



The Ethical Issues of Artificial Intelligence/Generative AI on the Practice of Law in 2025

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SYMPOSIUM**

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Session Overview

- Technology continues to develop and change rapidly
- The law of AI is in its infancy – as is our real understanding of what it does and what the risks are
- A perfect storm for lawyers and other professionals in this emerging area – you can't possibly keep up with everything, there's too much technology and the law is moving in unpredictable and often unexpected ways
- Is it realistic for lawyers to keep up with (all of) the developments?
- What are the primary ethics challenges in giving advice in this environment?

Session Overview

- Tremendous amount of uncertainty in applying existing law to new technologies and few right answers – on both substance and ethics
 - Being a lawyer in this environment is not just about applying the law to facts
 - Need to think ahead, be thoughtful, have good instincts, and exhibit sound judgement
 - Complicated issues involving risks and enforcement possibilities
 - It is clear that substantive law will continue to evolve quickly and extensively, in somewhat unpredictable ways

Session Overview

- Think about several questions throughout the discussion
- How do I give advice when the answer is unclear?
- How do I give advice when I don't fully understand the technology?
- How do I give advice when the law is changing in ways that cannot realistically be predicted?
- How do I give advice about enforcement risk (both in terms of regulator awareness and regulator interest)?
- If the “law” says you can't do it, can I advise that its ok?
- How do you handle laws that give companies a “cure” period?

Obligations from the unexpected

- What do you do when there is unexpected guidance/enforcement?
- Do you have an obligation to go back over previous advice?
- What do you do when you do not fully understand the technology?
- How well do I need to be able to predict the future?

Challenges for Practitioners

- Keeping up with technology – counseling requires a mix of skill and knowledge that may require dependence on others with detailed technical knowledge
- Keeping up with the law, guidance, and best practices can feel like drinking from a firehose
- Anticipating where the law is going and how regulators are likely to apply and/or stretch the law to achieve desired aims (note – how is this changing in the new environment)
- Weighing risks where the law is unclear
- Counseling clients consistent with ethical obligations

Challenges for Practitioners

- Part of our job is understanding what regulators care about
- Part of our job is evaluating where complaints or other issues will arise
- Part of our job is understanding media interest – which can lead to regulator and legislative interest
- Part of our job is understanding how the enforcement process works (in some similar laws – for example privacy laws - ask yourself whether anything was illegal under these laws where there was a right to cure)
- Do these issues get addressed appropriately in the ethics rules?

Model Rules of Professional Responsibility

- Rule 1.1 – Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

- Comments (Legal Knowledge and Skill)

- [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.
- [2] Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study.

Model Rules for Professional Responsibility

- Comments (Maintaining Competence)
 - [8] 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
- What does this mean for practitioners?
 - Understand your client's business and their technology
 - Don't be afraid to ask questions and/or seek clarification on how your clients' products and services work – and where they are using or not using AI
 - Seek out training on new technologies
 - Stay current on new legal developments

Model Rules for Professional Responsibility

- Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer
 - (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.
 - (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
 - (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
 - (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rules for Professional Responsibility

- Comments (Criminal, Fraudulent and Prohibited Transactions)
 - [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Model Rules for Professional Responsibility

- What does this mean for practitioners?
 - Where the law is uncertain, may be difficult to counsel clients on whether activities are permissible or prohibited
 - Think ahead – what’s legal today might not be legal tomorrow
 - Don’t just counsel on legal risk; reputational and business risk are relevant too
 - Representing a client whose cause is controversial does not constitute approval of the client’s views or activities
 - And these rules may not fit very well on “counselling”
- What about situations where?
 - It’s illegal, but no one will find out?
 - It’s illegal, but regulators do not seem to care about the issue?
 - Its illegal, but there’s an opportunity to cure

Model Rules for Professional Responsibility

- Rule 2.1 – Advisor

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

- Comments (Scope of Advice)

- [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
- [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Model Rules for Professional Responsibility

- What does this mean for practitioners?
 - It's your responsibility to think outside of the existing legal framework
 - New technologies may be legal, but might raise ethical and moral concerns (think AI at this point)
 - Clients sometimes “drink the Kool-Aid” – outside perspective is important (because reactions of others matter)
 - Clients may not have an understanding of what is happening across industries or sectors; a wider viewpoint may be useful to contextualize the permissibility of a particular practice
 - Counsel on where the law is, and where it is going (and think long term and short term)
 - If a particular business practice smells bad, even if it isn't technically illegal, say something

Model Rules for Professional Responsibility

- Rule 3.1 – Meritorious Claims and Contentions

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

- Comments

- [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change
- [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Model Rules for Professional Responsibility

- What does this mean for practitioners?
 - Developing good faith arguments require that you understand the technology and the current state of law
 - Can be difficult to apply the law to the facts when dealing with new technologies
 - Frequently no clear right answer or existing legal precedent
 - Use ambiguities in existing legal frameworks to your client's advantage, but be honest about the risks of doing so
 - Think about where the law is going (and where it should go) when developing arguments

Ethical Responsibility

- I often ask my clients “what do you want the answer to be?”
- By that I mean:
 - Are you asking me as an academic/neutral?
 - Are you asking me what we can defend?
 - Are you asking me what the options are and what the consequences are if we take an unreasonable position?

Adding AI to the Mix

- New ethical obligations (or new applications of ethical obligations)
- Evolving law
- Evolving ethical guidance
- Limited technical knowledge

AI Development

- Chair Khan - Sensitive personal data related to health, location or web browsing history should be “off limits” for training artificial intelligence models.
- The FTC is working to create “bright lines on the rules of development, use and management of AI inputs.” Khan said.
- “On the consumer protection side, that means making sure that some data — particularly peoples’ sensitive health data, geolocation data and browsing data — is simply off limits for model training.”
- Khan said that companies that want to use data they’ve already collected for AI training also must actively notify users of the change.
- How do you use these statements with what you know about AI risks (e.g., bias and discrimination)
- Is this now “irrelevant?” (think now and the future)

Some technology ethics developments

- “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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”
- ABA Ethics commission has added technology as a component of competence as a lawyer

Some technology ethics developments

- Some earlier examples relied upon by the ABA and others
- You aren't required to use them but you need to be aware of social media sites, the ethical risks associated with using them and how they affect your cases.
- You need to understand the growing use of the cloud and how it affects law office management and your clients.
- You have to know the risks associated with using mobile devices and how to mitigate those risks.
- You must understand the basic issues of data security and implementing any necessary security measures for your law office, such as using strong passwords and encrypting the information on your devices.
- You need to keep up with e-discovery and e-filing practices.

ABA Formal Opinion on AI Ethics

- Formal opinion covering the growing use of generative artificial intelligence (GAI) in the practice of law

ABA Formal Opinion on AI Ethics

- Bar Associations have given practical guidance for the use of Gen AI:
 - ABA Formal Opinion 512: Generative Artificial Intelligence Tools
 - Lawyer's duty to understand the capabilities and limitations of Gen AI tools
 - Need for transparency and disclosing Gen AI use to clients
 - Lawyer's responsibility for supervising employees' and agents' Gen AI use
 - Ethical implications of charging fees for Gen AI-assisted services

ABA Questions about GAI Tools

- What level of competency should lawyers acquire regarding a GAI tool?
- How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation?
- When must lawyers disclose their use of a GAI tool to clients?
- What level of review of a GAI tool's process or output is necessary?
- What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

Competence

- To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.

Competence

- A lawyer’s reliance on, or submission of, a GAI tool’s output—without an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.15 While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

Rule 1.3 Diligence

- A lawyer shall act with reasonable diligence and promptness in representing a client.
- It is possible that generative AI outputs could include information that is false, inaccurate, or biased. A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law. Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.
- Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer. AI-generated outputs can be used as a starting point but must be carefully scrutinized. 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, including as part of advocacy for the client. 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. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing.

Rule 1.5 Fees

- Think about how AI issues fit into fee structure
- Think about your responses to RFPs on cost savings from AI
- Are these accurate today?
- Is this “ethics” or client relations?

Rule 1.6 Confidentiality of Information

- Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others inside the firm who will not adequately protect the information from improper disclosure or use because, for example, they are unaware of the source of the information and that it originated with a client of the firm.

Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security. 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 must anonymize client information and avoid entering details that can be used to identify the client. One 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.

Duty to Communicate (ABA Resolution 112)

- “A lawyer’s duty of communication under Rule 1.4 includes discussing with his or her client the decision to use AI in providing legal services.”
- “A lawyer should obtain approval from the client before using AI, and this consent must be informed. The discussion should include the risks and limitations of the AI tool.
- In certain circumstances, a lawyer’s decision not to use AI also may need to be communicated to the client if using AI would benefit the client.
- Failing to use AI technology that materially reduces the costs of providing legal services arguably could result in a lawyer charging an unreasonable fee to a client.”

Duty to Supervise

- How does the duty to supervise change with AI?
- What do you know about what your vendors have done?
- What do you know about what your clients have done?
- How are you training the new generation?

Supervision (borrowed from cloud analogies)

- Lawyers should:
 - ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;
 - investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;
 - determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;
 - and understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.

AI Case Study

- A prestigious US University wants to improve the likelihood of success of its law students.
- It is engaged in an extensive data collection project to examine data of the last ten years of law students – their applications, their performance in law school and their career prospects after school.
- They want to use this data to build artificial intelligence and appropriate algorithms to improve the admissions process
- They also want to use that data – including data about current students – to evaluate new scholarships and additional job support services for current students
- What are the legal issues? How do you try to understand the models?

My Favorite AI Example Recently

- My colleague asked for bio information on a new client
- Half a dozen normal bullets (job title, previous jobs, schools)
- Then: Fun fact: If we stacked bananas, [HIS] privacy expertise would be equivalent to approximately 46,449 bananas! 🍌
- How do you lawyer for this?

Theory Meets Reality in Franchise Law

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Practical Uses For AI in Franchise Legal Work

- The FDD
- Regulatory filings and relationship issues
- M & A and due diligence
- Formal and informal dispute resolution

The FDD

- Pricing
 - Hourly Work
 - Fixed Fee
- Time Allocation
 - Hourly Work
 - Fixed Fee

Regulatory Filings and Relationship Issues

- FDD annual updates
- Application preparation
- Application submittal
- Comment letter responses
- Default letters and termination notices
- What is the future roll of the paralegal?

M & A and Due Diligence

- Drafting the LOI
- Drafting the purchase agreement
- Diligence document review
- Drafting the diligence memo
- Preparing and circulating signature pages
- Preparing the closing binder

Formal and Informal Dispute Resolution

- Drafting arbitration or mediation statements
- Drafting complaints
- Document review
- Brief writing
- Deposition review and questions
- Drafting settlement agreements

Questions?