
*Lawyers Risk Purchasing Group*

 **Ethical Uses of Generative AI in the Practice of Law**

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**Introduction**

The use of generative AI in the law practice offers the possibility of great rewards and equally great risks.

Advocates say AI can transform the profession in wonderful ways. But the headlines contain scary tales of robot lawyers in traffic court and human lawyers sanctioned for filing ChatGPT-generated briefs full of fake cases.

What should a practicing lawyer know about AI?

This webinar will answer that question. It will provide a history and overview of AI in the law. It will distinguish between ethical, responsible use and unethical, irresponsible use. It will highlight relevant Rules of Professional Conduct and case opinions.

And it will give attendees specific Best Practices to implement in their office, taught by an experienced JD/lecturer with insider expertise in law office management and AI applications.

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**1. AI in the Law Office: Background and Basic Assumptions**

- AI is a legal assistant, not a lawyer.
- Legal assistance can come from humans or technology.
- Lawyers must use their own independent judgment before finalizing any work product.
- Ethical use: User is in Control
- Ethical use: User is Accountable
- Ethical use: Responsible engineering and development
- Ethical use: Knowing what AI can and cannot do

**Today’s Artificial Intelligence**

- Large language model-enabled research workflow.

- Users use plain, natural language.

- AI uses vectors, not words, to identify similar semantic values.

- AI transforms sentence-level results to document-level results.

- Users receive conceptually relevant, meaningful results.

- Generative AI can produce unique, novel, human-like content.

**2. An AI Cautionary Tale: *Avianca v. Mata***

**Lawyer Files Brief Citing Nonexistent Cases Generated by ChatGPT**Two New York lawyers were sanctioned and ordered to take remedial action after using ChatGPT to create a brief deemed by the court to be “replete with citations to nonexistent cases” as well as “bogus quotes and bogus internal citations.”

[From the ABA Journal](https://www.abajournal.com/news/article/judge-finds-out-why-brief-cited-nonexistent-cases-chatgpt-did-the-research): “Affiant has never utilized ChatGPT as a source for conducting legal research prior to this occurrence and therefore was unaware of the possibility that its content could be false, Schwartz wrote. ChatGPT had assured Schwartz that the cases that it cited were real and can be found in reputable legal databases, such as LexisNexis and Westlaw, according to queries and answers Schwartz submitted to the court.”

**SOURCE:** [Two US lawyers fined for submitting fake court citations from ChatGPT | ChatGPT | The Guardian](https://www.theguardian.com/technology/2023/jun/23/two-us-lawyers-fined-submitting-fake-court-citations-chatgpt)

**The court’s reasoning for sanctions:**

● The filing of papers “without taking the necessary care in their preparation” is an “abuse of the judicial system” that is subject to Rule 11 sanction. (p.22)

● “Rule 11 creates an “incentive to stop, think and investigate more carefully before serving and filing papers.” (p.22)

● “Rule 11 ‘explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed.’” (p. 22-23)

**Rationale for bad faith finding:**

● “Not reading a single case cited in his March 1 Affirmation…” (p. 29)

● “Taking no other steps on his own to check whether any aspect of the assertions of law were warranted” (p. 29)

● “Signing and filing… after making no inquiry” (p. 29)

● The lawyer “was aware of facts that alerted him to the high probability that [the fake cases] did not exist and consciously avoided confirming that fact.” (p. 30)

● “...he knew before making a submission to the Court that the full text [one fake case] could not be found but kept silent.” (p. 7)

*Source:* <https://www.courtlistener.com/docket/63107798/54/mata-v-avianca-inc>

**3. AI and the Ethical Duty of Tech Competence**

**Rule of Professional Conduct 1.1**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.” [New technology is assumed.]

*The phrase “including the benefits and risks associated with relevant technology” would offer greater clarity regarding this duty and emphasize the growing importance of technology to modern law practice. As noted in ethics opinions, such as those relating to cloud computing, this obligation is not new. Rather, the proposed amendment emphasizes that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent in a digital age. ‒ ABA Commission on Ethics 20/20, August 2012*

*Practice Tips*
- Attend relevant learning opportunities like CLE presentations.
- Make time to understand new technology.

- Carefully evaluate the underlying, enabling software that AI is built with and uses (e.g., cloud storage, third-party processing agreements, etc.)

- Choose AI built by experienced developers for legal practitioners

**4. AI and the Rules of Professional Conduct**

**Rule 1.3 Diligence**
A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 1, in part: “...a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2.”

Comment 2: “A lawyer's work load must be controlled so that each matter can be handled competently.” See also, Rule 3.2 (expediting litigation).

*Practice Tip:*Technology like AI may assist lawyers in maintaining their workload.

**Rule 1.4 Communication**
A lawyer shall (a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (a)(3) keep the client reasonably informed about the status of the matter; (a)(4) promptly comply with reasonable requests for information ….

Comment 2, in part: “A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.”

Comment 1: “Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”

Comment 3, in part: “In some situations… this duty will require consultation prior to taking action.”

*Practice Tips*

- Explain your use of AI to clients (e.g., fee agreements, terms, privacy policy).

- If AI is not secure, private, or cannot show its work, clients will be concerned.

**Rule 1.6 Confidentiality**
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent… (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.

**Rule 3.1 Meritorious Claims**
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law…

Comment 2, in part: “What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.”

*Practice Tips*
- AI must be able to cite to real cases, statutes, regulations

- AI must be able to cite to relevant portions of litigation records

**Rule 3.3 Candor**
(a) A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) 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; or (3) offer evidence that the lawyer knows to be false…

Comment 2, in part: “This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.”

*Practice Tip:* Using AI that limits its investigation to a real, domain-specific source of information, and that shows its work, will help lawyers “avoid conduct that undermines the integrity of the adjudicative process.”

**Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer**

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistance**

*Resolution 112 (2019) notes that, in 2012, Rule 5.3 was changed from “Assistants” to “Assistance” to clarify that the rule “encompasses nonlawyers whether human or not. Under Rules 5.1 and 5.3, lawyers are obligated to supervise the work of AI utilized in the provision of legal services and understand the technology well enough to ensure compliance with the lawyer’s ethical duties.”*

*Practice Tips*
- Nonhuman legal assistance is within the scope of the ABA’s rules.

- Lawyers must supervise AI legal assistants just like any other legal assistant.

**5. AI Tools for Your Practice**

* AI Ethics Law Office Checklist
* ABA Primer on AI – Published January 2024
* ABA Task Force on Law and AI
* Professional Guidelines for AI in the Law
* ABA Cybersecurity Handbook

***Practice Tool #1***

**AI Ethics Law Office Checklist**

✓ There is no “AI exception,” because new technology is assumed.

✓ But AI was already considered in 2019.

✓ Diligence can benefit from AI, but AI is not required… yet.

✓ Communicate your use of AI to clients (e.g., terms, privacy policies).

✓ AI should show its work, so you file “meritorious claims.”

✓ AI must allow you to offer candor to a tribunal.

✓ AI must preserve client confidentiality (i.e., it is secure, private).

✓ Competence expects you to learn about AI (e.g., CLE, new tech).

🆇 Misunderstanding technology is not a defense for misuse.

**SOURCE:** CaseText

***Practice Tool #2***

**ABA Primer on AI – Published January 2024**

The ABA Task Force on Law and Artificial Intelligence has created a primer on AI in the practice of law. Here is an excerpt from the [introductory paragraphs published on the ABA website on January 21, 2024](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2024/january-2024/a-primer-on-artificial-intelligence/):

*We have used AI in our lives increasingly for many years.  For example, the software we use to search statutory or caselaw databases for specific information relevant to our needs represents an application of AI in our professional lives.  The software has grown more and more sophisticated as AI evolved.  Examples of AI in our personal lives include virtual assistants such as Siri, Alexa, and Google Assistant, all of which employ AI to understand and respond to voice commands.*

*ChatGPT has rapidly accelerated the growth of the sophistication of AI and opened the door to many new applications.  For example, in healthcare, AI aids in diagnosing diseases, predicting patient outcomes, and drug discovery. In finance, AI does risk assessment, fraud detection, and can monitor high-frequency trading. In transportation, self-driving cars and AI-based traffic management systems may improve safety and efficiency.*

**SOURCE:** [AI Column: A Primer on Artificial Intelligence (americanbar.org)](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2024/january-2024/a-primer-on-artificial-intelligence/)

 ***Practice Tool #3***

**ABA Task Force on Law and AI**

*The mission of the AI Task Force is to: (1) address the impact of AI on the legal profession and the practice of law, and related ethical implications; (2) provide insights on developing and using AI in a trustworthy and responsible manner; and (3) identify ways to address AI risks. The Task Force is focusing its work on seven critical issues: (1) Impact of AI on the Legal Profession, (2) Access to Justice, (3) AI Governance, (4) AI Challenges: Generative AI, (5) AI in Legal Education, (6) AI Risk Management and (7) AI and Courts.*

**SOURCE:** [Task Force on Law and Artificial Intelligence (americanbar.org)](https://www.americanbar.org/groups/leadership/office_of_the_president/artificial-intelligence/)

***Practice Tool #4***

**First Professional Guidelines for AI in the Law**

In 2023, the American Bar Association Adopted the first professional ethics guidelines for the use of AI in a law practice.

Resolution 604 addresses ethical issues of Accountability, Transparency and Traceability. It calls on attorneys, law firms, tech companies, software designers and other stakeholders that design, develop, deploy and use AI to follow these guidelines:

* Developers of AI should ensure their products, services, systems and capabilities are subject to human authority, oversight and control.
* Organizations should be accountable for consequences related to their use of AI, including any legally cognizable injury or harm caused by their actions, unless they have taken reasonable steps to prevent harm or injury.
* Developers should ensure the transparency and traceability of their AI and protect related intellectual property by documenting key decisions made regarding the design and risk of data sets, procedures and outcomes underlying their AI.

Read [Resolution 604](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2023/house-of-delegates-resolutions/604/) here.
Read an article [ABA House Adopts 3 Guidelines to Improve Use of Artificial Intelligence (americanbar.org)](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may-23-wl/ai-0523wl/).

The Cybersecurity Legal Task Force, which submitted the resolution, also urges Congress, federal executive agencies and state legislatures and regulators to adhere to these guidelines in laws and standards associated with AI.

***Practice Tool #5***

The ABA Cybersecurity Handbook: A Resource for Attorneys

New third edition published by the [ABA Cybersecurity Legal Task Force](https://www.americanbar.org/groups/cybersecurity/#_blank) addresses the current overarching threat, describes how the technology works, outlines key legal requirements and ethical issues, and highlights special considerations for lawyers and practitioners of all types.

*Edited by Jill Rhodes, Robert S Litt, and Paul S Rosenzweig.*

**About the Speaker**

**Ryan Groff** is admitted to practice law in the Commonwealth of Massachusetts. He is Lecturer on Law at New England Law | Boston, and provides legal education at U.S. state and county bar associations. Ryan is also a board member and officer at the [Heathmere Center for Cultural Engagement](http://www.heathmere.org/), a nonprofit on Boston’s north shore strengthening communities through dialogue and the arts. He is also a member of the [Taxpayer Advocacy Panel](http://www.improveirs.org/), an independent federal advisory committee improving taxpayer experience at the IRS. He holds a J.D. cum laude from New England Law | Boston, and an M.A. in Theology cum laude from Gordon-Conwell Theological Seminary. Ryan is the Casetext Customer Education Manager. He lives just north of Boston with his wife, four children, and their dog, Dobby.

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