



What Would You Do? Ethical Dilemmas Faced by In-House Counsel

May 13, 2025

Presenters



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Potentially Conflicting Ethical Obligations

- **Ethical Obligations to the Client**
 - Duty of Confidentiality
 - Duties of Competence & Diligence
 - Duty to Past Clients
 - Duties to Multiple Clients
- **Ethical Obligations to the Court**
 - Duty of Candor
 - Duty to Remediate
- **Ethical Obligations to the Adversary**
 - Duty to Bring Only Meritorious Claims and Defenses
 - Duty Not to Delay

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Scenario 1: Defending a Class Action Lawsuit

- Your company is defending a class action lawsuit over alleged misleading environmental disclosures.
- During discovery, outside counsel represents to the court that all environmental testing data has been produced.
- Weeks later, an in-house engineer reveals that one set of historical tests, stored on an old server, was missed. The test shows higher contamination at one site but doesn't affect 95% of class claims.
- The court has ruled on key motions assuming discovery was complete and opposing counsel hasn't raised the issue.
- The company *does not want to disclose* the missing data to the court.

What, if anything, should in-house counsel do about this error?

Scenario 1: Poll

What, if anything, should in-house counsel do about this error?

A: Do nothing. The omission was inadvertent, has minimal impact, and disclosing it would harm your client's position.

B: Conduct an internal review to determine exactly how the error happened and how material it is before deciding whether to involve the court.

C: Immediately produce the missing data to opposing counsel but let them decide whether to raise it with the court.

D: Inform outside counsel and decide whether to disclose the omission to the court, given the potential impact on past rulings and pending issues.

Ethical Obligations to the Court

Duty of Candor

A lawyer must:

- Disclose controlling legal authority known to the lawyer to be directly adverse to the position of the client. CRPC 3.3(a)(2)

A lawyer must not:

- Make false statements of fact or law to the court. CRPC 3.3(a)(1)
- Offer evidence the lawyer knows to be false. CRPC 3.3(a)(3)
 - A lawyer may refuse to offer the evidence.

Ethical Obligations to the Court

Duty to Remediate

- If the lawyer comes to know that material evidence offered to the court is false, the lawyer “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”
 - But the lawyer must still abide by the duty of confidentiality to the client.

And...Ethical Obligations to Adversaries

Duty of Fairness to Opposing Parties and Counsel

A lawyer may not:

- “Unlawfully obstruct another party’s access to evidence, including a witness.”
CRPC 3.4(a)
- “Destroy or conceal a document or other material having potential evidentiary value,”
or counsel or assist another person in doing so. CRPC 3.4(a)
 - *Potential criminal penalties: Cal. Pen. Code § 135; 18 USC §§ 1501-20*
- “Suppress any evidence that the lawyer or the lawyer’s client has a legal obligation
to reveal or to produce.” CRPC 3.4(b)
- Falsify evidence. CRPC 3.4(c)

But...Ethical Obligations to the Client

Duty to Maintain Confidentiality

- “It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”
Cal. Bus. & Prof. Code 6068(e)(1); see *also* CRPC 1.6
 - Sole exception: an attorney may, but is not required to, reveal a client’s confidential information if disclosure is necessary to prevent a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual.
- **Remedial measures do not include disclosure of client confidential information**, which the lawyer is required to protect under Business and Professions Code section 6068, subdivision (e) and rule 1.6.

Scenario 1: Poll

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B: Conduct an internal review to determine exactly how the error happened and how material it is before deciding whether to involve the court.

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Scenario 2: Representing a Small Company

- You are in-house counsel for a small startup.
- You are helping the company negotiate a deal to be acquired. Part of the deal involves equity and non-compete terms for the company's founders.
- One of the founders asks you to explain the deal terms to her.
- She also asks you if she should sign the deal.

Who do you represent at that moment? Should you answer the founder's questions?

Scenario 2: Poll

Who do you represent at that moment? Should you answer the founder's questions?

A: You represent both the company and the founder because she is a key stakeholder. You may explain the deal terms and give her legal advice, as long as her interests align with the company's.

B: You represent the company, not the founder. You may explain the terms objectively, but you cannot advise her on whether to sign or not, unless the company specifically allows you to represent its founders and there is no conflict of interest in representing both the company and the founder.

C: You represent the company, but you may advise the founder on whether to sign because she is a company executive, and your role includes supporting leadership in business decisions.

D: You represent the company, and you should not explain the terms or offer any advice because doing so could create an attorney-client relationship with the founder, violating your duty of loyalty to the company.

Scenario 2: Representing a Small Company

General rule

- “A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents” CRPC 1.13(a)
- True even if corporate legal counsel’s advice affects the principals.
Skarbrevik v. Cohen, England & Whitfeld, 231 Cal. App. 3d 692 (1991).
- True even in the context of a small, closely held corporation.
Sprengel v. Zbylut, 253 Cal. App. 5th 1028 (two 50% owners of LLC)

Scenario 2: Representing a Small Company

But it's complicated

- “[A]n attorney for a closely-held corporation may owe professional duties to individual owners with whom he or she has had ‘close interaction.’” *Sprengel, supra*.
- Depends on totality of the circumstances, including:
 - size of company;
 - kind and extent of contacts
 - attorney’s access to information relating to individual owner’s interests.

Scenario 2: Representing a Small Company

So what does this mean?

- Your client is the company, not the owner.
- Explaining the deal terms to the owner may be okay.
- But advising the owner on whether or not she should sign *may* not be, depending on the circumstances.
- Clear communication is important.
- Permissible to represent both—but watch out for potential conflicts and consent rules. CRPC 1.13(g)

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Scenario 3: Working at Competitor Companies

- You are in-house counsel for Alpha, a patent licensing and enforcement company.
- You are overseeing a patent infringement lawsuit against Beta, Alpha's competitor, with outside counsel, Law Firm, LLC.
- Your boss, the Associate General Counsel (AGC), previously worked as an IP attorney at Beta.
- The AGC claims she had very limited involvement with the patent at issue during her time at Beta over 7 years ago but may have been in meetings where the patent was discussed.
- She has been walled off from the case and is not participating in or advising on the litigation.

Is the conflict of interest imputed to you? Can you represent Alpha in this matter?

Scenario 3: Poll

Is the conflict of interest imputed to you? Can you represent Alpha in this matter?

- A:** Yes, the conflict is automatically imputed to you because your boss (the AGC) is part of the legal team at Alpha, and her prior work with Beta creates a conflict of interest that extends to all in-house counsel under imputation rules. You must notify Beta and withdraw from the lawsuit.
- B:** No, the conflict is not imputed to you because your boss is not actively involved in the case and was only minimally exposed to the patent at issue over seven years ago. Since she is not very involved, you do not need to take additional steps to address the potential conflict, and you may continue representing Alpha.
- C:** Yes, the conflict is imputed to you because your boss was previously an IP attorney at Beta, and even minimal past exposure to the patent could create a material conflict. Ethical rules related to conflicts of interest apply broadly to in-house legal teams.
- D:** No, the conflict is not automatically imputed to you, but you should take additional steps to ensure proper screening measures are in place, notify Beta if necessary, and confirm that your boss does not provide any indirect input on the case. You may continue representing Alpha as long as the screen is effective and Beta does not challenge it.

Scenario 3: Working at Competitor Companies

Rule 1.10(a) of the California Rules of Professional Conduct

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon rule 1.9(a) or (b) and arises out of the prohibited lawyer's association with a prior firm,* and
 - (i) the prohibited lawyer **did not substantially participate in the same or a substantially related matter**;
 - (ii) the prohibited lawyer is **timely screened** from any participation in the matter and is apportioned no part of the fee therefrom; **and**
 - (iii) **written notice is promptly given to any affected former client** to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening procedures employed; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

Scenario 3: Working at Competitor Companies

Comments to Rule 1.10 of the California Rules of Professional Conduct

[1] In determining whether a prohibited lawyer's previously participation was substantial,* a number of factors should be considered, such as the **lawyer's level of responsibility in the prior matter**, the **duration of the lawyer's participation**, the **extent to which the lawyer advised or had personal contact with the former client**, and the **extent to which the lawyer was exposed to confidential information of the former client likely to be material** in the current matter.

[6] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm,* or (2) the use of a timely screen* is effective to avoid that imputation, are also the subject of statutes and case law. (See, e.g., Code Civ. Proc., § 128, subd. (a)(5); Pen. Code, § 1424; *In re Charlissee C.* (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].)

Ethical Screens

- The California Rules of Professional Conduct now expressly allow for use of ethical screens to avoid imputed conflicts **without client consent** in some cases.
- Previously recognized only in case law.

Ethical Screens

Key elements of an effective screen

- Imposition of screen in a **timely** manner
- Screened lawyer **can't share in fees** from the matters at issue
- **Notice** to affected clients
- **Prohibitions against communications** across the screen
- **Limitation on** prohibited person's **access** to screened matter's file
- **Limitation on access** of firm lawyers or other personnel to the prohibited person's documents and information

Scenario 3: Working at Competitor Companies

Takeaways

- Timely and thorough screening is required.
- “Firm” under the ABA Model Rule 1.10(a) includes corporate legal departments.
- California courts have held there is a rebuttable presumption that a plaintiff’s lateral in-house lawyer who formerly worked for defendant shared defendant’s confidential information with her current in-house peers. *See Advanced Messaging Technologies, Inc. v. EasyLink Services Intern. Corp.*, 913 F.Supp.2d 900, 911 (C.D.Cal. Dec. 19, 2012).

Dynamic 3D Geosolutions, LLC v. Schlumberger Ltd., 2015 WL 4578681 (W.D. Texas Mar. 31, 2015)

APRIL 21, 2015

Entire In-House Legal Department Disqualified Following Lateral Hire

A Closer Look at *Dynamic 3D Geosolutions, LLC v. Schlumberger Ltd.*

Holland & Knight Alert

PDF



HIGHLIGHTS:

- This court opinion demonstrates that in-house legal departments can and will be treated the same as traditional law firms when it comes to imputation of conflicts and the resulting potential for disqualification.
- Although the extent to which lateral attorneys will be presumed to have learned pertinent confidences from their former clients and/or shared them internally or externally may vary from case to case or jurisdiction to jurisdiction, in-house legal departments are well-advised to think about setting up conflicts checking and screening systems which parallel their outside counterparts.

RELATED PRACTICE

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Scenario 4: California Lawyers Working Outside of California

- You are a California-licensed attorney working remotely for a tech startup based in Texas.
- The startup frequently seeks your advice on California-specific legal matters, such as employment law and contract disputes.
- However, they also occasionally ask you to review Texas-specific contracts and provide guidance on local regulatory compliance.
- You are not licensed to practice law in Texas but feel confident in your ability to research and address these issues.

Are you engaging in the unauthorized practice of law (UPL) by advising on Texas-specific matters? What steps should you take to comply with California's ethical rule and multijurisdictional practice guidelines?

Scenario 4: Poll

Are you engaging in the unauthorized practice of law by advising on Texas-specific matters? What steps should you take to comply with California's ethical rule and multi-jurisdictional practice guidelines?

A: No, as long as you clearly disclose that you are only licensed in California and base your guidance on general legal principles, you are not engaging in the unauthorized practice of law in Texas. You may continue advising on Texas-specific matters.

B: Yes, advising on Texas-specific contracts and regulations without a Texas law license constitutes unauthorized practice of law. You must either obtain a Texas license or refrain from providing legal guidance on these issues.

C: Not necessarily, but to comply with ethical rules, you should limit your advice to California law and recommend that the company consult Texas-licensed counsel for state-specific matters. You may provide general contract analysis but should avoid interpreting Texas statutes or regulations.

D: No, because you are employed by the startup as in-house counsel, and California multi-jurisdictional rules allow in-house attorneys to advise on all legal matters that are relevant to their client. There are no restrictions on your ability to provide Texas-specific legal guidance as long as you believe you can competently do so.

California Lawyers Working Outside of California

COVID has changed the way we practice law

- Remote work
- California lawyers working for California firms or companies want to live in and work from other states
- What does this mean from a legal ethics perspective?

California Lawyers Working Outside of California

ABA Formal Opinion 495 (Dec. 2020)

- “[I]n the absence of a local jurisdiction’s finding that the activity constitutes the unauthorized practice of law, **a lawyer may practice the law authorized by the lawyer’s licensing jurisdiction** for clients of that jurisdiction, **while physically located in a jurisdiction where the lawyer is not licensed** if the lawyer does not hold out the lawyer’s presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.”

California Lawyers Working Outside of California

California's rule for California lawyers practicing elsewhere

California Rules of Professional Conduct, Rule 5.5(a)

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction **where to do so would be in violation of regulations of the profession in that jurisdiction;**

or

(2) knowingly* assist a person* in the unauthorized practice of law in that jurisdiction.

California Lawyers Working Outside of California

Other state's rules for foreign lawyers working in the state

- *Many* states have a rule similar to Rule 5.5(b) of ABA Model Rules

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, **establish an office or other systematic and continuous presence** in this jurisdiction for the practice of law; or

(2) **hold out to the public or otherwise represent that the lawyer is admitted** to practice law in this jurisdiction.

California Lawyers Working Outside of California

California State Bar Formal Ethics Opinion (Aug. 2023)

- “The committee recognizes that **lawyers working remotely may temporarily or permanently relocate to another state where the lawyer is not licensed to practice law**. This committee is not authorized to opine on issues of unauthorized practice of law, including whether a particular conduct or activity constitutes the unauthorized practice of law. California licensed lawyers practicing California law remotely in another state where they are not licensed **should consult the multijurisdictional practice and unauthorized practice of law rules and authorities of the state where they are physically present**.
- “The ABA and some other state bar and local ethics committees have issued opinions regarding unauthorized practice of law considerations for attorneys remotely practicing the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted.”

California Lawyers Working Outside of California

Takeaways

- Rules in California and other states increasingly allowing California attorneys to live in other states while practicing law in California
- BUT have to check local rules for the jurisdiction and follow as the rules develop
- And consider taking or passing into local bar

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Scenario 5: Using AI in Legal Practice

- You are in-house counsel for a small startup that is highly cost-conscious.
- The CEO wants to understand data privacy compliance for a new product launch and asks you to do some preliminary research before engaging outside counsel.
- To save time, you decide to use a reputable AI chatbot with a deep research function to explore the question.
- The chatbot provides an insightful response, which you review and assess as approximately 80% accurate.
- You consider sending this initial research to outside counsel for verification and refinement.

Can you rely on AI tools for preliminary legal research and what steps should you take to ensure compliance with ethical obligations?

Scenario 5: Poll

Can you rely on AI tools for preliminary legal research and what steps should you take to ensure compliance with ethical obligations?

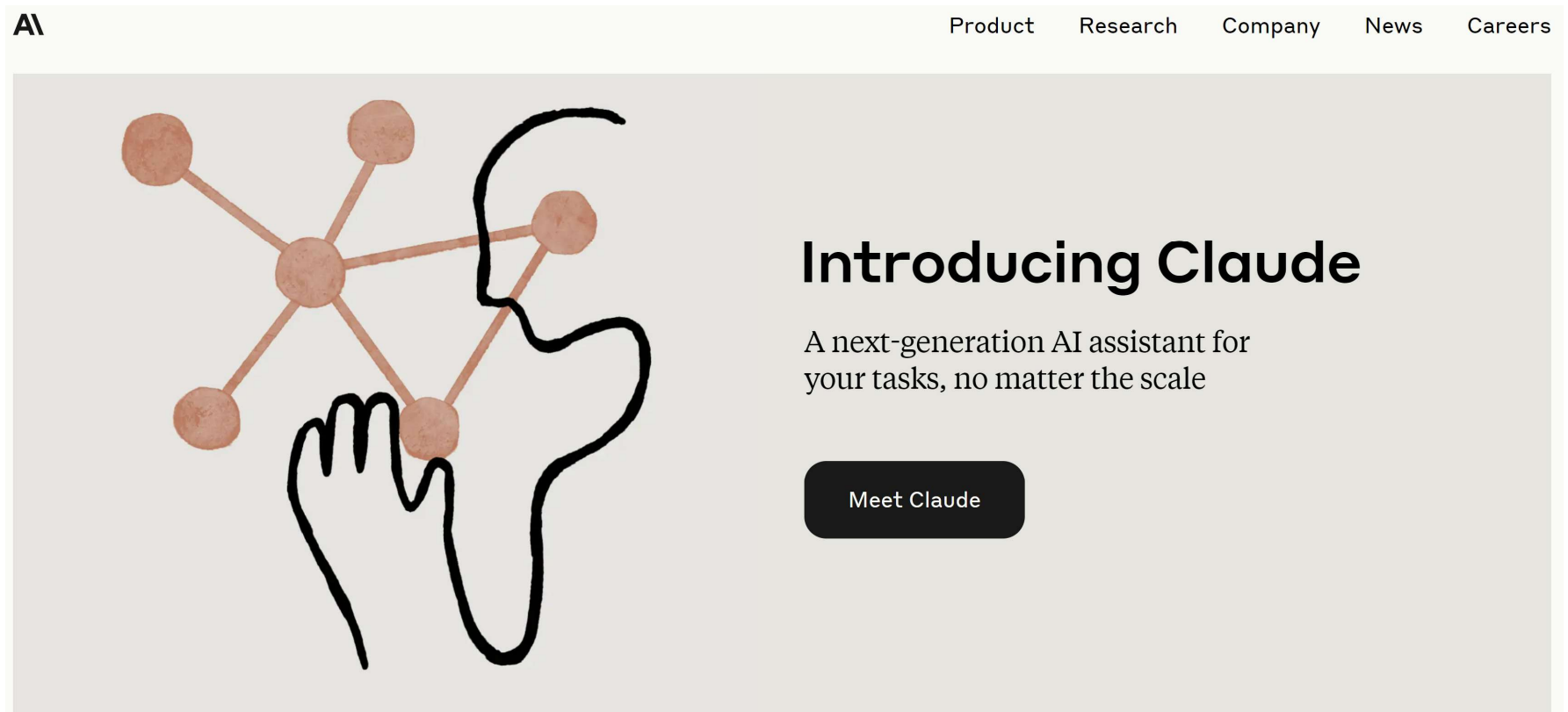
A: No, relying on AI-generated legal research is ethically problematic because AI tools can produce inaccurate, misleading, or hallucinated results. You should conduct your own legal research or engage outside counsel directly instead of using AI as an intermediary.

B: No, because AI tools may not be designed for legal research and could expose you to ethical risk and your client to embarrassment if you or outside counsel are misinformed by the AI results. Even if you verify the output, it is not advisable to use AI for legal research unless the tool is designed for this use.

C: Yes, AI can be a useful research tool, and as long as you review the output critically before relying on it there are no ethical concerns. You may share the AI-generated research with outside counsel for confirmation without additional precautions.

D: Yes, but AI-generated research should be treated as a starting point (like a google search), not a final source. You should independently verify the information using authoritative legal sources and disclose any AI usage to outside counsel when seeking their verification.

What is an AI Chatbot?



Potential Uses for AI in Legal Work (Eventually)

- Legal research
- Document review
- Summarization
- Fact research or investigation?
- Risk prediction?
- Drafting pleadings??




Numerous companies are already working on all of these...

What are the risks of using AI in legal work?

- It can get things horribly—but very confidently—wrong

What are the risks of using AI in legal work?




 Reuters


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AI 'hallucinations' in court papers spell trouble for lawyers

By Sara Merken

February 18, 2025 12:55 PM PST · Updated 17 days ago



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TECHNOLOGY


No. 42 law firm by head count sanctioned over fake case citations generated by AI

BY DEBRA CASSENS WEISS

FEBRUARY 10, 2025, 10:30 AM CST

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Updated: Lawyers from plaintiff's law firm Morgan & Morgan have been sanctioned for a motion that cited eight nonexistent cases, at least some of which were apparently generated by artificial intelligence.

What are the risks of using AI in legal work?

- It can get things horribly—but very confidently—wrong
- The information you put into chatbots may not stay confidential

What are the risks of using AI in legal work?

BloombergUS E

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Technology
AI






Samsung Bans Staff's AI Use After Spotting ChatGPT Data Leak


- Employees accidentally leaked sensitive data via ChatGPT
- Company preparing own internal artificial intelligence tools

By [Mark Gurman](#)
May 1, 2023 at 5:48 PM PDT *Updated on May 1, 2023 at 10:54 PM PDT*

[Samsung Electronics Co.](#) is banning employee use of popular generative AI tools like ChatGPT after discovering staff uploaded sensitive code to the platform, dealing a setback to the [spread of such technology in the workplace](#).

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What are the ethical implications of using AI in legal work?

Duty of Competence

- Rule 1.1
 - A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
 - Competence in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.

Duties of Competence and Diligence

Rule 1.1

Rule 1.3

- “It is possible that generative AI outputs could include information that is false, inaccurate, or biased.”
- “A lawyer must critically review, validate, and correct both the input and 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... **The duty of competence requires more than the mere detection and elimination of false AI-generated results.**”
- “A lawyer’s professional judgment cannot be delegated to generative AI and remains the lawyer’s responsibility at all times.”

What are the ethical implications of using AI in legal work?

Duty of Confidentiality

- Rule 1.6
 - Lawyers must protect information relating to the representation and take steps to prevent unintended disclosure or unauthorized access to that information

Supervision and Unauthorized Practice

- Rules 5.1, 5.3
 - Lawyer with supervisory authority over non-lawyer must make reasonable efforts to ensure non-lawyer's compliance and may be responsible for non-compliance
- Rule 5.5
 - Lawyer cannot “knowingly assist a person in the unauthorized practice of law”

Duty of Confidentiality Bus. & Prof. Code § 6068(e)

Rule 1.6

- “A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections.”
- “A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.”
- “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 utilize the information for its own use in any manner, including to train or improve its product.”

Duty to Supervise Lawyers & Non-Lawyers

Rules 5.1-5.3

- “Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the [organization] adopts measures that give reasonable assurance that the [organization’s] lawyers and non-lawyers’ conduct complies with their professional obligations when using generative AI.”
- “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 [] obligations.”
- **These issues are non-exhaustive; the Practical Guidance document addresses additional issues**

What does the California State Bar have to say?

THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

Takeaways

Ethical use of AI in legal practice

- Do not put confidential, privileged, or non-public information into chatbots
- If you use AI for legal work, do so with extreme caution and full duplication through other means
- Cannot delegate your professional judgment to generative AI
- Set policies and conduct trainings
- Keep track of developments and guidance—things will change fast

Scenario 5: Poll

Can you rely on AI tools for preliminary legal research and what steps should you take to ensure compliance with ethical obligations?

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Thank You
