <p>Rule 8.4</p>	<p>“Some [G]enerative AI is trained on biased [historical] information, and a lawyer should be aware of possible biases and the risks they may create when using [G]enerative AI (<i>e.g.</i>, to screen potential clients or employees).”³⁰</p>

²⁹ See ABA Op. 93-379 (1993).

³⁰ California Guidance at 4.