

ABA Guidance for Generative Artificial Intelligence – What Impact This Has on Client Representation and How States are Responding

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On July 29, 2024, the American Bar Association (ABA) released guidance for the use of generative artificial intelligence (GAI) in legal practice through Formal Opinion 512.¹ This opinion emphasized the potential benefits of this technology for practicing attorneys, while also outlining important ethical considerations for mitigating risk. Since this was released, many states have published their own guidance that mirrors the ABA. The ABA guidelines set out six main categories of obligations, rooted in the Model Rules of Professional Conduct: competence, confidentiality, communication, candor toward the tribunal, supervisory responsibilities, and fees.² In this blog post, I wish to address how these obligations interact with emerging GAI and client representation, and how the trends of forthcoming state guidelines are similar and different.

Under the Model Rules of Professional Conduct Rule 1.1, lawyers are required to provide competent representation to their clients.³ Comment 8 to this rule emphasizes that lawyers must understand benefits and risks of technologies they use to provide legal services to their clients.⁴ The Formal Opinion states that lawyers do not need to be experts in GAI. However, lawyers should have reasonable knowledge about the specific GAI technology they use in their practice, or they should acquire assistance from someone who can provide adequate guidance about the relevant technology.⁵ Because this technology is so new, it is important for lawyers to understand major risks, such as the risk of hallucinations, which is defined as a phenomenon where GAI technology generates nonsensical or false outputs as a result of misinterpreting patterns.⁶ It is crucial for lawyers to mitigate risk by checking the work produced by GAI for errors. The amount of individual work an attorney should do will depend on the tools they use.⁷ Lawyers must make informed decisions when it comes to implementing GAI in their practice to provide their clients with the highest quality of representation.

Confidentiality is another factor that attorneys should consider while using GAI. Model Rule 1.6 requires lawyers to keep information relating to the representation of a client confidential unless they obtain the client's informed consent or if there is an implied authorization to disclose information for the representation of a client.⁸ This rule requires attorneys to understand the risks of the GAI technology they plan on using. There are potential risks to confidentiality that could result from inputting client information into GAI tools, such as the accidental disclosure of sensitive information. All lawyers must at least read and understand the policies and terms of any GAI they use.⁹ The risk of violating confidentiality is especially high with a self-learning GAI

¹ ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

² *Id.*

³ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N, 2023) [hereinafter MODEL RULES].

⁴ MODEL RULES r. 1.1 cmt. 8.

⁵ Formal Op. 512 *supra* note 1 at 3.

⁶ *What are AI Hallucinations?*, IBM, <https://www.ibm.com/topics/ai-hallucinations> (last visited Oct. 15, 2024) [<https://perma.cc/GHX8-B6ZB>].

⁷ *Id.* at 4.

⁸ MODEL RULES r. 1.6.

⁹ Formal Op. 512 *supra* note 1 at 7.

tool, which is more likely to disclose confidential information in later outputs.¹⁰ Again, the client's consent is a top priority, and a lawyer should obtain a client's informed consent before inputting confidential information into a self-learning GAI interface.

Lawyers have a duty to communicate promptly with their clients about any important information under Rule 1.4.¹¹ This rule requires lawyers to obtain informed consent for certain uses of GAI. Depending on the facts of the case, lawyers may be required to communicate with clients when and how GAI is being used in the representation.¹² This rule may require further disclosures, however. For example, a lawyer may be required to disclose the use of GAI to a client if the lawyer wishes to input confidential information into the GAI tool.¹³ A lawyer may also be required to inform a client if GAI output may influence a significant decision in the case.¹⁴ A client may wish to know when a lawyer is deferring to GAI in deciding a matter, rather than using their own judgment.

Under Model Rules 3.1, 3.3., and 8.4(c), lawyers have a duty of candor towards the tribunal.¹⁵ Lawyers have a responsibility under 8.4(c) to not bring forth frivolous claims, nor should the lawyer engage in dishonest or fraudulent conduct.¹⁶ This rule requires attorneys to check the GAI product to confirm that no false or fraudulent statements are being made and submitted.¹⁷ Any misstatement of law or fact, even if produced by GAI, could be a violation of the Rules by the attorney.

Rules 5.1 and 5.3 lay out a lawyer's supervisory obligations.¹⁸ These rules apply to a law firm, subordinate lawyers, and nonlawyers working under an attorney.¹⁹ A supervisory attorney is responsible for ensuring compliance with the professional rules.²⁰ As a result, lawyers may need to provide training on GAI tools to explain best practices.²¹ These rules also require lawyers to have a thorough understanding of the privacy risks from a GAI product. The lawyer should have a thorough understanding of the privacy policies, the vendor's conflicts, and any potential for third party access to inputted information.²² This protects the client interests.

Under Rule 1.5 a lawyer's fees must be reasonable.²³ This applies when a lawyer is charging a client for work done using GAI. GAI tools will likely make the lawyer more efficient, but they can only charge the clients for the actual time spent on the case, not what they would have

¹⁰ *Id.*

¹¹ MODEL RULES r. 1.4.

¹² Formal Op. 512 *supra* note 1 at 8.

¹³ *Id.*

¹⁴ *Id.* at 8.

¹⁵ MODEL RULES r. 3.1; MODEL RULES r. 3.3; MODEL RULES r. 8.4(c).

¹⁶ *Id.*

¹⁷ Formal Op. 512 *supra* note 1 at 10.

¹⁸ MODEL RULES r. 5.1; MODEL RULES r. 5.3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Formal Op. 512 *supra* note 1 at 10.

²² *Id.* at 11.

²³ MODEL RULES r. 1.5.

spent had they not used GAI.²⁴ Rule 1.5(a) sets out factors to help determine reasonableness in fees, which will apply even when GAI is used under either a flat or contingent fee.²⁵

The ABA's Formal Opinion 512 provides guidance on the implementation and use of GAI in legal practice. The Opinion utilizes the Model Rules of Professional Conduct to represent a lawyer's ethical obligations to their clients. There are six main categories that the Opinion focuses on, and states have adopted similar guidance. The six categories are competence, confidentiality, communication, candor toward the tribunal, supervisory responsibilities, and fees.

State bar associations have been adopting similar guidance. For the most part, the states have adopted near-identical guidance to Formal Opinion 512, focusing on the same six categories for obligations. However, some states have emphasized different points for lawyers to look for. Minnesota's Working Group on AI, for example, published information about large language models and the risk of unauthorized practice of law (UPL).²⁶ Lawyers should be careful to use AI only to provide legal information, not legal advice.²⁷ The New York City Bar Association Formal Opinion 2024-5 on Generative AI also highlighted rules that deal with conflicts of interest.²⁸ The Opinion explains that a law firm has to ensure that any GAI system has any necessary ethical screens to avoid wrongful disclosures.²⁹ The Florida Bar prohibits any misleading content, or manipulative or intrusive advertisements.³⁰ Lawyers have to exercise caution during advertising and intake when using GAI.

The ABA guidance on generative artificial intelligence is a crucial development in the use of AI in the legal profession. States are following the ABA's lead and adopting guidance that specifically addresses GAI. Although lawyers already have ethical rules they can reference for decision-making in the representation of a client, guidelines such as these are invaluable for navigating this new frontier.

²⁴ Formal Op. 512 *supra* note 1 at 12.

²⁵ *Id.*

²⁶ See Working Group on AI, *Implications of Large Language Models (LLMs) on the Unauthorized Practice of Law (UPL) and Access to Justice*, MINN. STATE BAR ASS'N (June 2024), <https://www.mnbar.org/docs/default-source/default-document-library/msba-ai-working-group-final-report-and-recommendations.pdf> [<https://perma.cc/3YA4-7Q3R>].

²⁷ *Id.* at 4.

²⁸ New York City Bar, Formal Op. 2024-5: Generative AI in the Practice of Law (2024).

²⁹ *Id.*

³⁰ Florida Bar, Op. 24-1 (2024).