KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-457

Issued: March 15, 2024

Subject: The Ethical Use of Artificial Intelligence ("AI") in the Practice of Law

Question #1: Like other technological advances, does an attorney have an ethical duty to keep abreast of the use of AI in the practice of law?

Answer: Yes.

Question #2: Does an attorney have an ethical duty to disclose to the client that AI is being used with respect to legal matters entrusted to the attorney by the client?

Answer: No, there is no ethical duty to disclose the rote use of AI generated research for a client's matter unless the work is being outsourced to a third party; the client is being charged for the cost of AI; and/or the disclosure of AI generated research is required by Court Rules.

Question #3: If the effect of an attorney's use of AI reduces the amount of attorney's time and effort in responding to a client matter must the lawyer consider reducing the amount of attorney's fees being charged the client when appropriate under the circumstances?

Answer: Yes.

Question #4: May an attorney charge the client for expenses related to using AI in the legal practice?

Answer: If the client agrees in advance to reimburse the attorney for the attorney's expense in using AI, and that agreement is confirmed in writing, then yes, the attorney may charge for those expenses. However, similar to the lawyer's cost of general overhead expenses, the costs of AI training and keeping abreast of AI developments should not be charged to clients.

Question #5: If an attorney utilizes AI in the practice of law, is the attorney under a continuing duty to safeguard confidential client information?

Answer: Yes.

Question #6: Does an attorney using AI have an ethical duty to review court rules and procedures as they relate to the use of AI, and to review all submissions to the Court that utilized Generative AI to confirm the accuracy of the content of those filings?

Answer: **Yes.**

Question #7: **Does an attorney serving as a partner or manager of the law firm that uses AI, and/or supervising lawyers and/or nonlawyers in the law firm who are using AI, have an ethical responsibility of ensuring that policies and procedures regarding AI are in place, and that training has taken place to assure compliance with those policies?**

Answer: **Yes.**

REFERENCES

SCR 3.130 [Kentucky Rules of Professional Conduct] 3.130(1.1) & cmt. (2) & (6); (1.4); (1.5(a) & (b)); (1.6); (1.8); (1.9(c)(l)); (3.1); (3.3); (4.1); (5.l(b)); (5.8); and (8.4).

Cases:

In re Burghoff, 374 B.R. 681 (Bankr. S.D. Iowa 2007) 374 B.R. 681; *Mata vs. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22,2023).

Ethics Opinions

KBA E-446 (2018); KBA E-403 (1998); KBA E-427 (2007); KBA E-437 (2007); and KBA E-442 (2017); ABA Formal Ethics Op. 08-451 (2008); ABA Formal Opinion 93-370 (1993); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010); Florida Bar Ethics Opinion 24-1 (2024).

Miscellaneous

2023 Year-End Report of the Federal Judiciary" by John G. Roberts, Jr., Chief Justice of the U.S. Supreme Court; American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013; President Joe Biden's Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.

INTRODUCTION

Artificial intelligence ("AI") is defined as "... the use... of computer systems or machines that have some of the qualities that the human brain has, such as the ability to interpret and produce language in a way that seems human, recognize or create images, solve problems, and learn from data supplied to them…."[1] AI is now the latest form of technology that may revolutionize the practice of law. Whether AI is utilized by machine learning such as Google search, by deep learning with voice recognition systems named Siri or Alexa, or Generative AI[2] ("GAI") in applications known as Chat GPT, Google Bard or Microsoft Bing, the potential use of AI in the

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[1] Cambridge English Dictionary at "artificial intelligence."

[2] The term "generative" has been found to have two neural networks, a generator, and a discriminator, which are trained simultaneously through a competitive process. The generator creates new data, while the discriminator evaluates whether the generated data is authentic or not. This adversarial training process helps the generator improve over time, creating more realistic and convincing content. However, potential misuse comes into play because generative AI can be used to create deepfakes or other deceptive content.

practice of law is unlimited.[3]

As with all technological advances, attorneys are challenged to meet lawyer ethical responsibilities when utilizing a new product and this applies to AI. Whether the attorney is researching relevant case law, reviewing documents, or drafting court pleadings, care must be taken that the attorney understands how AI works, how it may be used responsibly and in conjunction with the Supreme Court Rules of Professional Conduct.[4] As U. S. Supreme Court Chief Justice John G. Roberts, Jr., explained, "(A)ny use of AI requires caution and humility."[5]

The current Rules of Professional Conduct do not specifically address AI, but they do require an attorney to "...keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."[6] While the use of AI continues to evolve, some of the suggested benefits of AI for lawyers are:

☐ Streamlining legal research to find relevant case law, statutes, and precedents more quickly;

☐ Reviewing and analyzing large volumes of documents and summarizing them;

☐ Automating repetitive tasks to reduce the requirement for extensive manual labor;

☐ Detecting deception in emails or documents;

☐ Predicting case outcomes and legal trends based upon historical data;

☐ Expediting responses to client inquiries;

☐ Providing around-the-clock access to legal information and resources;

☐ Reducing legal expenses to the client due to accelerated research and document preparation.

Although the use of AI in the practice of law is relatively new, certain risks have already become apparent, including but not limited to:

• AI may struggle to grasp complex legal concepts which can produce inaccuracies and misinterpretations;

• AI models trained on biased data may perpetuate biases in the legal decision-making process;

• AI lacks transparency because of its use of AI algorithms which operate as "black boxes" making it difficult to understand how AI arrived at its conclusions;.

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[3] When ChatGPT was asked to explain how it functions and compares to other AI providers, ChatGPT answered, in general, as follows:
ChatGPT is based on Generative Pre-trained Transformer architecture and is trained using a diverse range of internet text but does not have specific knowledge about the details of individual documents or sources. Other AI providers use different architectures, training datasets, and methods. For example, Google's BERT (Bidirectional Encoder Representations from Transformers) focuses on bidirectional context understanding. Further, ChatGPT is designed for natural language understanding, making it suitable for conversational applications, and content generation. Other AI providers may offer a broader range of services, including image recognition, speech processing, and domain-specific applications. Finally, ChatGPT advises that it has options for users to fine-tune models for specific tasks, while other providers may offer more customization options, allowing developers to fine-tune models for specific use cases.
[4] SCR 3.130 et seq.
[5] "2023 Year-End Report of the Federal Judiciary" by John G. Roberts, Jr., Chief Justice
[6] SCR 3.130(1.1), Comment (6).

- AI's generative training may result in the disclosure of confidential client information ;

- AI may provide false information including citations to nonexistent legal "authorities;" and,

- AI may provide duplicative and/or irrelevant materials which may increase discovery production expenses.

The Ethics Committee has issued Ethics Opinions discussing the ever-changing environment of technology and its application to the Rules, and many of these Opinions are applicable to AI.[7] In addition to the guidance provided by these Opinions, we caution lawyers that before using an AI product they review the provider's privacy policies and its disclaimers in handling client and attorney information.

Due to the many concerns surrounding the impact AI has to the ethical requirements of lawyers, the Kentucky Bar Association formed a Task Force on Artificial Intelligence and the Task Force is considering a lawyer's responsible use of AI. Until the Task Force's work is completed, and years of usage have passed, lawyers should be mindful that it may be difficult or impossible to answer many questions regarding the ethical use of AI. Further, we do not address Kentucky's Advertising Rules which may come into play if a lawyer intends to advertise the use of AI because the Advertising Rules raise issues beyond the scope of this Committee's authority.

In the interim it is intended that this Opinion will provide some practical guidance while the Task Force explores multiple AI issues and whether amendments to the Rules of Professional Conduct are appropriate to address the unique applications a lawyer faces in the use of AI. The following commentary is a review of what we today consider the most crucial ethical issues when using an AI tool; however, lawyers must be mindful to the future implications of using AI services and the Rules governing lawyer conduct.[8]

COMPETENCE

SCR 3.130(1.1) mandates that "(a) lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Two of the Supreme Court's Comments to the Rules elaborate on the scope of the competency requirement. The first point is Comment 2, as follows:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. … Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. 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. Competent representation

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[7] *See*, KBA E-446; KBA E-403; KBA E-427; KBA E-437; and KBA E-442. For example, in E-437 the Committee considered a new development in technology (cloud computing) and while the Opinion is not directly applicable to the use of AI, many of the Committee's comments would apply when a lawyer uses AI. The Committee opined that lawyers may use cloud computing but must follow the Rules with regard to safeguarding client confidential information, act competently in using cloud computing, properly supervise the provider of the cloud service, and communicate with the client about cloud computing.

[8] We remind lawyers that the ethical implications of using AI also apply to all of a lawyer's non-lawyer activities; specifically, "a lawyer is a lawyer is a lawyer" and the Rules of Professional Conduct apply to all of a lawyer's actions. SCR 3.130(5.8) ("Responsibilities regarding law-related services").

can also be provided through the association of a lawyer of established competence in the field in question.

The second point is Comment 6, as follows:

> 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.

Therefore, attorneys have a continuing ethical responsibility to maintain competence in their law practice, and reliance upon technology to do so is just another aspect of the competency requirement.

Indeed, for many years lawyers have used technology to not only attain competency in the practice of law, but also to maintain their competence by utilizing computer research resources, including Westlaw, LexisNexis, and Decisis, all of which are readily available. Internet research also provides an additional level of resources for an attorney to best serve their clients' needs. In addition, many lawyers are now required to take training in, and become competent in, the use of electronic filing in state and federal courts, as well as in most administrative proceedings.

Attorneys have already been using AI whether they realize it or not. "Spell check," "grammar search" and the auto correcting function on most emails employ AI, as do the Shephardizing functions of legal research tools. We are told that these functionalities only scratch the surface of what AI may be able to do for the practice of law in this ever-changing dynamic of the technological revolution. As with any new advance in technology, lawyers are expected to know how to use AI to maintain competence because, it is argued, it will allow lawyers to provide better, faster, and more efficient legal services, and at a reduced cost to the client. In the near future, using AI may become as commonplace as an attorney's current use of other technological systems which have now become an indispensable part of the practice of law.

There are many AI resources now available to the lawyer, and there is much discussion about what AI resources are on the horizon, therefore, as AI tools become more refined, and their use in the legal profession becomes more widespread, lawyers need to be aware that not using an available AI tool may constitute a failure to meet the lawyer's duty of attaining and maintaining competence under Rule 1.1. For example, legal research may be more comprehensive using an AI-generated function of computer research programs. At the same time, understanding how AI works, (a) may enable an attorney to better respond to an opponent's arguments or theories, or (b) better analyze the evidence presented by the attorney's adversary. In essence, the rapid development of AI poses challenges for attorneys to continuously update their knowledge base in order to maintain their competence.

COMMUNICATION

Consideration should be given to whether a lawyer has an ethical duty to advise the client that AI is being utilized in respect to their matters. SCR 3.130(1.4)[9] requires that a lawyer keep the

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[9] (a) 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;

  (2) reasonably consult with the client about the means by which the client's objectives are to be

client reasonably informed about the status of their matter, to promptly inform the client of any decision or circumstance which requires the client's informed consent, and to obtain the client's informed consent of such decision or circumstance. Further, the attorney is required to "reasonably consult" with the client about the means by which the client's objectives are to be accomplished.[10] The word "reasonably" is intended to preclude an interpretation that the lawyer would always be required to consult with the client when a particular act is impliedly authorized.[11] The Rule's Comments explain that the lawyer is to provide the client with sufficient information to participate intelligently in decisions concerning the means by which the client's objectives are to be pursued.[12] Thus, routine use of AI generated research in a client's matter does not in and of itself require specific communication to the client, unless the client is being charged for the cost of the research,[13] a third party service is being utilized to provide the AI research, or if the disclosure of the use of AI generated research is required by Court or other rules.[14]

Moreover, it is clear from prior opinions that when an attorney employs third party providers, or outsources a client's work, that communication of the "means" by which a representation is to be accomplished requires that clients should be informed of such outsourcing.[15] If an outside AI service will be receiving information protected by the lawyer's duty of confidentiality under SCR 3.130(1.6), then obtaining client consent is required. Further, as discussed below, the attorney should also have an agreement with the client about who is responsible for paying the cost of such outsourced services.

LAWYER'S CHARGES FOR FEES & EXPENSES

As with other uses of technology, the lawyer's charging of fees and expenses to a client remains subject to the reasonableness standards of SCR 3.130(1.5(a) and (b)).[16] These standards

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accomplished;

    (3) keep the client reasonably informed about the status of the matter;

    (4) promptly comply with reasonable requests for information; and

    (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[10] *See* SCR 3.130(1.4(a)(2)).

[11] *See* American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982– 2013, at 77 (2013).

[12] SCR 3.130(1.4) Supreme Court Commentary at (3) and (4).

[13] *See* the portion of this opinion regarding "Lawyers' Charges for Fees & Expenses."

[14] *See* the portion of this opinion regarding "Duty to Comply with Court Rules When Using AI."

[15] *See* ABA Formal Ethics Op. 08-451 (2008); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010).

[16] (a) 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;

    (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

    (3) the fee customarily charged in the locality for similar legal services;

    (4) the amount involved and the results obtained;

provide the following two primary points in charging a client when the lawyer has used AI. First, a reduced fee may be appropriate when a lawyer obtains an expeditious on point response to the client's matter because in all cases a lawyer's fee must be reasonable. Accordingly, the attorney's charge for legal services must be adjusted to recognize the reduced legal work devoted to a client's matter when there is a successful result by virtue of using AI. Second, if there are expenses associated with the use of AI, then who will bear the cost of implementing AI services, such as paying for online usage, and/or reimbursing a third-party provider? If the client is to bear these expenses, then before the charge can be made, the client's written consent must first be obtained.

Regarding the attorney's billings for client services and expenses, the essence of Rule 1.5 and the Supreme Court's Comments to the Rule, require that a lawyer provide the client with information about the lawyer's fees and expenses, and then render billing statements that adequately apprise the client as to the basis for the attorney's billing and how it has been determined. Advanced discussion with the client as to how AI expenses are to be paid are as necessary as the agreement with the client as to the basis or rate of the lawyer's fees. Ethics rules suggest that a written statement that confirms the terms of the engagement with the client "… reduces the possibility of misunderstanding."[17] If the lawyer intends to charge the client for AI expenses and the client agrees to pay these expenses, then the lawyer should explain, in writing and in advance, the anticipated cost of those expenses, the basis for the cost being billed, and the terms of payment.[18] There is an exception when the lawyer has regularly represented the client on an already existing basis, but with any changes in the billing procedure being communicated to the client.[19]

With regards to the time savings that an attorney using AI services may generate, an earlier ABA Formal Opinion[20] provided guidance which the attorney will continue to find helpful in determining the propriety of the lawyer's billing methods. The ABA Opinion explains that a lawyer is obliged to pass the benefits of economies on to the client. Thus, the use of AI programs may make a lawyer's work more efficient, and this increase in efficiency must not result in falsely

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(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

[17] *See* Comment (2) When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[18] *See*, SCR 3.130(1.5), Comments 2 and 3.

[19] *See*, SCR 3.130(1.5(a)&(b)).

[20] ABA Formal Opinion 93-370 (December 6, 1993).

inflated claims of time.

It should be obvious that lawyers may not charge a client for hours not actually spent on a client's matter. In the case of *In re Burghoff*,[21] the court found that the attorney's brief contained an extraordinary amount of research, and the attorney was directed to certify to the Court the author of two submitted briefs. The Court found that 17 of the 19 pages of one brief were verbatim excerpts from an article the lawyer found on the internet which had not been attributed to the article's author. The Court held, first, that it was a violation of the ethics Rules for an attorney to "…engage in conduct involving dishonesty, fraud, deceit, or misrepresentation … by committing plagiarism, …".[22] Further, the Court found that the attorney violated the ethics Rules by charging his client for 25.5 hours of legal work in preparing the briefs which was unreasonable given the actual labor invested in copying the article from the internet. Charging an unreasonable fee for "legal work" was also considered a form of attorney misconduct.[23]

While the total impact and costs for AI remain unknown, lawyers must consider the ethical requirements of SCR 3.130(1.5); specifically, including the following:

- Costs incurred in learning about AI, in maintaining AI provided services, and keeping up to date with changes in its use, should be considered like any other continuing legal education expense, and a part of the lawyer's overhead.

- Lawyers charging their clients on an hourly basis cannot submit inflated bills for hours not actually spent on their case, and savings generated by using AI, like other technologies, should be passed on to the client.

- Lawyers may request that their client reimburse them for the costs incurred in using AI services, but only after first explaining the anticipated cost, and also obtaining the client's agreement to reimburse the attorney for the expense.

CONFIDENTIALITY OF CLIENT INFORMATION

There is no ethical duty more sacrosanct than the requirement that an attorney not reveal information relating to a client, or the fact of the attorney's representation of that client, without the client's informed consent. SCR 3.130(1.6) is clear: "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 ..." under a specific exception to the Rule.[24] Additional Rules extend this nondisclosure duty to information provided to an attorney by a prospective client,[25] as well as to information obtained by the attorney in the representation of a former client.[26] The nondisclosure duty is broad, inasmuch as "(t)he confidentiality rule, for example, applies not only to matters communicated in confidence by the

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[21] 374 B.R. 681 (Bankr. S.D. Iowa 2007) 374 B.R. 681.

[22] *Ibid*, at page 683.

[23] Id.

[24] Paragraph (b) to SCR 3.130(1.6) creates exceptions to the disclosure prohibition in those circumstances where the "... lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to secure legal advice about a lawyer's compliance with these Rules..." or (3) to establish a claim or defense on behalf of a lawyer and the client, or in defense of a criminal or civil charge made by the client against the lawyer, or "(4) to comply with another law or a court order."

[25] *See*, SCR 3.130(1.8).

[26] *See*, SCR 3.130(1.8(b)) and (1.9(c)(l)).

client, but also to all information relating to the representation, whatever its source."[27]

It is well known that "AI is making it easier to extract, re-identify, link, infer, and act on sensitive information about people's identities, locations, habits, and desires. Al's capabilities in these areas can increase the risk that a client's personal data could be exploited and exposed."[28] To prevent or reduce this risk of disclosure, the attorney must ensure that the use and the retention of confidential client information by an AI provider is secure and avoids confidentiality risks. In order to confirm the confidentiality of client information, the attorney should understand how generative AI products are being used and then not input any client information that lacks reasonable and adequate security protections unless, of course, client consent is first obtained. Some generative AI products utilize inputted information or uploaded documents such as pleadings or contracts to train itself, or to share that information with third parties. Therefore, the attorney should review the "terms of use" of any AI product and the provider's disclaimers in order to understand whether the AI provider shares inputted information with a third party or will utilize the lawyer's inputted information for its own purposes.

Hence, an attorney should take care that any information inputted into a generative AI product does not identify the client or the nature of the representation. Historically, attorneys have relied upon hypotheticals to discuss legal or factual issues relating to a client's representation; however, the use of hypotheticals is only permissible as long as there is no reasonable likelihood that anyone will be able to determine who the client is or what the client matter involves.[29] The sophistication of generative AI which allows the attorney to have near-human conversations by asking questions with AI responding calls into question whether the use of a hypothetical can be disguised sufficiently to avoid confidential client information from being disclosed.

There are GAI systems that promise that the provider will not send a client's information off-site, or host or share third party content. If that promise is confirmed in writing, then it may be allowable to input the client's confidential information with that provider. However, it still may be difficult, or even impossible to determine whether client information has been kept confidential and once the information has been disclosed it has not yet been judicially determined whether sharing information with an AI program would render that information discoverable, and/or result in waiving claims of attorney-client privilege. Because these questions are currently unanswered, lawyers are advised to maintain a healthy dose of skepticism of AI programs and should proceed with caution.[30]

Two final points on this issue: first, if the attorney intends to utilize AI and is concerned that despite taking appropriate preventative measures confidential client information will be inadvertently disclosed, then SCR 3.130(1.6) allows disclosure of client information if the client gives "informed consent."[31] The attorney should discuss with the client the proposed use of AI, the applications of AI to be utilized, the risks and benefits of the AI product, and fully explain

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[27] *See*, SCR 3.130(1.6), Comment (3).
[28] President Joe Biden's Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.
[29] *See*, SCR 3.130(1.6), Comment (5).
[30] The words of President Reagan: "trust but verify" come to mind – this is what we need to do.
[31] See, SCR 3.130(1(e)) "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.

privacy concerns. With the informed consent of the client, the attorney should be able to meet this Rule's ethical obligations. We recognize there are some states that are considering ethics rules requiring clients to give advance permission before an attorney may use AI on their legal matters, but at this time Kentucky does not have any similar pending rules.

Second, using AI may expose a host of cybersecurity threats to the law firm, including phishing, social engineering, and malware. "We use ChatGPT differently than the way we use other types of searches, and therefore any vulnerabilities in ChatGPT become exacerbated and are much more likely to lead to the exposure of privileged information."[32]

DUTY TO COMPLY WITH COURT RULES WHEN USING AI

"A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (or) (2) fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.."[33] Accordingly, attorneys have an ethical duty to ensure that legal authorities presented to the Court are accurate. GAI tools are known to sometimes produce erroneous and often fictitious responses to inquiries that may seem credible, called "hallucinations." Attorneys who use AI provider services like ChatGPT have a responsibility to check their pleadings for accuracy in their references to both facts and legal citations. Citing non-existent judicial opinions, false quotes and fake citations in filings with the court have caused the judiciary to take notice, and in some instances the attorneys have been sanctioned for their inaccuracy and misleading pleadings. Two New York lawyers were recently sanctioned after the Court found they filed a brief that contained numerous fake, GAI case law citations, when they later failed to "come clean" with the Court about their use.[34] Since then several federal and specialty courts, and at least one state court, have adopted rules requiring attorneys using AI programs to review, and verify any computer-generated content, and then certify that fact to the courts with their filings.[35]

In light of the everchanging nature of AI and the adoption of different court practice rules,[36] attorneys are reminded that they are responsible to understand the court rules and procedures to competently represent a client in those courts in which they are practicing, including those rules related to AI.[37] The attorney should check, and keep abreast of any rules, orders or other court procedures implemented in the jurisdiction in which the attorney is practicing that may require additional certifications as it relates to filings prepared by utilizing GAI products.

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[32] Mark D. Rasch, lawyer, cybersecurity, and data privacy expert, quoted in "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers?," American Bar Association Journal (June, 2023).
[33] SCR 3.130(3.3(a)).
[34] *Mata vs. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22,2023).
[35] U.S. District Court for the Eastern District of Texas. U.S. District Judge Brantley Starr of the Northern District of Texas is one of the first U.S. Judges to require lawyers to certify that they did not use AI to draft their filings without a human checking their accuracy. In addition, the United States Court of Appeals for the Fifth Circuit has pending a similar certification requirement, and notes that lawyers who misrepresent their compliance with this certification could be sanctioned and have their filings stricken of record.
[36] Utah has established rules concerning the use of GAI and restricts judicial officers and court employees to using ChatGPT(version 3 or 4); Claude.ai(Beta); and Bard (Experiment) for all court-related work.
[37] *See*, SCR 3.130(1.1).

If an attorney later discovers an inaccuracy, then the attorney is required to correct the inaccuracy, and to notify the Court of any misleading statements. Without a doubt, if the Court questions the attorney's filings that include fake cases, the attorney must be candid with the Court and explain the error. Failure to do so not only subjects the attorney to potential sanctions by the Court but may also result in disciplinary action for the attorney for noncompliance with the Rules.[38]

SUPERVISING ATTORNEYS' RESPONSIBILITIES WHEN USING AI

SCR 3.130(5.1) requires a partner in a law firm, as well as an individual lawyer who exercises managerial authority over others, to 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." Lawyers who have direct supervisory authority over another lawyer are similarly responsible to ensure the other lawyer complies with the Rules.[39] Having policies and procedures relating to the use of AI in the law firm may reduce potential disclosure of confidential client information and ensure that generative AI is being used appropriately. "AI systems keep challenging old conceptions of things like security, privacy, and fairness. But at another level, they just reinforce existing best practices."[40] These issues were discussed in KBA E-446 relating to cybersecurity and confirmed that law firm partners, managers of attorneys, and any attorneys supervising other attorneys are required to ensure that all of the firm's attorneys, as well as nonlawyer assistants, employees, or independent contractors who are under their supervision, comply with the Rules of Professional Conduct. This requirement places an enhanced responsibility upon those managerial attorneys to prescribe policies and procedures to reduce the risk of disclosure of confidential information when using AI, as well as to explain the permissible uses, as well as the known risks of AI.

The following comments of Florida Bar Ethics Opinion 24-1 are appropriate to this topic:

(A) lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence [Kentucky SCR 3.130(4.1)], avoidance of frivolous claims and contentions [Kentucky SCR 3.130(3.1)], candor to the tribunal [Kentucky SCR 3.130(3.3)], and truthfulness to others [Kentucky SCR 3.130(4.1)], in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

The Committee does not intend to specify what AI policy an attorney should follow because it is the responsibility of each attorney to best determine how AI will be used within their law firm and then to establish an AI policy that addresses the benefits and risks associated with AI products. The fact is that the speed of change in this area means that any specific recommendation will likely be obsolete from the moment of publication. At the very least lawyers must take care

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[38] See, SCR 3.130(8.4).
[39] *See*, SCR 3.130(5.l(b)).
[40] "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers" by Matt Reynolds, American Bar Association Journal (June, 2023).

to address the use of any form of AI, what risk is associated with it, and what steps can be taken to avoid release of client information. As a part of this process, it is appropriate to review the law firm's existing cybersecurity policies so as to take AI into consideration.

The establishment of policies and procedures to deal with AI is an important step in meeting a lawyer's ethical obligations but it is not the end of the lawyer's duties. "All lawyers must make sure that subordinate attorneys, interns, paralegals, case managers, administrative assistants, and external business partners all understand necessary data and security practices and the critical role that all parties play in ensuring the protection of client information."[41] Creating a culture of security and privacy of client information may be best attained through training everyone on the law firm's AI policies and focusing on human error and behavior. "Humans are ... involved in more than 80% of data breaches, whether they've clicked on a phishing email or they've just done something stupid."[42]

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

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[41] KBA Ethics Opinion E-446, quoting Drew T. Simshaw in the American Journal of Trial Advocacy.
[42] Sharon Nelson, president of Sensei Enterprises, as quoted in ABA Journal, supra at 4.