Generative Artificial Intelligence & Legal Ethics

By

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I. Overview of ChatGPT

A. ChatGPT, developed by computer lab OpenAI, is the most commonly known form of a new generative artificial intelligence (GAI) tool that was first released in late 2022.

AI can take many forms. When you start a Google search and, after typing just a word or two, you see an option for your entire query, some call that AI. When your cable service is out and you go to the provider's website and click "chat with us," you may have an automated conversation with a "Chat Bot" that is programmed to analyze the words you typed and generate responses. That is also a form of AI.

B. ChatGPT and similar products such as Claude (by Anthropic), CoPilot (Microsoft), and Gemini (Google), take the concept of artificial intelligence to a whole new level. Developers have figured out how to gather up a mind-boggling large amount of information available online and from other sources (which grows with each new generation of the software), then created sophisticated and clever rules (algorithms) for sorting and recombining that information, which then (based on more rules and algorithms) generate complex, narrative responses to user queries. The answers are sophisticated enough to fool a college professor, which has already led to soul searching at the post-secondary level. Reasonably competent lawyers are also easily taken in by the seductive style of GAI responses, often to their detriment (see below).

C. An AI tool such as ChatGPT can answer questions based on lengthy inputs, commonly referred to as "prompts," of hundreds of words. Within a chat, it "remembers" the initial and subsequent questions and its previous answers and can be asked follow-up questions that it will respond to in the context of the conversation.

D. Access to OpenAI's basic ChatGPT (version 5.3) is currently free, although users must create an account. *See* www.chat.openai.com. Other GPT services are available, free and paid, on the internet. Some of these services, such as the paid version of ChatGPT, provide users with more messages per period (ranging from hours to days), deeper answers, more image generation, the ability to upload more documents for review and analysis, etc.

E. For a good summary of how ChatGPT works, *see* D. Riehl, "We Need to Talk About ChatGPT" Bench & Bar of Minnesota (June 2023) (available at https://www.mnbar.org/resources/publications/bench-

bar/articles/2023/05/24/we-need-to-talk-about-chatgpt) (last visited June 4, 2023).

F. *See* J. Choi, K. Hickman, A. Monahan, and D. Schwarcz, "ChatGPT Goes to Law School" (available at https://ssrn.com/abstract=4335905).

G. A good resource for continuing developments in the use of Large Language Models (LLM) like ChatGPT is https://www.superhuman.ai/, which also has a daily e-mail newsletter with industry updates, summaries and links to new apps, and tips on using various GPT tools.

II. Competency

A. Current Generative AI limitations. For lawyers to avoid violating their obligations to develop competency with new technological developments, it is critical that lawyers educate themselves regarding the limitations of this new technology. In addition, the various GAI tools are diverging in what types of inquiries they handle best and the extent to which they generate hallucinations. Particularly in the realm of lawyers relying too heavily on responses which may contain hallucinations, ChatGPT seems to be the tool most frequently associated with those issues, followed by Microsoft CoPilot.

1. *Citations unknown or unavailable*. It is important to understand that GAI is ***predictive***: based on the vast information it has been fed and trained on, a GAI tool predicts which words and concepts should follow others to yield its responses. GAI tools have begun including reference links for some or all of their responses where the query seeks a search of information from on-line and other sources. This can be contrasted with queries based on a defined set of documents that the user provides.

   a) Notably, if a college or law student produced assignment answers without referencing sources they might be accused of plagiarism.

   b) On the other hand, GAI does not simply cut and paste entries from other websites. It does not appear to, for example, reproduce whole Wikipedia entries. Instead, it provides answers based on the interpretation (i.e. numerical values assigned) to words, concepts, and so forth.

   c) GAI tools allow the user to pose follow-up questions requesting identification of sources. From November 2022 until around May 2023, ChatGPT could sometimes provide sources, including case citations. After the *Avianca* case in New York, it

appears guardrails were put in place to prevent ChatGPT from providing any legal citations. At some point, those guardrails were lifted and ChatGPT, as well as other GAI tools, will produce both real and hallucinated cases, real and hallucinated quotations from cases, etc.

2. *False information.* AGI creators are well aware of, and disclose on their website, that their tools may generate incorrect information. It is not uncommon, for example, for ChatGPT to cite an incorrect rule or transpose two parts of a rule. It has made up descriptions of court opinions that do not exist. Even with guardrails in place, the tools may make up narrative information that is not correct.

3. *Incomplete information*. AGI provides robust answers but it can be difficult to determine what has been omitted. An AGI tool might describe that possession of cocaine is a felony but omit an exception for very small quantities of the drug.

B. *Avianca* and its Aftermath.

1. A lawyer with 30 years' experience submitted to the court a brief generated by ChatGPT, complete with many false case citations that the lawyer did not check. https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html?smid=nytcore-ios-share&referringSource=articleShare (last checked June 4, 2023).

2. A federal judge in Texas issued a rule that attorneys appearing must file a certificate either attesting that no "generative artificial intelligence" has been used in submissions to the court or that any such material has been checked "by a human being" in traditional legal databases. https://www.txnd.uscourts.gov/judge/judge-brantley-starr (last visited June 4, 2023).

3. **The "AI Hallucination Cases" website and database** now (as of April 1, 2026) contains information on 1,222 cases in which lawyers, parties, or witnesses submitted hallucinated information to a court. *See* https://www.damiencharlotin.com/hallucinations/. The number has doubled in the last six months and the list is likely very incomplete because it focusses on federal rather than state court cases. Most of the cases (810) were in U.S. courts; lawyers were responsible for the improper submissions in 468 cases. *Pro se* litigants account for 722 of the cases.

C. Use Cases for Lawyers. GAI is a powerful tool when used carefully. For lawyers, this means "staying in your lane:" using GAI in situations in which

you possess the legal knowledge to assess whether the response created by the GAI tool is valid. Examples:

1. First drafts of letters and memoranda.
2. Translating documents into other languages (ChatGPT can translate into over 100 other languages from English, with high confidence in over 60 languages).
3. Explaining legal concepts to clients. You can cut and paste a statute into GAI and ask for an explanation in "simpler" terms, or on an eighth grade or fifth grade level. Similarly, GAI can produce simple explanations of such concepts as power of attorney, comparable negligence, vicarious liability, intestate succession, etc.
4. Converting text from the first person to the third person (and cleaning up the grammar at the same time). Rewriting text, such as a client's draft affidavit, to make it clearer.

D. Avoidance Risk. Like much new technology, there are risks to lawyers who fail to learn about and use it.

1. *Competitive Disadvantage.* GAI, at least in the forms into which it is likely to evolve, will increase efficiency for some lawyers and likely increase the numbers of clients some lawyers can assist, depriving other lawyers of the financial benefit of handling those cases.
2. *Recognizing usage by others.* Just as colleges and law schools are scrambling to determine whether students are using GAI to prepare their assignments for them, lawyers may need to detect whether opposing counsel or parties are relying on GAI. The arguments may sound good but the propositions unsupported. Judges may look for much tighter citing of sources than is presently expected in some practice areas.

III. Confidentiality Considerations.

A. Confidential Information is described in Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC) as all information "related to the representation." Includes:

1. Attorney-client privileged information. *See* Rule 1.6(b) and discussion below;
2. Other information, such as the client's identity; fee arrangements; the client's family, financial, medical, or criminal history; the client's demeanor or attitude; settlement positions: case strategies; etc. Information that is "related to the representation" but is not privileged is likely discoverable.

B. Disclosing Confidential Information. General guidelines about confidential information:

1. *General Rule: Disclose Nothing*. Similar to the Model Rule, Minnesota's Rule 1.6(a) states that "a lawyer shall not knowingly reveal information relating to the representation of a client" **except** "when permitted by paragraph b." Several of the exceptions are quite significant.

2. *No mandatory disclosures*. Rule 1.6 does not identify any circumstances in which a lawyer must disclose confidential information. A lawyer's duty as an officer of the court, however, will trump the duty of confidentiality when the lawyer learns that the client has made a material misstatement of fact to a tribunal. *See* Rule 3.3(a), MRPC; *In re Mack*, 519 N.W.2d 900 (Minn. 1994) (extending attorney's suspension for 23 additional months in part for failing to take reasonable remedial measures after learning that client had lied in a deposition).

3. A few states, including Wisconsin, have statutes that require lawyers to report child abuse under similar terms that apply to other professionals who have contact with children.

4. Even the disclosure of a brief discussion with the client, seemingly innocuous, may violate Rule 1.6 and serve as grounds for discipline. *See In re Panel No. 41310,* 899 N.W.2d 821 (Minn. 2017) (affirming private admonition issued to lawyer who stated to opposing insurance adjuster, regarding his former client's intent to renege on a settlement agreement, "I advised him that he already accepted it, there is no rescinding his acceptance").

C. "Cloud" Storage of Documents is permitted.

1. *Thirty* jurisdictions have assessed the risks of storing documents in "the cloud," i.e., on the servers of third-party electronic document storage providers. A summary of all of the opinions and links to the actual opinions can be found at https://www.clio.com/blog/cloud-computing-lawyers-ethics-opinions/ (last visited April 18, 2023).

   a) **No jurisdiction** prohibits cloud storage of confidential documents.

   b) **All jurisdictions** apply a reasonableness test to the questions of confidentiality and security that arise with cloud storage.

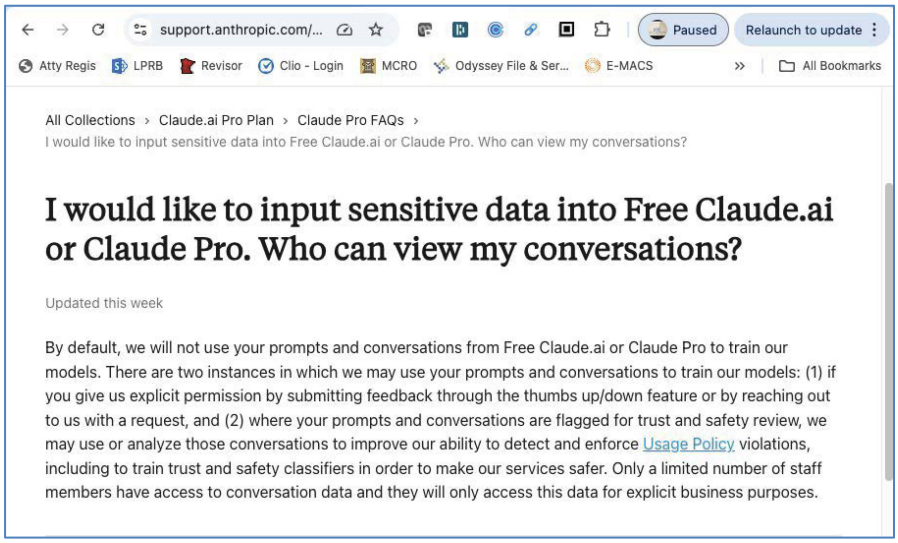
2. Reasonable care "does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access." New Jersey Advisory Committee on Professional Ethics, Op. 701. *Accord* New Your State Bar Ass'n committee on Professional Ethics, Op. 842 (reasonable care does not mean "that the

lawyer guarantees that the information is secure from *any* unauthorized access." (emphasis in original)); Virginia Legal Ethics Op. 1872.

3. Client consent to cloud storage is not necessary. State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Op. 33.

D. Confidentiality and Generative Artificial Intelligence. *GAI* allows lawyers to enter fact patterns into the query bar to obtain an analysis of those facts either generally or under some specified statutes or rules. Lawyers must be wary that GAI tools may not be clear about where entered data is stored and whether it may become available on the internet or used by the GAI to train future models of the software. Hence, caution is warranted in entering details of clients' matters in ChatGPT. *See* L. Eliot, "Generative AI ChatGPT Can Disturbingly Gobble Up Your Private And Confidential Data, Forewarns AI Ethics And AI Law" Forbes (Jan. 27, 2023) (available at https://www.forbes.com/sites/lanceeliot/2023/01/27/generative-ai-chatgpt-can-disturbingly-gobble-up-your-private-and-confidential-data-forewarns-ai-ethics-and-ai-law/?sh=750636417fdb.

1. Some GAI providers have become very clear about how they protect their users confidential information, such as Claude (Anthropic):



> 4. **Customer Content.** As between the parties and to the extent permitted by applicable law, Anthropic agrees that Customer owns all Outputs, and disclaims any rights it receives to the Customer Content under these Terms. Anthropic does not anticipate obtaining any rights in Customer Content under these Terms. Subject to Customer's compliance with these Terms, Anthropic hereby assigns to Customer its right, title and interest (if any) in and to Outputs. Anthropic may not train models on Customer Content from paid Services.

E. Confidentiality When Lawyers Blog and Use Other Public Commentary. Some of the risks inherent in using GAI may be analogized to confidentiality violations related to lawyer blogging and using social media.

1. ABA Formal Opinion 18-480 details the duties of confidentiality for lawyers who blog or use other forms of public commentary. The Opinion states that lawyers may not ***reveal*** information relating to a representation, even information included in a public record, unless the Model Rules permit.

2. Confidentiality. A lawyer must maintain confidentiality of information relating to client representation when making online postings. The lawyer may only reveal the confidential information if: (1) the client has given informed consent to the disclosure, (2) the disclosure is impliedly authorized, or (3) the disclosure is permitted by Rule 1.6(b).

3. Duty of Confidentiality under Rule 1.6.

   a) When commenting online a lawyer should remember that the lawyer is prohibited from discussing or disclosing publicly any information related to representation, unless an exception to Rule 1.6(a) applies.

      (1) In fact, even client identity is protected under the Rule.

      (2) Information contained in a court order is not exempt for Rule 1.6, even though the order is a public document.

      (3) Hypotheticals. A lawyer cannot avoid Rule 1.6 by describing the information as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation from the "hypothetical" facts.

      (4) In Minnesota, Rule 1.6(b)(2), not found in the ABA Model Rules, may provide a lawyer with more latitude to reveal some information about client matters. *See* discussion *supra.*

IV. **Plagiarism and Copyright Concerns**.

A. Plagiarism itself has no single or universally accepted definition.

1. Black's Law Dictionary defines it as "The deliberate and knowing presentation of another person's original ideas or creative expressions as one's own." Black's at 1267 (9th Ed. 2009).

2. Plagiarism is typically demarcated in written codes of conduct in academic settings which proscribe when the use of another's work is improper or restricted. *See e.g. In re Zbiegien,* 433 N.W.2d 871, 875 (Minn. 1988) (noting, in bar-admission case, that plagiarism violated William Mitchell College of Law's code of student conduct and "is also a violation of academic standards everywhere.").

3. Although improper reproduction of material from a copyrighted work may violate federal copyright law, we are not aware of any law or convention that states that copyright protections apply to grant applications such as the ones under consideration in this matter. Although this was not a client matter,

B. "In the context of legal instruments and agreements, rules against plagiarism are nearly universally disregarded, and the words and ideas of others are used with impunity. We think this is usually proper. Copying of legal instruments and agreements does not constitute plagiarism because the attorneys who prepare the document are not generally claiming "authorship" in the standard sense. The signers of such instruments do so to indicate that they endorse, stand behind, or agree to the content of the document. There can be no plagiarism without an express or implicit claim of authorship. Copying in this context is undoubtedly beneficial to the clients, not only because it is cheaper than drafting a document from scratch, but also because the use of highly conventional and often repeated language makes the interpretation of such documents more reliable. The "authorship" of a legal instrument is more like the collective authorship of a folk tale, in which numerous authors make modest contributions to an evolving work, and no one person is entitled to claim it as his or her own." J. Peterson and J. Gregor, "Copycat: Plagiarism, Copyright Infringement, & Lawyers" 84 Wisconsin Lawyer 6 (June 2011) (available at: http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=84&Issue=6&ArticleID=2098) (last visited April 18, 2023).

C. There is no Rule of Professional Conduct that specifically defines or prohibits plagiarism. Rule 8.4(c), the only rule likely to be applicable to an accusation of plagiarism where no client matter was involved, prohibits lawyers from

engaging in conduct that involves "dishonesty, fraud, deceit, or misrepresentation."

1. *See* M. Cole, "I Wrote This Article Myself" Bench & Bar of Minnesota (July 1993). The article discusses two unrelated incidents in which attorneys each appropriated about twenty pages of another attorney's CLE materials and held them out as their own in materials they themselves published as part of CLE seminars they presented. Remarkably, the disciplined attorneys used the entirety of the other attorneys' materials without attempting to alter or improve them. The misrepresentation was clear in those cases because placing one's name on CLE materials is regarded as authorship and a reflection that the attorney composed the materials therein. Moreover, the copying of twenty pages of materials is on its face knowing and intentional, which is an element of the definition of plagiarism cited above and consistent with the language of 8.4(c).

D. The few cases evaluating a bar applicant's or a lawyer's plagiarism all involved knowing and intentional copying of other works, evidenced by both the admissions of the plagiarizers and the volume of material copied.

1. *See Zbeigien,* 433 N.W.2d at 872 (first twelve pages of law student's paper were copied verbatim from various law review articles without attribution);
2. *Shodeen v. Petit,* 374 B.R. 681, 683 (Bankr.N.D.Ia. 2007) (seventeen of nineteen pages of brief were "verbatim excerpts" from a journal article);
3. *Iowa Supreme Ct. Bd. of Professional Ethics and Conduct v. Lane,* 642 N.W.2d 296 (Ia. 2002) (attorney's post-trial brief in federal court matter contained eighteen pages copied from a treatise; attorney submitted fee petition falsely claiming 80 hours of work on same brief); and
4. *In re Lamberis*, 443 N.E.2d 549 (Ill. 1982) (46 pages of attorney's post-graduate law degree thesis incorporated "substantially verbatim" from two published works).

E. Although ChatGPT is essentially a predictive technology, i.e. it is creating new material in response to every inquiry, the absence of information in ChatGPT responses about the sources of information not only raises competency concerns for lawyers but triggers alarms about whether a lawyer may, perhaps unwittingly, improperly plagiarize another's work or violate a copyright on published material. This makes verbatim copying and republishing ChatGPT answers risky.

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.

Comment

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.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;

(4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, or to prevent the commission of a crime;

(5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;

(7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these rules;

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order; or

(10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3.

(11) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

* * *

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

* * *

Acting Competently to Preserve Confidentiality

[15] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.