

Navigating the seven C's of ethical use of AI by lawyers

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The New York City Bar Association recently joined several other state bar associations and the American Bar Association (ABA) in providing critical guidance on the ethical implications of using Generative AI ("GenAI") in legal practice.

The ABA's Formal Opinion 2024-5 (<https://bit.ly/3BbliVP>) emphasizes that the duty of competence for lawyers now includes understanding and appropriately using AI tools. This commentary is aligned with similar opinions from other bar associations, reflecting the growing role AI plays in legal services.

Key areas of alignment across state and national guidelines

While each bar association tailors its guidance to its own ethical rules, the opinions issued by these bar associations share common themes that all legal practitioners must consider when integrating GenAI tools into their practices. Their common guidance and themes can be boiled down to "Seven C's" surrounding ethical use of AI: Competence, Confidentiality, Consent, Confirmation, Conflicts, Candor, and Compliance.

Competence

Across all opinions, it is clear that lawyers must maintain an appropriate level of competence in understanding the benefits, limitations, and risks of use of AI tools.

Model Rule 1.1 requires lawyers to exercise "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." That includes understanding both the benefits and risks associated with the use of GenAI. This does not mean that all lawyers need to become GenAI "experts," but all lawyers should have a "reasonable understanding" of what the technology can do and its limitations.

Alternatively, a lawyer may rely on the expertise of others (such as the lawyer's IT team or a competent consultant, such as an AI specialist or a technology expert with experience in legal applications). Even if a lawyer is competent in the use of technology, the New York City Bar's opinion (<https://bit.ly/4gDhhK5>) reiterates California's guidance (<https://bit.ly/4iwUUb7>) that a lawyer's "professional judgment cannot be delegated" to a GenAI tool.

In the same way that an attorney has a duty to verify search results in a legal search tool, validate citations from a cited opinion, or verify something prepared by a junior attorney or staff member, a lawyer has a duty to verify GenAI-generated arguments and review any cited authorities.

One of the greatest risks with GenAI-created content is that the content may appear to be accurate, even where some of it is "hallucinated" — i.e., made up by the GenAI. Advances in the technology, such as Retrieval Augmented Generation (RAG), have reduced the risk of hallucinations, but these tools are not foolproof.

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The tools will soon get to a point where the quality of the output can be trusted in the same way that a lawyer may trust the search results from more traditional legal research tools, but even results from those traditional tools require verification, interpretation, and judgment about how they are used. Lawyers' duties here are not new, but they have to be applied to this new technology.

Confidentiality

As with the use of any technology, lawyers have a responsibility to protect client information from impermissible disclosure (Model Rule 1.6). This obligation is not unique to GenAI, as lawyers should already be aware of policies related to how client data may be used, and where and how it may be stored and protected. While some GenAI tools can be installed "locally" within a law firm environment, most of these tools are cloud-based, and data shared with them may be stored on servers outside of the law firm's digital environment.

Care must also be taken with regard to how third parties handle client data. Recipients of productions may be putting client data into GenAI tools, and lawyers should consider protective orders to restrict actions that could risk the data becoming public. Even third parties that are retained by lawyers may be using GenAI without the lawyers' knowledge. Having conversations with vendors early in an engagement about their use of GenAI can prevent embarrassing or costly consequences.

Consent

While not all uses of GenAI require client consent, lawyers should consider where, and how, they will be using GenAI in their practices,

and consider the level of consent that should be obtained from a client before using GenAI for client matters. For example, while no consent may be needed if one is using GenAI to prepare the first draft of an email, or to brainstorm for a presentation, informed consent should be obtained before a GenAI tool is used to supplant traditional attorney functions such as document review, legal analysis, or research.

The level of consent needed may decrease as GenAI is more broadly adopted and becomes part of the everyday fabric of our practices. However, in the near term, lawyers should err on the side of informing clients and obtaining consent before GenAI is used for significant tasks. Many companies have started to require this from outside counsel through new mandatory guidelines for their law firms.

Confirmation

Lawyers have a duty to supervise the use of GenAI (see Model Rule 5.1). GenAI cannot replace lawyers' independent judgment, and it is lawyers' responsibility to confirm that any GenAI-generated content they use meets professional standards. The ABA particularly underscores the importance of not delegating critical legal analysis to GenAI tools, reminding lawyers that they are ultimately accountable for their work product.

This duty extends to those who are working at the direction of lawyers, including any experts or consultants retained by lawyers to assist with their work. Lawyers need to understand how GenAI tools are being used, set appropriate parameters for their use, and ensure that any generated content is reviewed for accuracy and compliance with professional standards. Supervision also means providing guidance to staff and consultants on the ethical use of GenAI and verifying that all outputs align with the quality expected in legal practice.

Conflicts

Another area of concern is the potential for GenAI systems to inadvertently create conflicts of interest, particularly when using systems that store or share client data. IT departments need to ensure that their security policies around ethical walls are updated to prevent an attorney from inadvertently pulling information from documents that may be subject to an ethical wall. These potential conflicts are much easier to detect and avoid in real-time with traditional document search methods.

About the authors



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Depending on how a law firm is using GenAI, if a GenAI tool retains information from prior interactions, it could potentially use that information in future prompt responses, thereby disclosing confidential details to another client or party. This inadvertent sharing could lead to a conflict of interest that would be difficult to detect until after the fact.

Both the New York City Bar (<https://bit.ly/4gDhhK5>) and the Pennsylvania Bar (<https://bit.ly/3DpgCOz>) caution lawyers to ensure that GenAI tools do not expose confidential client information to others who are ethically walled off from access to that information.

Candor

Mistakes can and do happen. With GenAI tools this may include, for example, incorrect legal citations or misrepresented facts. How a lawyer responds to those mistakes greatly affects the consequences that the lawyers and their clients may face.

Lawyers typically are obligated to correct any errors or false statements made to the court, or adversaries (Model Rule 3.3). That same duty applies to how lawyers use GenAI tools, and lawyers should react appropriately when any errors caused by such a tool are discovered. Additionally, outside of our own work, we must remain vigilant about how GenAI technology may affect information outside of our control. The New York City Bar's opinion specifically notes that, if an attorney suspects that their client may have provided the lawyer with GenAI-created evidence (including "deepfakes"), a lawyer may have a duty to further investigate.

Compliance

Some courts have rules restricting the use of GenAI, or requiring notice to the court and opposing parties when AI is used. Parties in a dispute may enter into protective orders that restrict, or regulate, how GenAI may be used on data exchanged in discovery. Changes in the regulatory landscape may also restrict the exposure of personal information or protected health information to GenAI tools, as the bar association opinions make clear; while GenAI can significantly enhance legal practice, it must be integrated responsibly.

Whether it's verifying the accuracy of GenAI-generated content or reviewing client data protections, lawyers must ensure their practices align with ethical rules, client policies, court policies, and general best practices.

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