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The Ethical And Procedural Implications Of Generative AI

by Brenda M. Johnson

Our first responsibility as lawyers is to provide competent representation to our clients.¹ Staying informed and abreast of the technologies that can aid us in our practice is a key element of this responsibility, which is why Thomas Ryan’s article about some of the AI-driven tools available to plaintiff attorneys is so relevant and useful today. However, this duty requires us to consider not just the benefits of any new technology, but its risks as well, and to be aware of any ethical or procedural rules that might limit its use in practice.² This sidebar is intended to complement Thomas Ryan’s article with a review of some of those issues.

Issue One – You Have To Check Their Work!

On July 29, 2024, the American Bar Association issued Formal Opinion 512 addressing the ethical issues posed by the use of generative AI in legal practice.³ State bar organizations have issued advisory opinions and guidelines on these issues as well, including those in Pennsylvania and Florida.⁴ One key concern highlighted in these opinions and guidelines has to do with the fact that generative AI carries with it an inherent risk of creating content that is either inaccurate or, in some cases, completely fabricated. As the ABA observed,

[Generative AI] tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect

biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context. Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.⁵

Because of this, generative AI tools have a propensity to generate what are referred to in the AI field as “hallucinations,” which the ABA describes as “ostensibly plausible responses that have no basis in fact or reality.”⁶

This propensity has significant implications for the field of legal research and writing, and, as many of us are likely already aware, can get a lawyer into trouble with the courts. An example that made the news in 2023 involved a plaintiff’s attorney who relied on ChatGPT to do research for a pleading he submitted in a personal injury case that had been removed to federal court.⁷ ChatGPT provided the attorney with an analysis containing fabricated case citations, which the attorney then incorporated into his response to a motion to dismiss. When the district court judge asked the attorney to provide copies of the opinions cited in the pleading, the attorney asked ChatGPT for the opinions. ChatGPT responded by generating entire bogus opinions out of whole cloth, which the attorney then submitted to the court. Ultimately, the attorney was sanctioned under Rule 11, as was his local counsel. In another case from the same year, the

Second Circuit sanctioned an attorney for filing an appellate brief generated by ChatGPT that contained at least one spurious citation, and referred the attorney to the court's disciplinary panel for further investigation.⁸ In so doing, both courts made it abundantly clear that blindly relying on generative AI violates an attorney's duties under Rule 11.

These examples involved the use of ChatGPT, which is a general purpose generative AI tool, as opposed to generative AI tools designed specifically for legal research. But a recent study suggests that AI-driven legal research tools marketed by industry stalwarts such as Westlaw and Lexis generate inaccurate or "hallucinated" responses to queries as well, albeit with less frequency.⁹

So, put in more simple terms, generative AI is going to make mistakes. In that sense, as the Florida Bar noted in Formal Opinion 24-1, "lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants."¹⁰ Thus, just as with the work of human assistants, a lawyer has an obligation under the Rules of Professional Conduct to verify any work or activity conducted with or through a generative AI tool to confirm that it is accurate and conforms to the lawyer's non-delegable duties to her clients, the courts, and to third parties.¹¹

Issue Two – Can You Trust It To Maintain Confidentiality?

The second key concern posed by generative AI has to do with confidentiality. Generative AI tools are algorithms built and trained on bodies of existing data, or language models, which they rely on and incorporate into their output. Also, if they are "self learning," they continue to develop from

the information their users give them. This means that generative AI carries with it an inherent risk that information given to it by its users will be disclosed in some form to other users.

Because of this, a lawyer who plans to use generative AI in a way that involves giving it access to a client's confidential information must fully evaluate the risks that come with the specific AI tool in question. As the ethics opinions on these issues have noted, however, the nature of generative AI and the evolving state of this technology can make this difficult to do. A closed-source tool can mitigate the risk, but each product works differently, and even when a generative AI tool is not accessible outside the particular law firm using it, there may still be a risk that information from one client's file might be disclosed improperly, either to other lawyers in the same firm or in materials intended for third parties.¹²

As a "baseline," the ABA advises reviewing a product's terms and policies as to who has access to information users input into the product, and consulting with relevant IT professionals as well, before integrating it into your practice.¹³ In addition, the potentially unmitigable risk of inadvertent disclosure led the ABA to conclude that informed consent is required from a client before a lawyer can input a client's confidential information into a generative AI tool.¹⁴ Other bar ethics opinions do not go as far as to require such consent, and the ABA opinion is not binding on any state disciplinary body. However, the ABA's position on this issue is, at the very least, a valuable resource in terms of determining what might constitute best practices in this area.

Issue Three – Does Your Court Allow It?

Finally, it is important to be aware that a number of courts and judges – both


in Ohio and throughout the country – have implemented local rules, standing orders, and case management orders addressing the use of generative AI in creating or editing documents that are to be filed with the court. The Hamilton County Court of Common Pleas, for instance, recently adopted a local rule requiring any document created with generative AI to be accompanied by a disclosure describing the technology used, its role in the document's preparation, and certifying that the attorney conducted a final review and approval of the document.¹⁵ Judge John J. Russo of the Cuyahoga County Court of Common Pleas now requires attorneys and pro se litigants to sign a certificate indicating that any AI-generated text in a filing will be reviewed by a human being before it is submitted to the court.¹⁶ And at least two Ohio federal district court judges – Judge Christopher Boyko of the Northern District, and Judge Michael J. Newman of the Southern District – have standing orders that bar the use of generative AI outright.¹⁷

As with the technology itself, the manner in which courts are dealing with its use is an issue still in development. At the very least, though, any attorney planning to integrate generative AI tools into her litigation practice should keep abreast of the implementation of such rules and orders, and should consider their implications. ■

End Notes

1. See Rule 1.1 of the Ohio Rules of Professional Conduct (Competence).
2. Rule 1.1 provides that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation." Comment 8 to Rule 1.1, in turn, states that "[t]o 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"
3. The opinion may be accessed here: <https://www.americanbar.org/news/abanews/>

- aba-news-archives/2024/07/aba-issues-first-ethics-guidance-aitools/ (last accessed November 6, 2024)
4. The Florida Bar's Board of Governors addressed these issues in an advisory opinion issued on January 19, 2024. See Florida Bar Ethics Advisory Opinion 24-1 (Opinion 24-1), which can be accessed at <https://www.floridabar.org/the-florida-bar-news/board-of-governors-adopts-ethics-guidelines-for-generative-ai-use/> (last accessed November 6, 2024). The Pennsylvania Bar Association and Philadelphia Bar Association teamed up to address them in a joint formal opinion issued on May 22, 2024. See Joint Formal Opinion 2024-200 (Opinion 2024-200), which can be accessed at <https://www.pabar.org/site/For-the-Public/Ethics-Opinions-Public> (last accessed November 6, 2024). Both of these opinions cover the relevant concerns in detail. Opinion 2024-200 also summarizes guidelines and recommendations that have been issued in other states, including New York, New Jersey, and Michigan. See Joint Formal Opinion 2024-200 at p. 7-8.
 5. ABA Formal Opinion 512, at p. 3 (citation footnotes omitted).
 6. ABA Formal Opinion 512, at p. 3 (citation footnote omitted).
 7. *Mata v. Avianca, Inc.*, 678 F. Supp.3d 443 (S.D.N.Y. 2023).
 8. *Park v. Kim*, 91 F.4th 610 (2d Cir. 2023).
 9. Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Research Tools*, STANFORD UNIVERSITY (June 26, 2024), accessible via pdf link at <https://hai.stanford.edu/news/ai-trial-legal-models-hallucinate-1-out-6-or-more-benchmarking-queries> (last accessed November 6, 2024). This study, which is currently under preprint review, showed that these providers' tools are more reliable than ChatGPT, but still produce incorrect information anywhere between 17% and 33% of the time. *Id.*
 10. See Opinion 24-1, "Oversight of Generative AI."
 11. As the Florida Bar noted, these include competence (RPC 1.1), avoiding frivolous claims or arguments (RPC 3.1), candor toward the tribunal (RPC 3.3), and refraining from making false statements of material fact to third parties (RPC 4.1).
 12. See ABA Formal Opinion 512, at p. 7-8.
 13. ABA Formal Opinion 512 at p. 7.
 14. *Id.* at p. 7.
 15. Hamilton Cty. Loc. R. 49, adopted effective May 21, 2024.
 16. A pdf of the certificate can be accessed at <https://cp.cuyahogacounty.gov/court-resources/judges/judge-john-j-russo/> (last accessed November 7, 2024).
 17. Judge Boyko's order can be accessed at <https://www.ohnd.uscourts.gov/content/judge-christopher-boyko> (last accessed November 7, 2024). Judge Newman's standing order, which is incorporated into his standing orders for both civil and criminal cases, can be accessed at <https://www.ohsd.uscourts.gov/FPNewman> (last accessed November 7, 2024)




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