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Spotting AI Ethical Issues

New Tools, Same Rules

Program Overview

- What Is Generative AI and ChatGPT?
- What Can Go Wrong and Ethical Duties
- Emerging Guidance from the Bench and Bar
- Key Takeaways
- Questions



What Is Generative AI and ChatGPT?

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Generative AI Overview

Generative AI

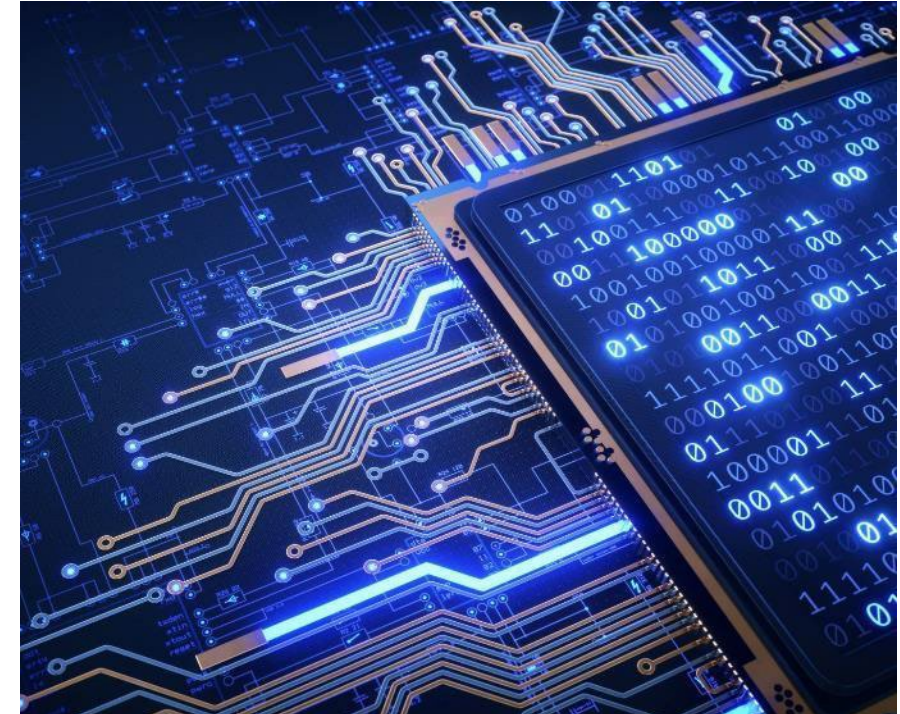
- A type of Artificial Intelligence that creates new content based on what it has learned from. When given a prompt, it can predict what the expected response might be (including text, images, audio)

GPT (Generative Pre-trained Transformer) models

- A class of Large Language Models (LLMs) that can digest massive quantities of text and can infer relationships between words.
- OpenAI released GPT-4 in March 2023

Large Language Models

- Employ neural network models to process natural language and predict the best response based on its understanding of language.



Generative AI Use Cases



- Summarize text
- Question and Answer
- Code Generation
- Image Generation
- Text Classification



Public v Commercial GenAI Applications

PUBLIC



Lawyers blame ChatGPT for tricking them into citing bogus case law



ENTERPRISE / COMMERCIAL

- Software your company licenses or develops.
- Uses "private" LLMs hosted on the cloud or on secured network.

Azure OpenAI Service

Build your own copilot and generative AI applications

Amazon Bedrock

The easiest way to build and scale generative AI applications with foundation models (FMs)



Generative AI Example – M365 Word Copilot

Van Arsdel & Wide World Importers

Proposal to supply sustainable building materials

Overview

Wide World Importers is a leading provider of innovative and environmentally friendly solutions, including flooring, wall coverings, and acoustic paneling made from sustainable materials such as coconut shells, bamboo, and sorghum stalks. Our products help reduce noise pollution by absorbing sound and are responsibly sourced. With a focus on sustainability, we offer valuable resources and insights to help our partners reduce costs and increase long-term value. Our consultative sales and support process ensures that our customers receive the best possible solution for their needs.

Fit to VanArsdel's Needs

We understand that sustainability is a top priority for VanArsdel's development projects and that it can help reduce costs and increase long-term value. With a strong commitment to sustainability

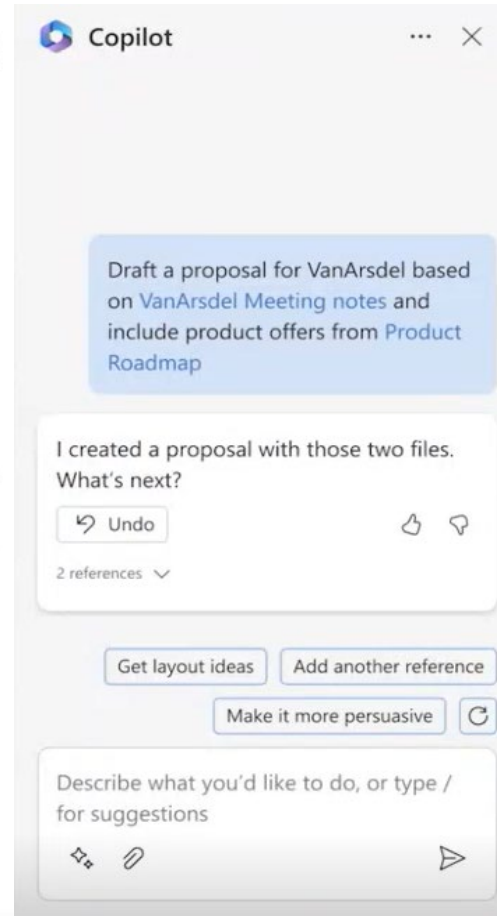
Design Timeline

Our team of experts is available to work with VanArsdel to ensure the design timeline is met while delivering the best possible solution.

Next Steps

We would be honored to further discuss this opportunity with VanArsdel and provide more detailed information about our products, services, and pricing. To proceed, we suggest setting up a follow-up meeting to discuss next steps.

✓ Keep it Adjust Regenerate Delete



Chat interface shows user interaction with Copilot and LLM's responses

Microsoft Copilot

- Because of the information generative AI applications like Microsoft Copilot have access to it can be a powerful tool for finding information within your organization.
- Known as a user's "graph" when a user prompts Copilot it will look externally to the internet (much like Chat GPT), but it will also search across a user's one drive, exchange, Teams, and SharePoint sites the user has permissions to access.



Microsoft Copilot

Copilot also has the ability summarize, create actions items, and task lists from transcription enabled Team's meetings.

Pros

- Allows users to be more engaged during meetings
- Cuts down on time spent organizing notes and generating meeting summaries post-meeting

Cons

- Creates more discovery
- Transcriptions aren't 100% accurate
- Difficult to govern



Enterprise GPT

- Securely sits behind an organization's firewall
- Allows for users to leverage their organization's confidential information without risking external exposure

Pros

- Quick and accurate
- Summarize long documents
- Translate documents
- Document comparisons

Cons

- Preservation
- Appearance – difficult to tell when you're on public vs. enterprise GPT application
- Overlap with other generative AI applications



Legal Research

Both Lexis Nexis and Westlaw have released generative AI applications within their legal research tools

Prompting is much easier than traditional searching

Ability to create initial drafts of legal documents



What Can Go Wrong and Ethical Duties

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Scenario 1: Document Drafting



- On Friday afternoon, Peter Partner assigned Ava Associate to draft the Opposition to the Motion to Dismiss (Opposition) and instructed her to provide it to him by Monday morning at 10 AM.
- Ava Associate, who had friends coming in for the weekend, decided to use ChatGPT to prepare the Opposition on Monday morning.
- In one of her prompts, Ava Associate inadvertently included privileged client information.

Scenario 1: Document Drafting



- In so using ChatGPT, Ava Associate did not violate any firm policies because the firm had no AI policy (and had not provided Ava Associate or any other firm attorney with AI training).
- Unbeknownst to Peter Partner and to Ava Associate, the **Opposition that was filed with the court was riddled with fake quotes from bogus cases.**

Scenario 1: Document Drafting – Ethical Duties

- ⌘ **Confidentiality:** A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent... (ABA Model Rule 1.6: Confidentiality of Information).
- ⌘ **Competency:** 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... (ABA Model Rule 1.1: Competence – Comment [8]).
- ⌘ **Advisor:** In representing a client, a lawyer shall exercise independent professional judgment and render candid advice (ABA Model Rule 2.1: Advisor).
- ⌘ **Supervision:** A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct (ABA Model Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer).

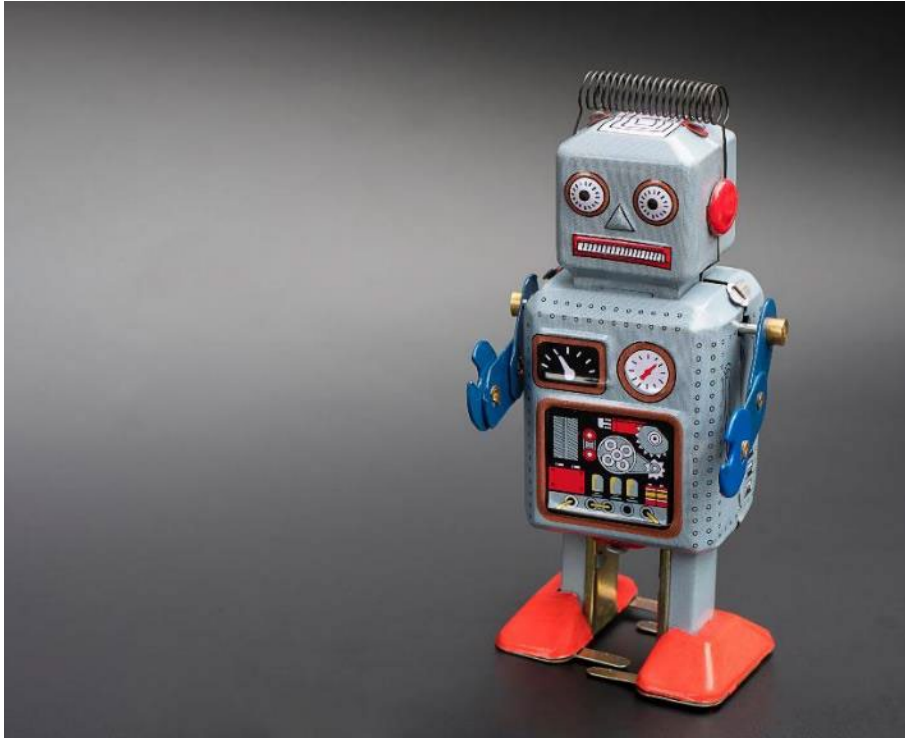


Scenario 1: Document Drafting – Ethical Duties

- ⌘ **Nonlawyer Assistance:** A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer (ABA Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance).
- ⌘ **Unauthorized Practice of Law:** 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 (ABA Model Rule 5.5: Unauthorized Practice of Law).

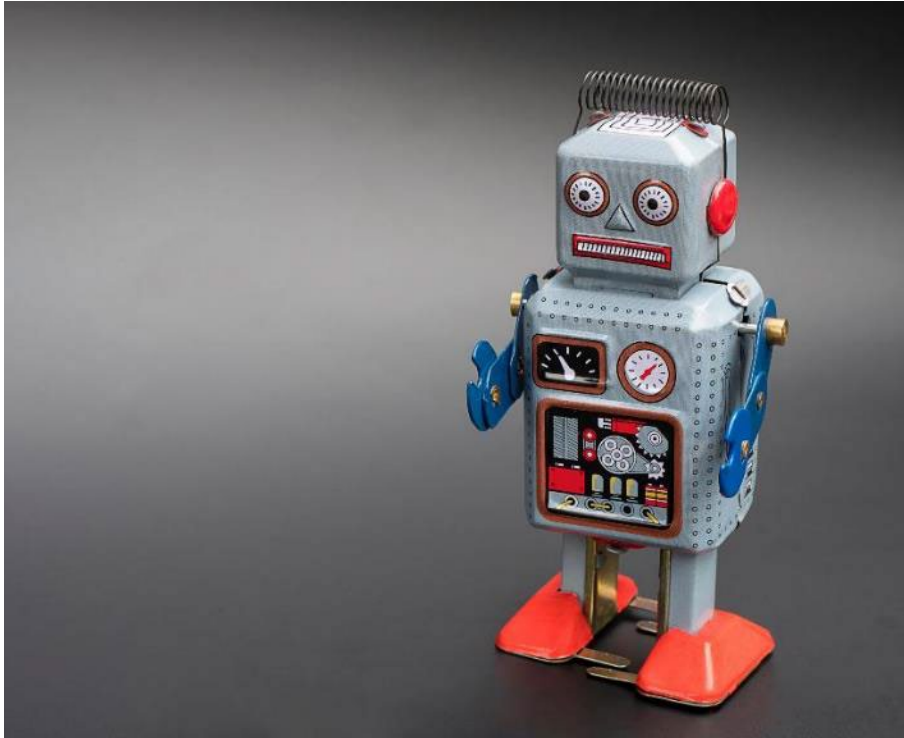


Scenario 2: AI Assistant



- ABC Law Firm implements AI Merge, a cloud-based AI solution to assist attorneys at the firm with due diligence for M&A transactions.
- The AI Merge application is installed locally onto each of ABC Law Firm computers, allowing the application to connect with the AI Merge cloud-based service. Attorneys can then create, edit, upload, and download documents containing client data.
- ABC Law Firm's contract with AI Merge **requires AI Merge to keep all data that is stored by the application secured and private.**

Scenario 2: AI Assistant



- A year after launch, **AI Merge was the victim of cyber-attack**, and a massive amount of client data was accessed and acquired by the cyber attackers.
- The cyber-attack was enabled by a known vulnerability to the AI Merge applications that were installed on ABC's computers.
- AI Merge had released a software update patching the vulnerability issue a couple of weeks before the cyber-attack, but **ABC Law Firm was not aware of the update and failed to update the AI tool.**

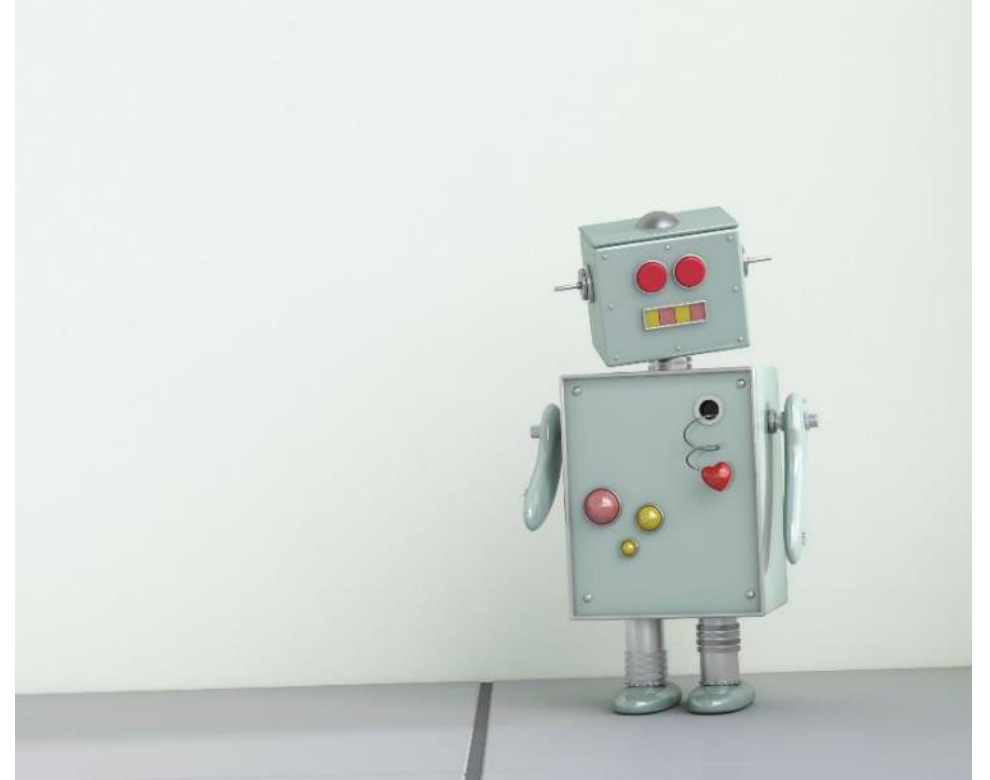
Scenario 2: AI Assistant – Ethical Duties

- **Confidentiality:** A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent... (ABA Model Rule 1.6: Confidentiality of Information).
- **Competency:** 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... (ABA Model Rule 1.1: Competence – Comment [8]).
- **Safekeeping Property:** A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property... Other property shall be identified as such and appropriately safeguarded (ABA Model Rule 1.15: Safekeeping Property).



Scenario 3: AI Assistant #2

- 7 Joe Associate has been asked to review a deposition transcript and draft a summary for the partner working on the case.
- 7 A year ago, Joe's firm licensed a new AI Assistant tool that was vetted by his firm's IT and data security department and was later approved by the firm's leadership.
- 7 In a presentation introducing the application, the firm's Chief Security Officer stated that client data could be submitted to the application because it was hosted within the firm's firewall and had no access to the outside world.
- 7 Joe chose to draft the summary without using the AI Assistant and submitted eight billable hours to the client.



Scenario 3: AI Assistant #2 – Ethical Duties

- **Competency:** 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... (ABA Model Rule 1.1: Competence – Comment [8]).
- **Fees:** A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly (ABA Model Rule 1.5: Fees).
 - 1996 ABA Task Force on Lawyer Business Ethics, “the lawyer [has] an obligation to address the matter... in a cost-effective manner and to avoid ‘churning’ hours[.]”



Scenario 4: Contract Analysis

- Ann Attorney was retained to draft a customer agreement for Acme Corporation. The General Counsel for Acme asked Ann Attorney to include a unique provision that the GC had drafted into the agreement.
- Ann used her firm's AI contract analysis tool to help draft the contract. She input the provision the GC had drafted into the tool.
- A month later, another attorney at Ann's firm used the AI contract analysis tool to draft a customer agreement for another firm client, Globex Corporation (Globex).



Scenario 4: Contract Analysis

- A year later, Acme sought to become a customer of Globex, and Globex provided its standard customer agreement to Acme.
- In reviewing the agreement, Acme's GC noticed that Globex's customer agreement included the unique term she had drafted for the Acme agreement. In the context of the Globex agreement, this term was very beneficial to Globex and very unfavorable to Acme.
- The AI contract analysis tool was not configured to refrain from retaining or using terms incorporated in specific client agreements, and did not provide any option for users to flag provisions that should not be used in other agreements drafted by the firm. The firm's IT department and AI tool vendor confirmed that the tool had incorporated the unique term Acme's GC had drafted for the Acme customer agreement into Globex's customer agreement.



Scenario 4: Contract Analysis – Ethical Duties

- ⌘ **Competency:** 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... (ABA Model Rule 1.1: Competence – Comment [8]).
- ⌘ **Communications:** A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules... (ABA Model Rule 1.4: Communications).
 - ⌘ "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct (ABA Model Rule 1.0: Terminology (e)).
- ⌘ **Conflict of Interest:** A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.



Scenario 5: M&A



- Growing Company's (GC) IT Department has developed an M&A analytics tool to help its M&A team evaluate potential targets and deals.
- GC, which is considering acquiring Target Company ("TC"), intends to input confidential financial and operational data concerning GC, as well as confidential financial and operational data it has received from TC, into the tool.
- GC's Legal department has been asked to sign off on the acceptability of inputting such data into the tool.

Scenario 5: M&A – Ethical Duties

- ⌘ **Competency:** 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... (ABA Model Rule 1.1: Competence – Comment [8]).
- ⌘ **Communications:** A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules... (ABA Model Rule 1.4: Communications).
 - ⌘ "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct (ABA Model Rule 1.0: Terminology (e)).
- ⌘ **Conflict of Interest:** A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.



Scenario 6: M&A #2



- It turns out that the best skills of GC's IT Department are not in the area of AI tool development.
- GC's tool provides very little value, and the M&A team decides to purchase a third-party M&A analytics tool.
- GC's Legal department is again asked to sign off on the acceptability of inputting confidential financial and operational data concerning GC and TC into the third-party tool.

Scenario 6: M&A #2 – Ethical Duties

- ⌘ **Competency:** 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... (ABA Model Rule 1.1: Competence – Comment [8]).
- ⌘ **Communications:** A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules... (ABA Model Rule 1.4: Communications).
 - ⌘ "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct (ABA Model Rule 1.0: Terminology (e)).
- ⌘ **Conflict of Interest:** A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.



Emerging Guidance from the Bench and Bar

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Federal Courts on AI

- Chief Justice Roberts' 2023 Year-End Report on the Federal Judiciary
- Judicial Conference Committees
- Amendments to local rules
- 25+ federal judges with standing orders on use of AI
- ABA Opinion 512, July 29, 2024



State Courts and Bars

- Judicial committees
- State bar AI task forces
 - Published guidance and ethics opinions from numerous state bars
- ABA Task Force
- International cooperation among bar associations and law societies



Key Takeaways

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Key Takeaways

- Generative AI can be helpful in analyzing, summarizing, and drafting content.
- Understanding how Generative AI works can help assess potential pitfalls and risks, including legal, business, and ethics.
- Understanding how the rules of professional conduct may apply to the usage of Generative AI is critical to understanding and reducing ethical risks.
- Key ethics rules to consider: Competence; Advisor; Fees; Communication; Confidentiality; Safeguarding of Client Property; Conflicts of Interest; Supervisory Lawyer Responsibilities; Responsibilities concerning Nonlawyer Assistance; Unauthorized Practice of Law; and Misconduct.



Questions

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