Current Issues in Wildlife and Hunting Law 2025
Sponsored by Safari Club International and the Nashville Bar Association

Thursday, January 23, 2025
1:00 P.M. – 5:15 P.M. Central
Music City Center – Room 103 BC
Nashville, Tennessee
4 CLE Credit Hours, Including 1 Ethics Hour

AGENDA

1:00 – 1:05 P.M.	Introductions
1:05 – 1:50 P.M.	**Upstream: Industry Creates for Conservation** Aurelia Skipwith Giacometto, Secretary, Louisiana Department of Environmental Quality
1:50 – 2:35 P.M.	**Understanding MMPA Permit Requirements** Lawson Fite, Shareholder, Schwabe, Williamson & Wyatt
2:35 – 3:20 P.M.	**Predicting Wildlife Law Challenges and Opportunities Facing the New Administration** Jeremy Clare, Litigation Counsel and International Affairs Liaison, Safari Club International
3:20 – 3:30 P.M.	**Break**
3:30 – 4:15 P.M.	**Skunks, Turtles, and Wolves, Oh My! Legal Challenges to Predator Management** Regina Lennox, Litigation Counsel, Safari Club International
4:15 – 5:15 P.M.	**Ethics Considerations of Using AI** Madeline Demaske, Litigation Associate, Safari Club International

Presenter Bios

Aurelia Skipwith Giacometto

Aurelia Skipwith Giacometto's biography could easily take up this entire page, so we have focused on the highlights. Aurelia currently serves as Secretary of the Louisiana Department of Environmental Quality. Aurelia previously served as Director of the U.S. Fish and Wildlife Service. In that role, Aurelia led the agency to revolutionize business operations, improve service, and grant more access to federal lands to the American people, including hunters and anglers. Aurelia also served as the CEO of the International Order of T. Roosevelt. In 2023, she founded Las Golden & Associates, which provides services in conservation and environmental stewardship to clients in variety of industries. And before that, Aurelia was the Assistant Corporate Counsel at Alltech, an all-natural international animal feed and agriculture corporation. Aurelia is both a biologist and a lawyer. She received a Master of Science in molecular genetics from Purdue University, and her J.D. from the University of Kentucky College of Law.

Lawson Fite

Lawson Fite is a shareholder with Schwabe, Williamson & Wyatt, P.C., based in Oregon. Lawson supports clients in the natural resource and energy sectors as they manage the complexities of environmental regulation, compliance, and permitting, as well as related litigation. Lawson is a seasoned litigator who has argued numerous cases in state and federal trial and appellate courts. Lawson has also testified before Congress on matters concerning proposed reforms to resource management, the ESA, and NEPA. He is the current co-chair of the American Bar Association's Endangered Species Committee, Section on Environmental, Energy, and Resources. Lawson began his legal career at the Department of Justice working on endangered species and wildlife matters. He also clerked for Justice Walter L. Carpeneti on the Alaska Supreme Court. Lawson obtained his law degree from Harvard University.

Jeremy Clare

Jeremy Clare is a Litigation Counsel and International Affairs Liaison for Safari Club. He has worked in SCI's legal department for over a decade. Jeremy's practice includes a range of wildlife and administrative law matters, and he represents SCI in various international fora, including at CITES meetings. Jeremy obtained his law degree from the University of Texas.

Regina Lennox

Regina Lennox has served as Senior Litigation Counsel for Safari Club since April 2019. Prior to joining SCI, Regina was a Staff Attorney for the U.S. Court of Appeals for the Fifth Circuit and a Legal Writing Professor at Loyola University New Orleans College of Law. Before that, Regina practiced wildlife law with Conservation Force in Louisiana, and litigated complex business disputes with McKee Nelson LLP (now part of Morgan Lewis LLP) in New York. Regina clerked for Chief Judge Curtis L. Collier of the U.S. District Court for the Eastern District of Tennessee. Regina earned her law degree from Duke University.

Madeline Demaske

Madeline Demaske is a Litigation Associate for Safari Club. Madie previously worked with the Dallas Safari Club and is an active member and volunteer, including serving on several committees, with the Wild Sheep Foundation and the Rocky Mountain Bighorn Society. Madie obtained her law degree from the University of Kansas.

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NASHVILLE BAR ASSOCIATION

SCI FIRST FOR HUNTERS®

Upstream: Industry creates for conservation

AURELIA S. GIACOMETTO

JANUARY 23, 2025

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Environmental Laws

- **National Environmental Policy Act (NEPA)** - 1969
- **Clean Air Act (CAA)** - 1970
- **Clean Water Act (CWA)** - 1972
- **Endangered Species Act (ESA)** - 1973
- **Resource Conservation and Recovery Act (RCRA)** - 1976
- **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)** - 1980
- **Toxic Substances Control Act (TSCA)** - 1976
- **Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)** - 1947 (amended in 1972)
- **Marine Protection, Research, and Sanctuaries Act** - 1972
- **National Marine Sanctuaries Act** - 1972

Louisiana is Ground Zero

- Modes of Transportation System
  - Air, Maritime, Rail, Road, Pipeline, Train
  - 30+ Ports, with 5 MS River ports
- Oil & Gas and Refining is dominant economic industry
- Energy Statistics
  - 3rd in Natural Gas Production
  - 61% of LNG exports
  - 1/6th US refining capacity at 3 million barrels of crude per day

- Preserving the Wildlife & Environment – Sportsman's Paradise
- State: 1.6 million acres of wildlife managed
- Federal: 23 NW refuges at > 550,000 acres
- Louisiana's Population of 4.6 million
  - In 2022, over 41.2 million visitors
  - Industry, Tourism – Outdoor, Culture, Business

Louisiana Department of Environmental Quality

Mission: The mission of the Department of Environmental Quality is to provide service to the people of Louisiana through comprehensive environmental protection in order to promote and protect human health, safety and welfare.

- Regulatory Authority of LDEQ:
  - Air, Waters of the State, Waste (hazardous and solid)
  - Lead, Asbestos, Nuclear, Environmental Crimes
- Industry is upstream of the conservation efforts for wildlife and their habitats
- Allow pollutants into the ecosystem at acceptable levels
- Balance of clean air and water and healthy industry and economies
- Louisiana is Open for Business

Litigation in Louisiana

- Industrial Investment in LA vs. So-called environmental groups, and law centers
  - Industrial Corridor of Louisiana, the River Region - 3 parishes

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- **Formosa Plastics** – a $9.8 billion facility manufacturing resins and polymers for single use plastics to artificial turf. LDEQ issued the air permit, required for construction

  - Litigation began in 2020, allegations that LDEQ had failed to evaluate the potential impacts in issuance of Title V air permit in 2018.
  - Plaintiffs claimed that LDEQ violated Title VI Disparate Impacts (DI); EPA's DI regulation prohibit any programs receiving EPA funding, including state agencies, that cause disproportionate negative effects towards certain groups of people based on race, color, or national origin.
  - Disparate impact regulations are distinct from the regulations that prohibit intentional discrimination. They co-exist.
  - LDEQ provided that its air quality standards are presumptively protective of human health, and that a permitted facility operates in accordance and does not present an adverse impact and therefore can't have a disproportional adverse impact to a protected class.
  - First Circuit concluded that issuance of the permit was not arbitrary or capricious.
  - In April 2024, 23 state attorneys general signed a petition for EPA to stop using the regulation citing concerns of unlawfulness and "racial engineering."

Litigation in Louisiana

- **Formosa Plastics** – a $9.8 billion facility manufacturing resins and polymers for single use plastics to artificial turf. LDEQ issued the air permit, required for construction

  - Plaintiffs argued that LDEQ's environmental justice analysis was insufficient. The First Circuit agreed.
  - First Circuit ruled that environmental justice analysis was required as a part of the "economic, social, and other factors" of LDEQ's public trust duty.
  - The Public Trust Doctrine (PTD) which is in the Louisiana Constitution, requires that the state ensure environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people."
    - *Save Ourselves, Inc. v. La. Env'tl Control Com'n*, 452 So. 2d 1152, 1156 (La. 1984), "the IT Case", the LA. Supreme Court observed that PTD is a "rule of reasonableness" and an agency must determine that adverse environmental impacts have been minimized or avoided as much as possible consistent with the public welfare before granting approval of a proposed action affecting the environment.
  - LDEQ argued no provisional mandates in constitution, laws, or regulations for environmental justice analysis with permitting decisions. So, LDEQ appealed.
  - Louisiana Supreme Court declined to review the case: *Rise St. James vs. LDEQ.*
  - No guiding principles on what's acceptable environmental justice analysis.

Rules & Litigation in Louisiana

Denka Performance Elastomer – the only producer of neoprene in the U.S. Neoprene is a synthetic polymer resembling rubber, resistant to oil, heat, and weathering. Denka employs 250 local residents, in 2022 paid $40 million, ~$160,000/employee. Denka purchased from DuPont in 2015. Facility in operation for over 60 years.

- **Denka Performance Elastomer** – the only producer of neoprene in the U.S. Neoprene is a synthetic polymer resembling rubber, resistant to oil, heat, and weathering. Denka employs 250 local residents, in 2022 paid $40 million, ~$160,000/employee
  - Denka is a permitted Title V facility.
  - In April 2024, EPA *announced* its Final Rule "Reduce Toxic Air Pollution from the Synthetic Organic Chemical Manufacturing Industry and the Polymers and Resins Industries"
    - 'Reduce emissions of ethylene oxide (EtO) from synthetic organic chemical production and chloroprene from neoprene production'
    - Facilities must meet the risk-based requirement within the timeframe of the effective date:
      - 2 years for EtO.
      - 90 days for chloroprene.
    - Ironically, in the proposed rule, all facilities had two years to comply.
  - The Final Rule revoked LDEQ's delegated authority to grant an extension for Denka's compliance. With the final rule effective August 2024, LDEQ granted Denka's request for extension for 2-year compliance. If not extended, Denka forced to shutdown.
  - EPA claimed that Denka's emissions pose an "imminent" or "imminent and substantial endangerment" to the community. No credible science to statement; a few years prior Denka reduced emissions by 85%.
  - October 2024, federal district judge granted EPA's request to restart its novel "imminent and substantial endangerment" enforcement suit against Denka.
  - January 2025, district judge dismisses Denka motion for lack of jurisdiction; Denka claims EPA circumventing the rule-making process to set emissions limits.
  - Litigation on-going.

Environmental Quality & Conservation

- Environmental quality enables the development of industries and economies that do pose harm or danger to the environment.

- INDUSTRY…
  - Feeds Louisiana
  - Fuels this Nation
  - Funds Sportsman's Paradise

- Requires rigorous review of emission or discharge sources into the environment
- Compliance is Number One Objective.
- Louisiana is Sportsman's Paradise
- Louisiana is a leading energy and chemistries state.
- You Can Have Both…clean air & water and healthy economies.

Understanding MMPA Permit Requirements

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Lawson E. Fite

Safari Club Convention, Jan. 21, 2025

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Agenda

- **About the MMPA**
  - Species subject to the MMPA
  - Prohibitions
- **MMPA** Permit Requirements
- **Interaction** Between the MMPA and ESA
- **Outlook** for the second Trump Administration

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About the MMPA

- Enacted in 1972 (one year before Endangered Species Act)
- 16 USC 1361–1423h
- Applies to two types of mammals:
  - Mammals “morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea)”
  - Any mammal which “primarily inhabits the marine environment (such as the polar bear)”

  [16 USC 1362(6)]

About the MMPA

Sea otters and members of the orders Sirenia, Pinnipedia and Cetacea

Schwabe

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Sea otters and members of the orders Sirenia, Pinnipedia and Cetacea

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About the MMPA: Administration

FWS: sea otters, polar bears, manatees

NOAA: Whales, seals, sea lions

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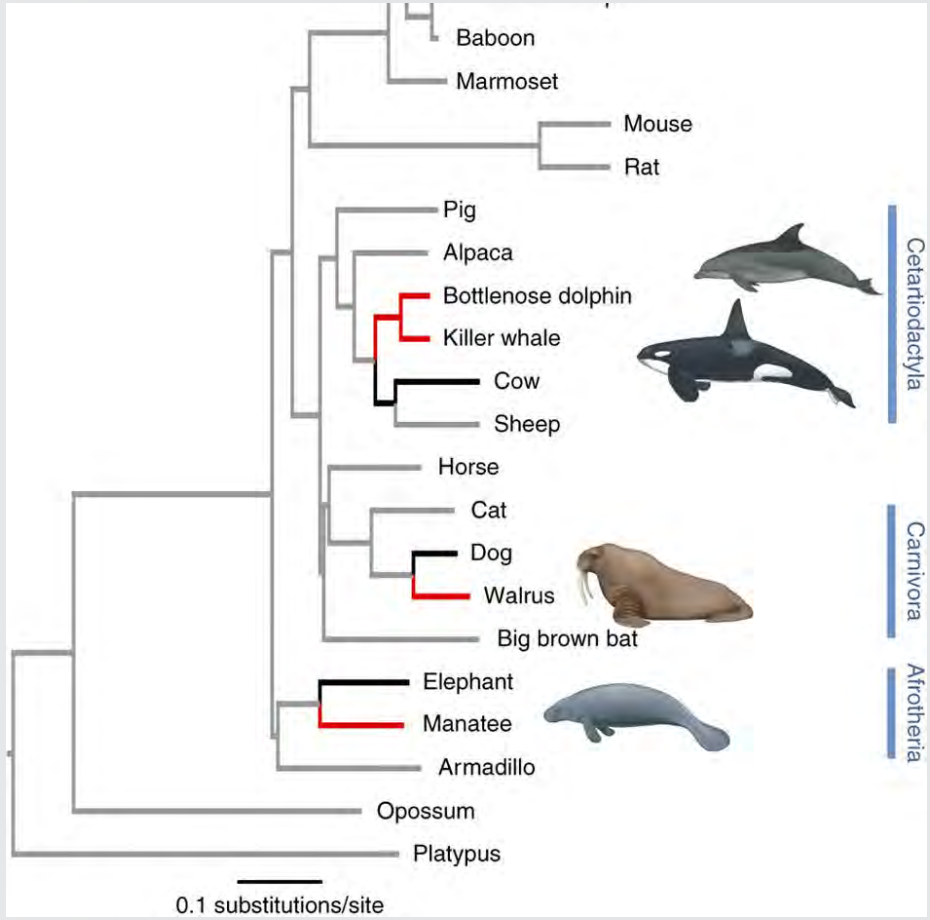
Family Tree

- Mammalian phylogeny from Foote et al., 2015. Notice the sister groups of the three marine mammal groups shown here (cetaceans, pinnipeds, and sirenians).

- The sea otters and polar bears are closely related to the pinnipeds, depicted by the walrus.



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Basic Prohibitions of the MMPA

- **Take** of marine mammal prohibited
  - *Applies on the high seas to any person/vessel subject to US jurisdiction*
  - *Applies on lands and waters under the jurisdiction of the US (out to 200 mile limit)*
- "Take" under MMPA has the traditional definition: harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.
- Actions to **deter** MMs consistent with agency guidelines are not prohibited/also **self-defense**
- **Harassment** is "pursuit, torment, or annoyance" which may harm or disturb animals
- **Purchase or sale** of any marine mammal or product taken in violation of MMPA

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Compare ESA §9 Take Prohibition

- ESA Section 9 (16 USC 1538) prohibits:
  - Take of Endangered species
  - Import/Export of Endangered species
- Services may extend prohibitions to Threatened species by Rule
- Take is broadly defined:
  - The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
  - “Harm” in the definition of take means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”

Basic Prohibitions of the MMPA

- **Import Restrictions**
  - Import generally prohibited
- **Depleted Stocks**
  - Automatically includes ESA-listed species
  - Taking and importation may not be permitted

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Permits

- Agency may issue permits "for **taking, and importation** for purposes of scientific research, public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock, or for importation of polar bear parts (other than internal organs) taken in **sport hunts in Canada**"
- Permit applications reviewed by Marine Mammal Commission and Committee of Scientific Advisors on Marine Mammals
- Polar bear sport hunt application information is at 50 CFR 18.30 – (inactive); designates areas of Canada where management sufficient

Polar Bear Litigation

- Polar bear listed as threatened in 2008
- By operation of law, became a depleted stock for which no import or take permit can be issued– immediately effective when listing rule issued
- Courts upheld listing in 2011 & 2013:
  - *In re Polar Bear*, 794 F. Supp. 2d 65 (D.D.C. 2011), aff'd, 709 F.3d 1 (D.C. Cir. 2013)
- FWS denied import permits to hunters who had taken bears prior to ESA listing, and courts upheld decision—import ban applies regardless of time of taking, upheld denials of "enhancement" permits
  - *In re Polar Bear*, 818 F.Supp.2d 240 (D.D.C. 2011), aff'd, 720 F.3d 354 (D.C. Cir. 2013)

Outlook

- ESA permits listing/de-listing of “distinct population segments”; FWS must respond in statutory period to petitions
- Absent legislative change, de-listing a population is most direct way to revive permit authority
- FWS previously authorized imports from 6 populations in Canada:
  Southern Beaufort Sea, Northern Beaufort Sea, Viscount Melville Sound, Western Hudson Bay, Lancaster Sound, and Norwegian Bay
- Following *Loper Bright*, perhaps FWS could revise its interpretations of MMPA; courts deferred to FWS under *Chevron* on its rulings denying enhancement permits

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Thank you!

Predicting Wildlife Law Challenges and Opportunities Facing the New Administration

Jeremy Clare
Litigation Counsel
Safari Club International
January 23, 2025

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Overview

- We're in a unique situation with President Trump coming back into office.
- Several issues have flip-flopped back and forth since the Obama Administration.
  - Biden Administration overturned Trump 1 policies; will Trump 2 reinstate them?
- Multiple issues continue from Biden Administration.
- Expect plenty of lawsuits from environmental organizations.

Wolves

- Trump Administration will likely continue to litigate the lower-48 delisting rule.
  - Delisted in 2020 (Trump 1); Defended by Biden Administration.
  - Continuing now on appeal into Trump 2.
  - *Defenders of Wildlife v. USFWS*, 584 F.Supp.3d 812 (N.D. Cal. 2022)
- New litigation defending denial of petitions to relist Northern Rocky Mountain wolves.
  - *CBD v. USFWS,* 24-cv-00086-DWM (Mont. 2024).
- Future litigation challenging denial of petitions to delist Western Great Lakes Distinct Population Segment and to downlist western wolves?

Grizzly Bears

- Trump Administration will have to grapple with recently proposed grizzly rule and potential litigation.
  - USFWS denied petitions to establish and delist Greater Yellowstone Ecosystem DPS and Northern Confidential Divide Ecosystem DPS.
  - Proposed to redefine geographic boundaries of the DPS and amend the 4(d) Rule to allow for more take in certain circumstances.
  - Could see challenges on "both sides" of the rule.
- Frequent litigation challenging projects, plans, etc. that allegedly result in grizzly takes.

Lead Ammo on Federal Lands

- Use of lead ammunition and tackle, especially on National Wildlife Refuges, has been a recurring issue since the very end of the Obama Administration.
  - Director Ashe (Obama) banned the use of lead as left the building.
  - Trump 1 immediately overturned the lead ban.
- Biden Administration took a more methodical approach, banning lead on specific Refuges or for specific hunting opportunities in annual rulemakings.
    - *National Wildlife Refuge Association v. Haaland*, 23-cv-02203-BAH (D.D.C.).
- Recreational shooting on National Monuments.
  - Biden established 10 National Monuments and expanded boundaries on 5 others, and closed or attempted to close recreational shooting on two monuments.
  - Trump 1 restricted boundaries to several Monuments, including those that Biden restored.

ESA Regulatory Amendments

- Several Trump 1 amendments to ESA implementing regulations were reversed by Biden Administration.
  - Reinstated language that listing decisions are made "without reference to possible economic or other impacts of such determinations."
  - Rescinded definition for the term "habitat" for critical habitat designations.
  - Reinstated the threatened species "blanket rule."
- Blanket rule applies all the prohibitions of endangered listed species to threatened listed species, unless the USFWS adopts a Section 4(d) Rule (special rule).
  - 50 C.F.R. § 17.31
- PERC/RMEF have "launched" a lawsuit to challenge the blanket rule.

Alaska

- National Park Service rule has flip-flopped from Obama to Trump to Biden.
- The (current) rule prohibits the use of bait to hunt bears on all National Preserves in Alaska – 22 Million acres!
  - Reversed a 2020 Trump 1 rule, which also authorized wolf and coyote hunting during denning season, hunting of swimming caribou, and the use of dogs and artificial lights to hunt black bears.
  - All those activities were prohibited under a 2015 rule by the Obama administration.
- More litigation seems inevitable.
- 89 Fed. Reg. 55059 (July 3, 2024)

Foreign Species

- Giraffe proposed ESA listing
  - USFWS recently proposed to split-list giraffe under the ESA.
  - Uncertain whether Trump 2 will finalize the listing.
- Hippo ESA listing?
  - Recent settlement obligates USFWS to make a 12-month finding (decide whether to propose to list) by July 27, 2028.
- Two CITES Conferences of the Parties
  - 2025 and 2028
  - 2025 likely to focus on sharks, turtles, and other non-game species.

Active Environmental Organizations

- High level of distrust toward the Trump Administration among environmental organizations.
  - For Trump 1, CBD had a lawsuit counter on its website:
  - "We sued Trump 266 times during his first administration and won nearly 90% of those cases."
- CBD and others certainly will challenge numerous Trump 2 actions.

SCI Priorities

- Protect and Expand Access for Hunting, Fishing, and Recreational Shooting on Public Lands.
  - Exemption from Executive Order 13658 for Recreational Services on Federal Lands.
- Adopt Sensible Amendments to the ESA are Consistent with Congressional Intent and Improve Conservation of Truly At-Risk Species.
  - Including by amending Section 9(c)(2)
- Allow USFWS to Focus on Species Truly at-Risk by Delisting Wolves and Grizzly Bears from the ESA.
- Implement the ESA's Directive to "Encourage Foreign Countries to Provide for the Conservation of Fish or Wildlife."

SCI Priorities

- Protect Access to Traditional Ammunition and Fishing Tackle Except in Limited Cases with Clear Evidence of Conservation Need.
- Improve Consultation with the States, Especially Western States with Significant Federal Lands.
- Improve the Implementation of ANILCA on Federal Public Lands in Alaska.
- Confirm the Importance of Predator Hunting and Control to State Wildlife Management.
- Limit the Equal Access to Justice Act.
  - Limit how often Act can be used by an organization.
- Facilitate the Travel with Firearms for Hunting.

Questions?

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Predicting Wildlife Law Challenges and Opportunities Facing the New Administration
Citations and Links to Materials

Lower-48 Wolf Delisting Case: *Defenders of Wildlife v. USFWS*, 584 F.Supp.3d 812 (N.D. Cal. 2022)

Challenge to Denied Petitions to Relist Northern Rocky Mountains Wolves: *CBD v. USFWS,* 24-cv-00086-DWM (Mont. 2024)

Grizzly Bear Proposed 4(d) Rule: https://www.federalregister.gov/documents/2025/01/15/2025-00329/endangered-and-threatened-wildlife-and-plants-grizzly-bear-listing-on-the-list-of-endangered-and

Canaan Valley National Wildlife Refuge Lead Ammunition Case (settled): *National Wildlife Refuge Association v. Haaland*, 23-cv-02203-BAH (D.D.C.)

Blanket Rule for Threatened-Listed Species, 50 C.F.R. § 17.31: https://www.ecfr.gov/current/title-50/chapter-I/subchapter-B/part-17/subpart-D/section-17.31

PERC Press Release re Challenging Blanket Rule: https://perc.org/2024/12/10/conservation-groups-launch-suit-against-fish-and-wildlife-service-for-impairing-species-recovery-and-ignoring-science/

Alaska National Preserves Rule 2024:
https://www.federalregister.gov/documents/2024/07/03/2024-14701/alaska-hunting-and-trapping-in-national-preserves

Giraffe Proposed Listing Rule: https://www.federalregister.gov/documents/2024/11/21/2024-26395/endangered-and-threatened-wildlife-and-plants-listing-the-giraffe

SCI Priorities for the Trump Administration to Support and Advance Sustainable-Use Conservation
https://safariclub.org/sci-hunters-policy-priorities-trump-administration/

ESA Section 9(c)(2): https://www.govinfo.gov/content/pkg/USCODE-2011-title16/pdf/USCODE-2011-title16-chap35-sec1538.pdf

Predator Management: Justifications and Legal Challenges

Regina Lennox

Safari Club International

Adapted from Dr. Chris Comer, SCIF

Wildlife Law CLE

January 23, 2025

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What We'll Cover

- Intro – Biological Concepts
- Predator Hunting
- Predator Control
- Legal Challenges and Detrimental Impacts

Definition 1 – Predator

An organism that consumes other animals, either living or recently killed.

Predator Hunting v. Predator Control

Predator Hunting

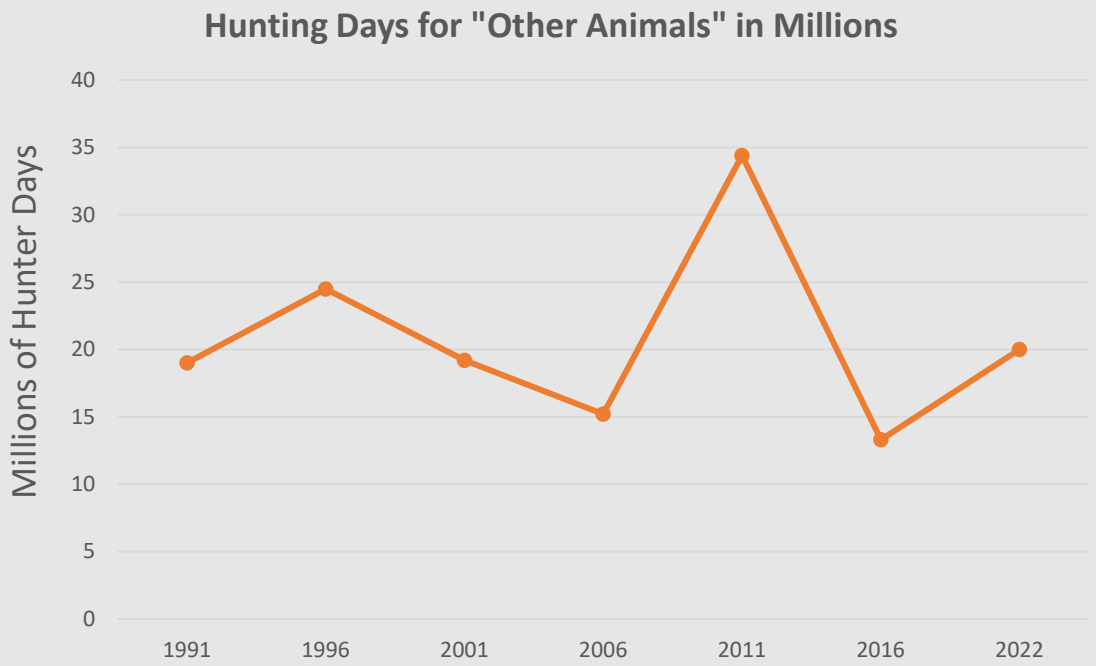
- Recreational and food purposes
- Done by the public
- Often tightly regulated for season, method, bag limit

Predator Control

- Management purposes
- Done by professionals
- Often no limits on take or method

Predator Hunting – Is It Worth It?

-



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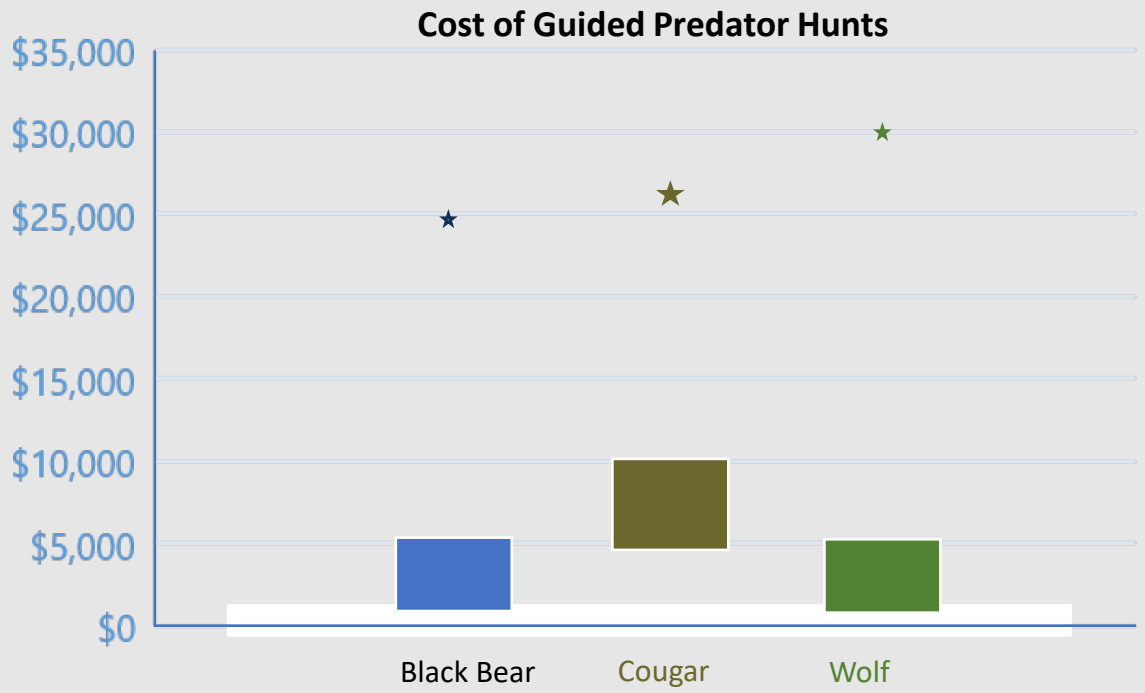
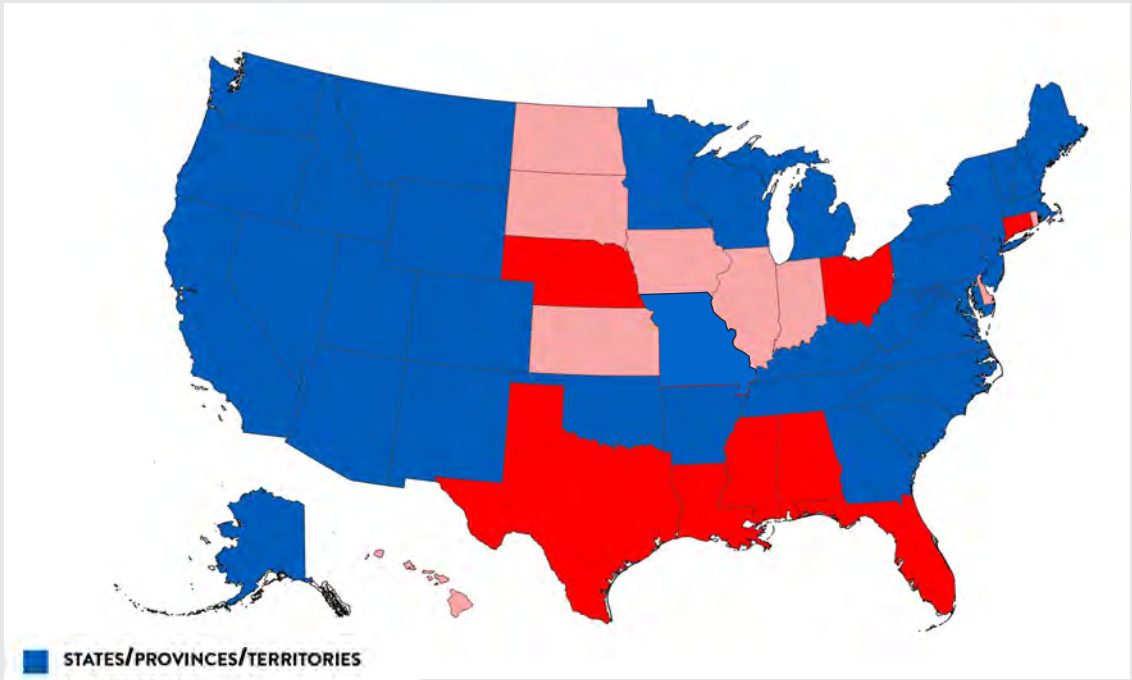
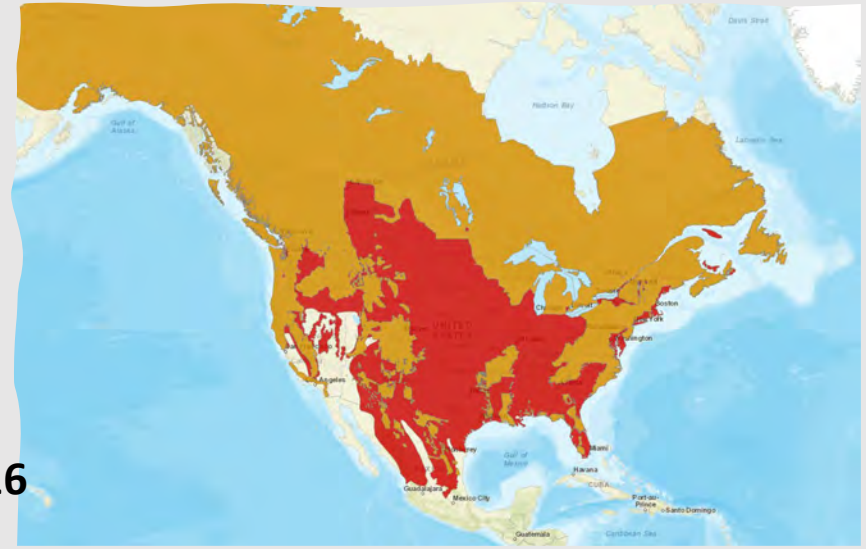


Predator Hunting – Is It Sustainable?



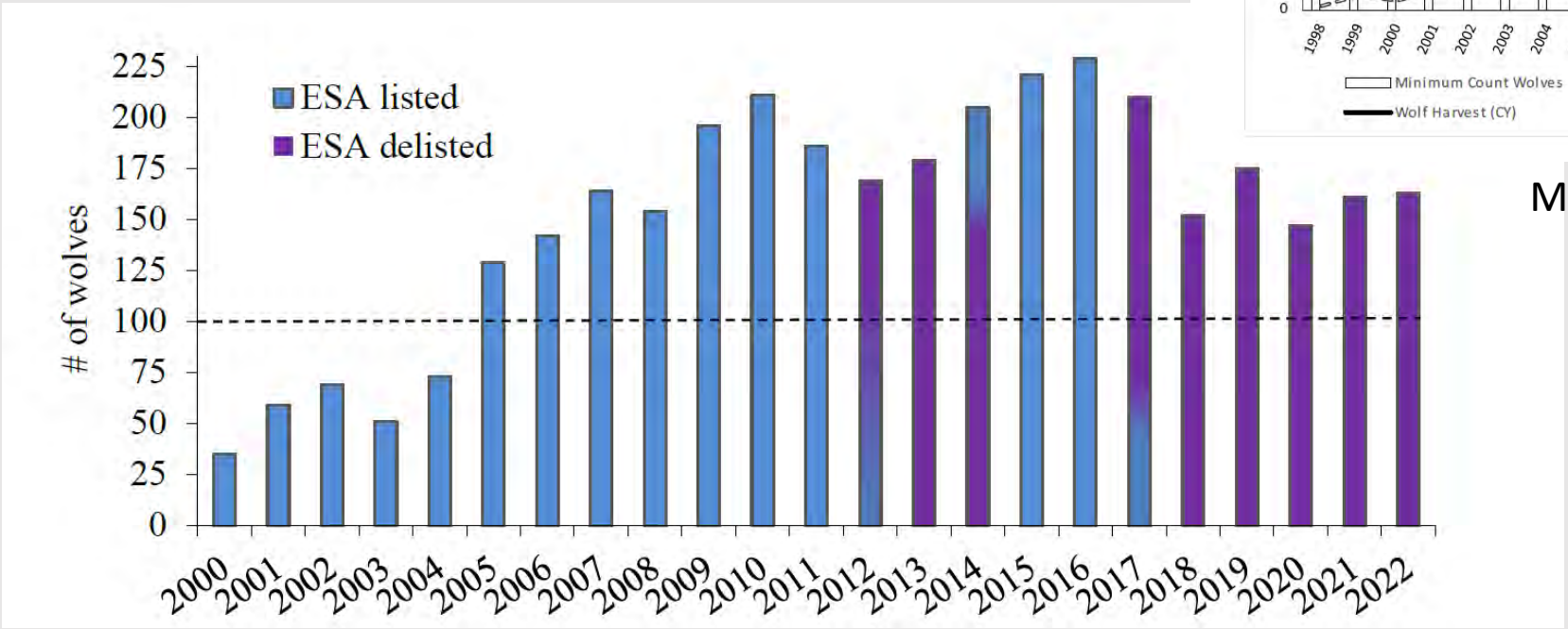
1994

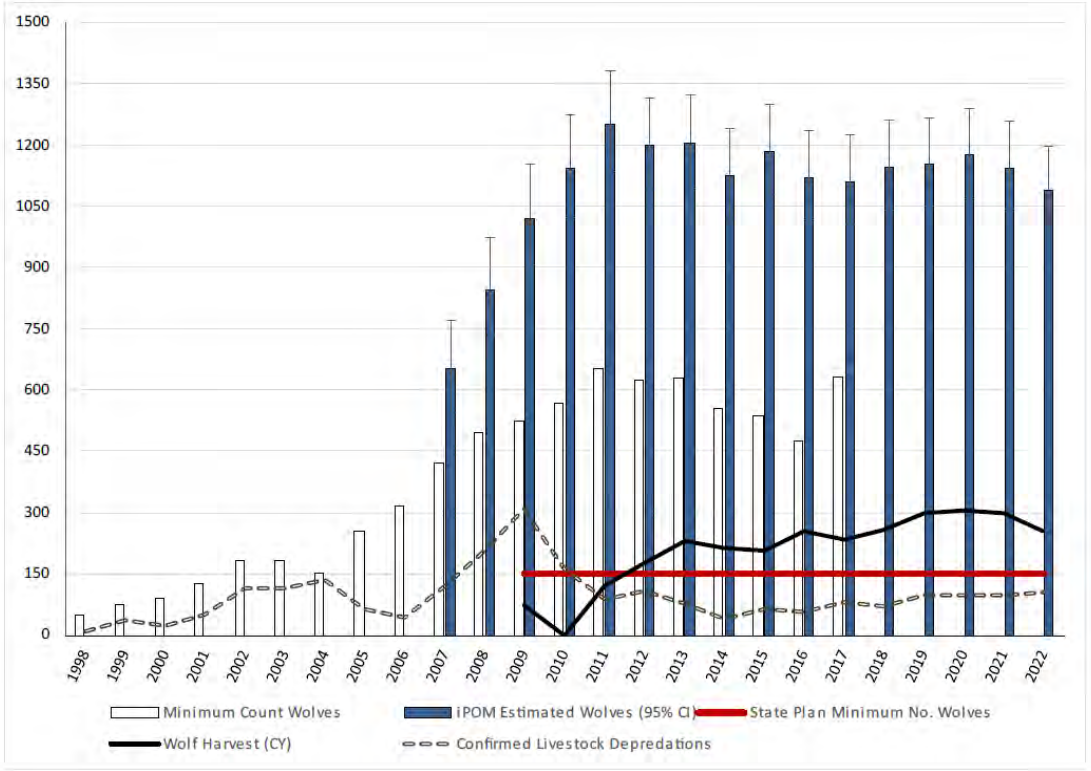
2016



Predator Hunting – Is It Sustainable?

Wyoming WTMA (wolf hunt since 2012)





Montana (wolf hunt since 2009)

Hunting as a Management Tool

- What is the “right” number of predators?

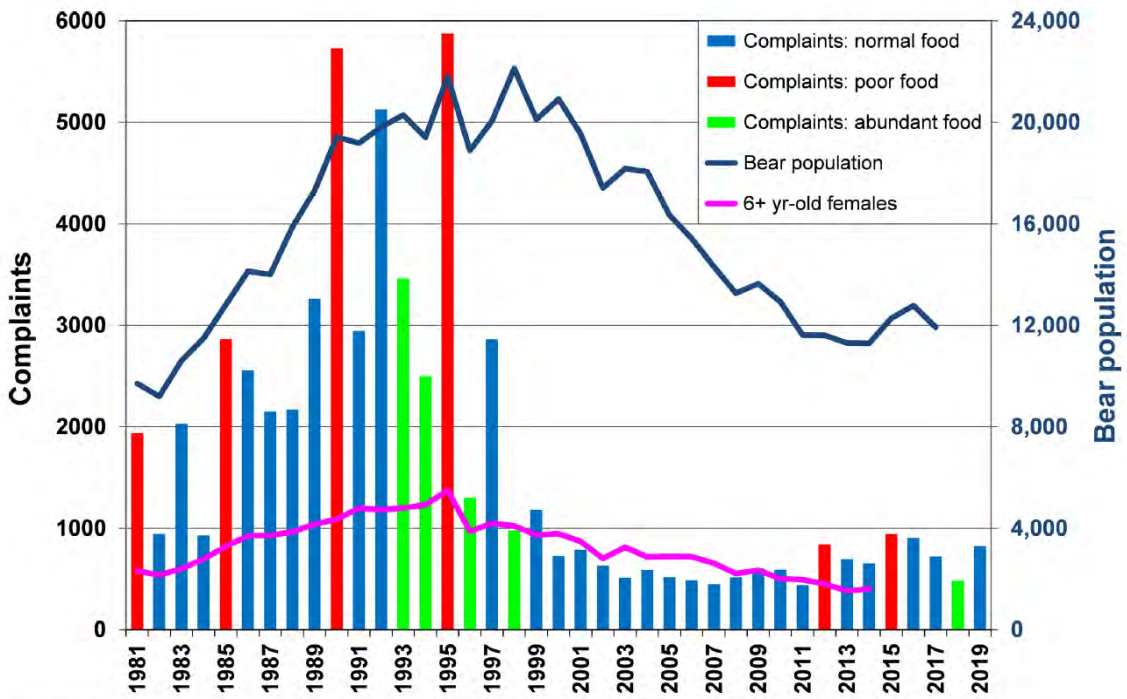


Fig 4. Comparison of total bear complaints, population size, and yearly rating of natural foods. Bear complaints rose sharply as the population of bears rose (population estimates not available for most recent 2 years). Complaints were especially high in years when natural summer and fall foods for bears were sparse, and were low when foods were abundant. A sharp decline in complaints occurred during 1998–2000 when the MNDNR phased-in a policy against translocating bears and greatly reduced on-site visits (Fig 1). Reduced complaints also corresponded with fewer prime-age females in the population.

Garshelis et al. 2020 (Minnesota bears)

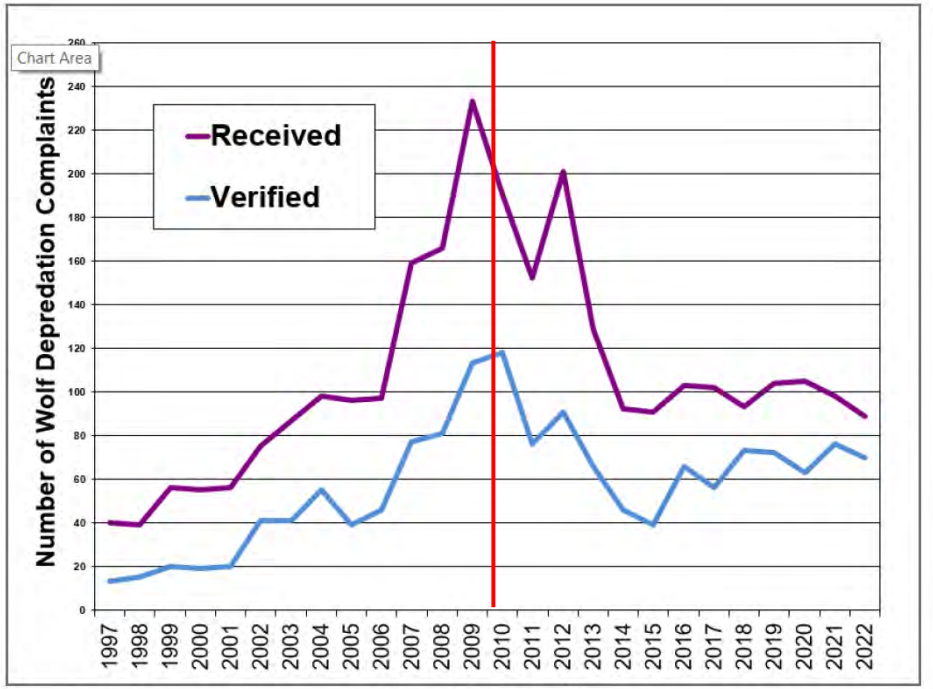
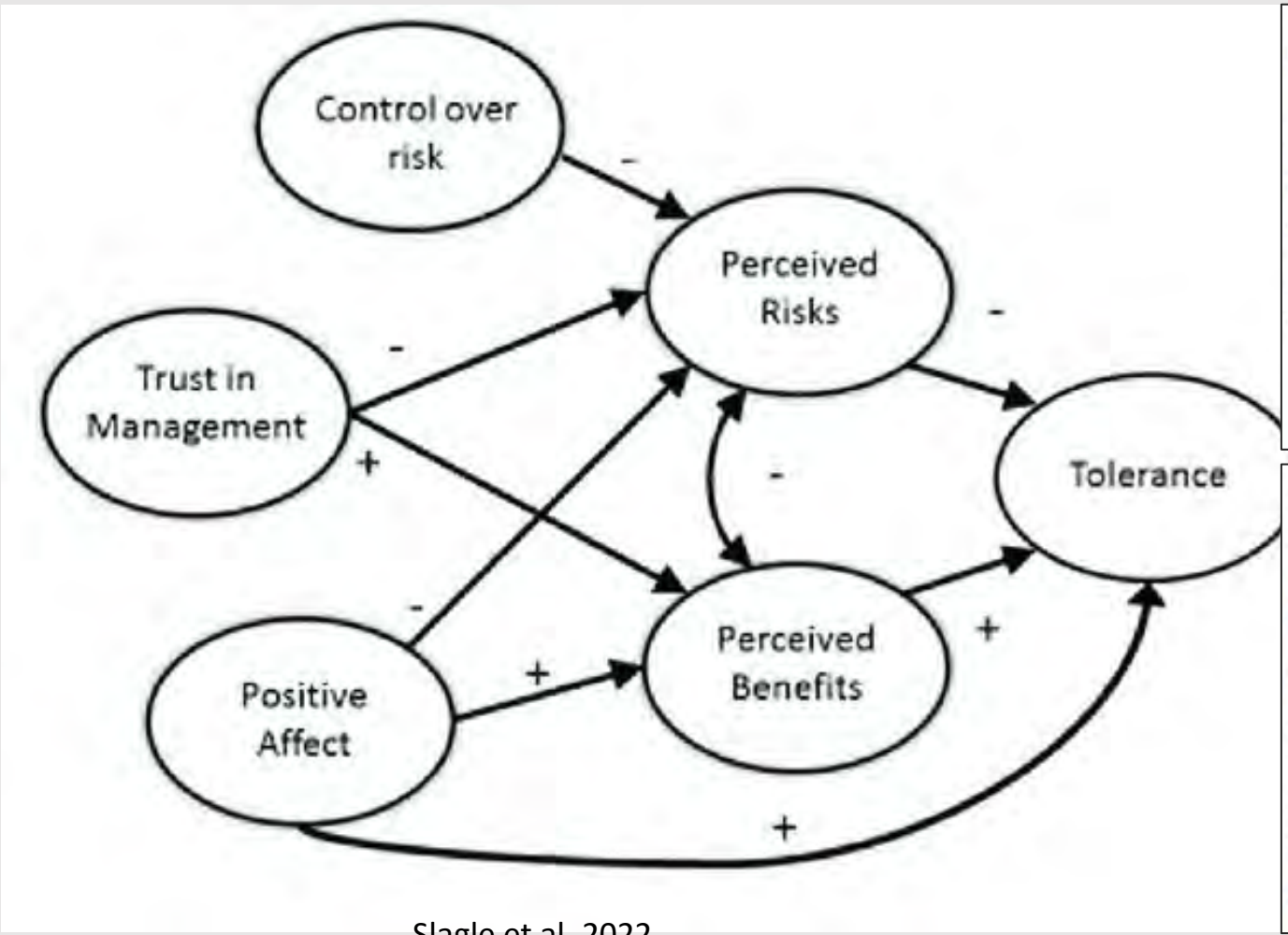


Figure 11. Number of complaints received by USDA Wildlife Services as suspected wolf damage and number of complaints verified as wolf damage, Federal Fiscal Year 1997-2022.

Montana FWP 2022 (Montana wolves)

Hunting and Social Tolerance



Slagle et al. 2022

SOCIETY & NATURAL RESOURCES
https://doi.org/10.1080/08941920.2022.2048152
Routledge
Taylor & Francis Group
Check for updates

"They Need to Be Managed:" Hunters' and Ranchers' Narratives of Increased Tolerance of Wolves after a Decade of Wolf Hunting

Jill Eileen Richardson
Department of Community and Environmental Sociology, University of Wisconsin, Madison, WI, USA

ABSTRACT
How do hunters and livestock producers who report increased tolerance for wolves account for the changes in their attitudes, and how

ARTICLE HISTORY
Received 19 January 2021
Accepted 18 February 2022

ELSEVIER
Biological Conservation
Volume 144, Issue 12, December 2011, Pages 3018-3027

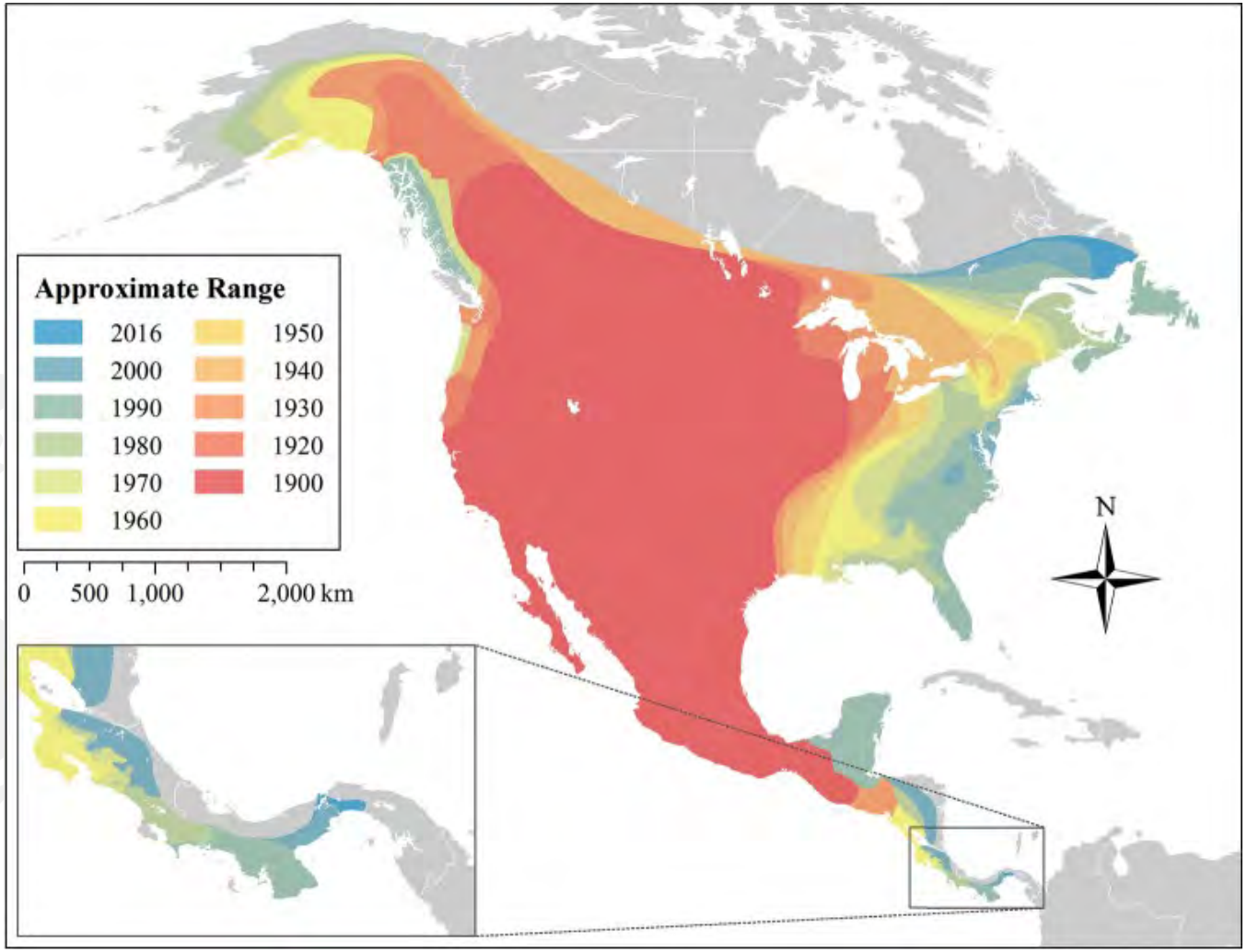
Dynamics of public attitudes toward bears and the role of bear hunting in Croatia

Aleksandra Majić [a 1], Agnese Marino Taussig de Bodonia [b 1], Đuro Huber [c], Nils Bunnefeld [b]

Show more

Predator Control

- Nothing new…
- One tool in the toolbox
- Abundant native predators
- Not applicable in every situation
- Not necessarily a long-term solution



Coyote Range 1900-2016, Hodey & Kays (2018).

Sea Turtles, Raccoons, and Pigs

Journal of Experimental Marine Biology and Ecology
Volume 395, Issues 1–2, 15 November 2010, Pages 147-152

Dramatic and immediate improvements in insular nesting success for threatened sea turtles and shorebirds following predator management

Richard M. Engeman [a], Anthony Duffiney [b], Sally Braem [c], Christina Olsen [c], Bernice Constantin [b], Parks Small [d], John Dunlap [b], J.C. Griffin [b 1]

Raccoon Removal Reduces Sea Turtle Nest Depredation in the Ten Thousand Islands of Florida

Ahjond S. Garmestani, H. Franklin Percival
Author Affiliations +

Southeastern Naturalist, 4(3):469-472 (2005). https://doi.org/10.1656/1528-7092(2005)004[0469:RRRSTN]2.0.CO;2

Facts About Sea Turtles & Raccoons

Raccoons destroy thousands of sea turtle eggs each year and are a one of the greatest causes of sea turtle mortality on Florida's beaches. This brochure provides information on how you can help protect Florida's sea turtles.

SEA TURTLE CONSERVANCY

Sea Turtle Conservancy
4424 NW 13th St, Ste B-11
Gainesville, FL 32609
352-373-6441
www.conserveturtles.org

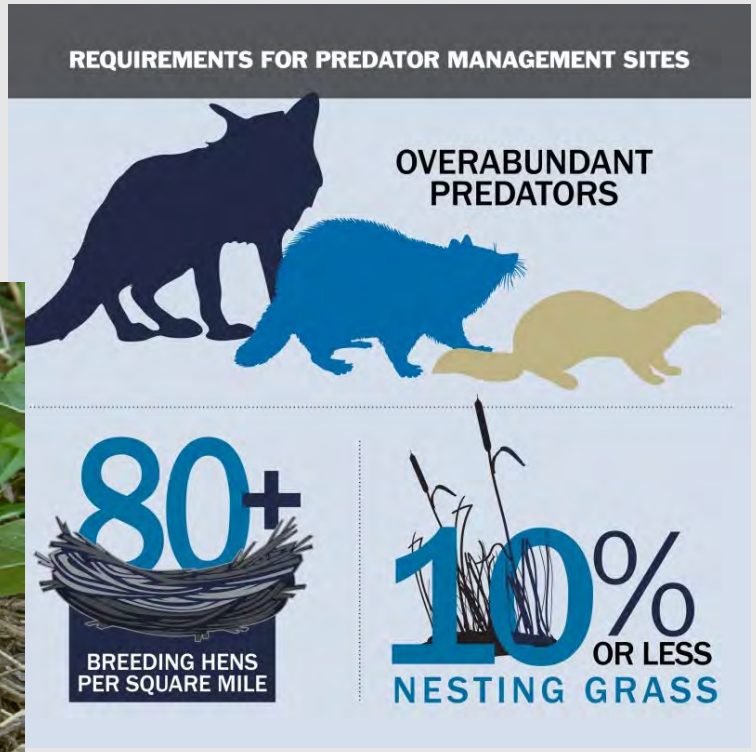
Ducks and Mesopredators

HIGH DUCK NESTING SUCCESS IN A PREDATOR-REDUCED ENVIRONMENT

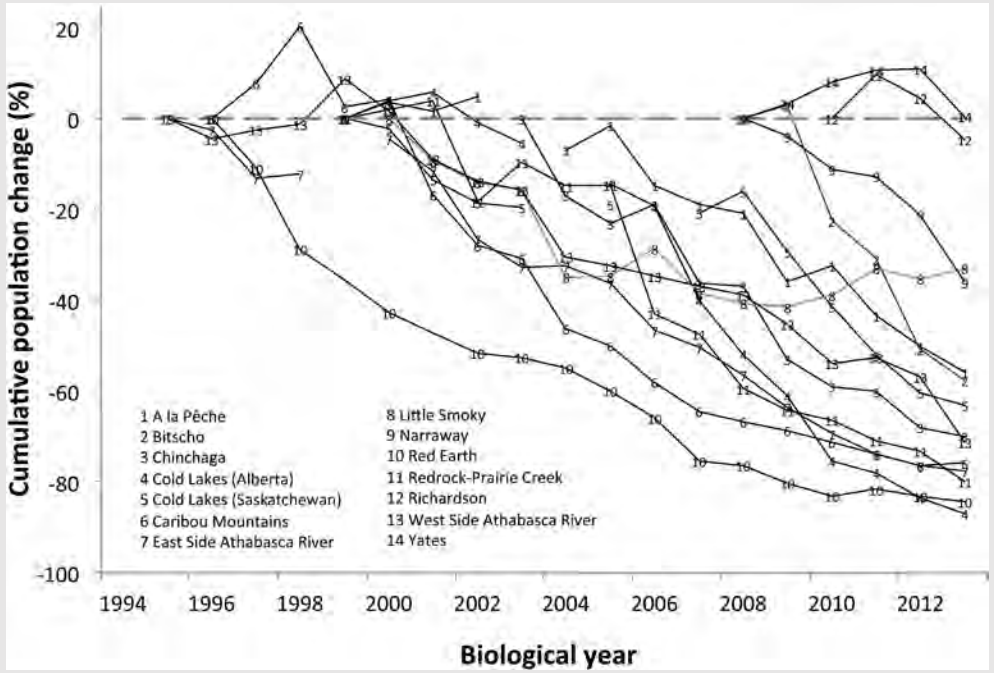
HAROLD F. DUEBBERT, Northern Prairie Wildlife Research Center, U.S. Fish and Wildlife Service, Jamestown, ND 58401
JOHN T. LOKEMOEN, Northern Prairie Wildlife Research Center, U.S. Fish and Wildlife Service, Jamestown, ND 58401

Abstract: Duck nesting and production were studied during 1969–74 on a 51-ha field of undisturbed grass-legume cover and a surrounding 8.13-km² area in north-central South Dakota. The principal mammalian predators of ducks were reduced within a 259-km² zone from May 1969 throug
Dabbling duck nest densities, hatching success, and breeding populations attained hig
duck species produced 1,062 nests on the 51-ha field during 6 years; 864 (81%) hatched,
destroyed, and 52 (5%) had other fates. During 1970–72, when predator reduction was mo
hatching success for 756 nests was 94%. The number of mallard (*Anas platyrhynchos*)
from 37 (0.7/ha) in 1969 to 181 (3.5/ha) in 1972. Mallard pairs increased from 2.8/km² to
8.13-km² area during the same period. A minimum of 7,250 ducklings hatched on the 51
the 6 years, including 2,342 ducklings in 1972. Exceptionally high duck nesting densitie
rates occurred when predators were controlled.

J. WILDL. MANAGE



Woodland Caribou and Wolves



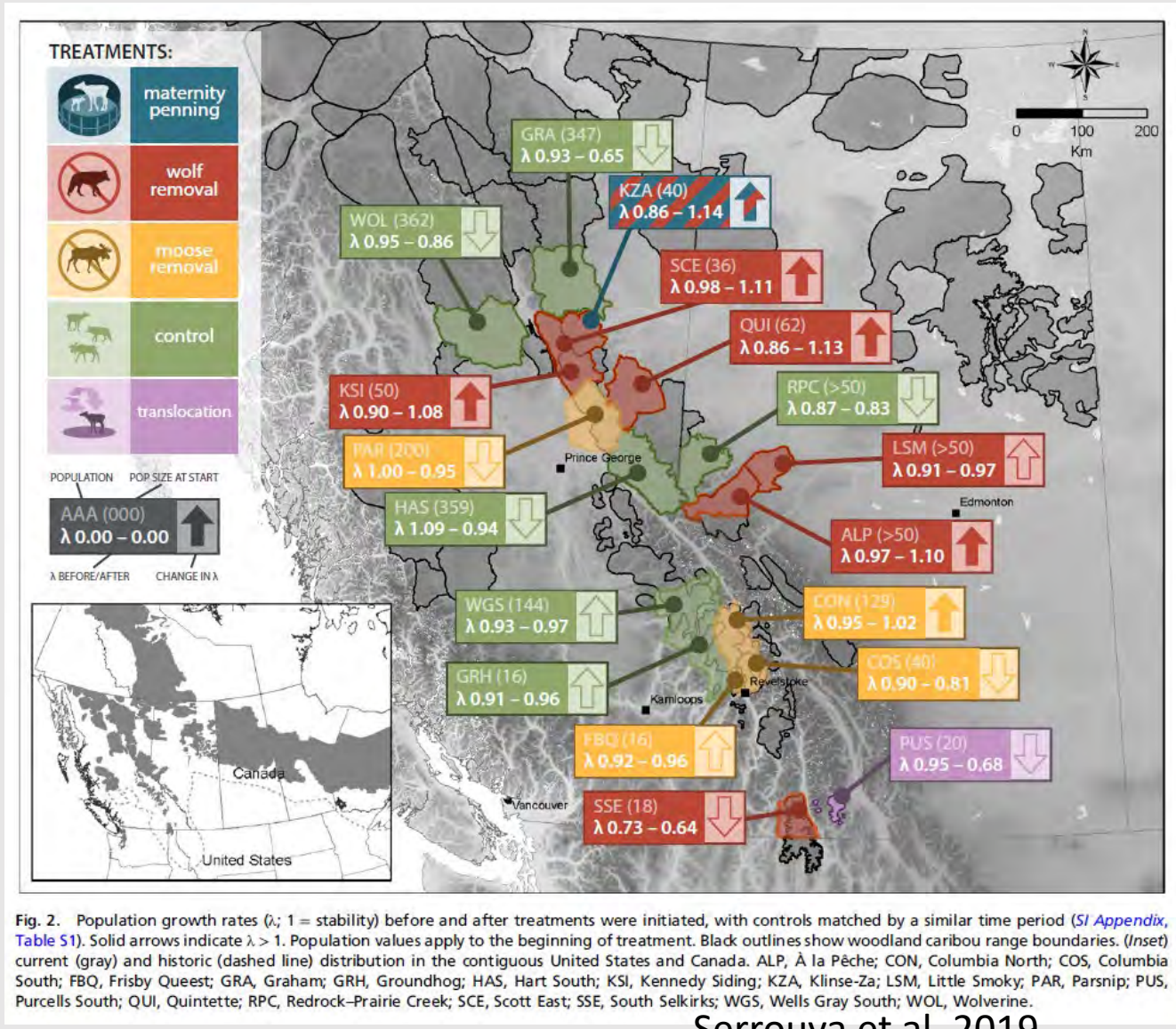


Fig. 2. Population growth rates (λ; 1 = stability) before and after treatments were initiated, with controls matched by a similar time period (*SI Appendix*, Table S1). Solid arrows indicate λ > 1. Population values apply to the beginning of treatment. Black outlines show woodland caribou range boundaries. (*Inset*) current (gray) and historic (dashed line) distribution in the contiguous United States and Canada. ALP, À la Pêche; CON, Columbia North; COS, Columbia South; FBQ, Frisby Queest; GRA, Graham; GRH, Groundhog; HAS, Hart South; KSI, Kennedy Siding; KZA, Klinse-Za; LSM, Little Smoky; PAR, Parsnip; PUS, Purcells South; QUI, Quintette; RPC, Redrock–Prairie Creek; SCE, Scott East; SSE, South Selkirks; WGS, Wells Gray South; WOL, Wolverine.

Serrouya et al. 2019

Recap

Predator Hunting

- Appropriate use of a valuable resource
- Can be done sustainably and scientifically.
- Related to social carrying capacity
- Likely to promote social tolerance

Predator Control

- Important in management of rare and endangered species
- Must be done deliberately and as part of an integrated management plan
- Why remove a useful tool from the toolbox?

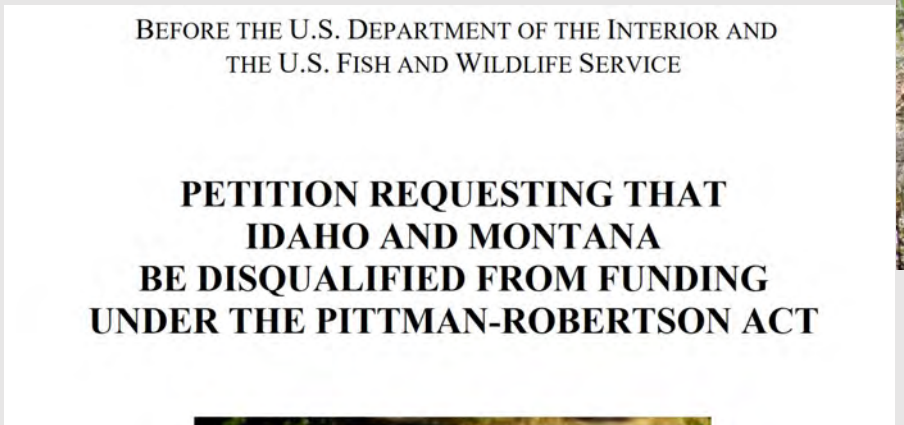
Despite That Background …

- A number of states, federal agencies, and Congress have considered restrictions on predator hunting and predator control
- These proposed restrictions raise legal questions about management authority and best available science

Lawsuits target Alaska predator-control program that killed 99 bears in effort to boost caribou

The Board of Game-authorized program carried out in southwestern Alaska was illegal and will not help the flagging Mulchatna caribou herd, the lawsuits claim

BY: YERETH ROSEN - AUGUST 2, 2023 5:59 AM



BEFORE THE U.S. DEPARTMENT OF THE INTERIOR AND
THE U.S. FISH AND WILDLIFE SERVICE

**PETITION REQUESTING THAT
IDAHO AND MONTANA
BE DISQUALIFIED FROM FUNDING
UNDER THE PITTMAN-ROBERTSON ACT**

Who Has Wildlife Management Authority?

- Under federal law, States have broad powers to manage the fish and wildlife within their borders, including on Federal lands. *E.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976).
- "In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State." 43 C.F.R. 24.3.

Who Has Wildlife Management Authority?

- "Under the Property Clause of the Constitution, Congress is given the power to 'make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' In the exercise of power under the Property Clause, Congress may choose to preempt State management of fish and wildlife on Federal lands …" 43 C.F.R. 24.3.
- "The Property Clause … empowers Congress to exercise jurisdiction over federal land within a State if Congress so chooses … If Congress so chooses, federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives under the Constitution's Supremacy Clause." *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002).

Who Has Wildlife Management Authority?

- State Constitutions or Statutes – delegate wildlife management authority to commissions or wildlife agencies
- *E.g.*, AS 16.05.221. Boards of Fisheries and Game.
- (b) For purposes of the conservation and development of the game resources of the state, there is created a Board of Game composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The governor shall appoint each member on the basis of interest in public affairs, good judgment, knowledge, and ability in the field of action of the board, and with a view to providing diversity of interest and points of view in the membership. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Game, but shall be ex officio secretary.

Who Has Wildlife Management Authority?

- Federal preemption of state wildlife management
  - Draft BIDEH policy
  - Bill to ban predator hunting contests on federal lands
  - Regulations restricting “predator control” on federal public lands in Alaska
  - Bill introduced to permanently protect bison, grizzly bears, and wolves

Who Has Wildlife Management Authority?

- “Ballot box biology” – using voter initiatives and petitions to stop predator hunting, trapping, or contests
  - Colorado: Bill in Legislature, petitions to Commission, and now a Ballot Initiative to ban mountain lion and bobcat hunting (Proposition 127)
  - Petitions to California, Washington, and Oregon Commissions to stop bear hunting
  - Petitions to stop predator hunting in Arizona, Nevada, and more

Who Has Wildlife Authority?

- Lawsuits to prohibit use of certain state policies
  - Wolf trapping in grizzly range (Idaho)
  - Intensive management of predators in Alaska
  - Leopard import permits from southern Africa
  - Michigan coyotes and Proposal G

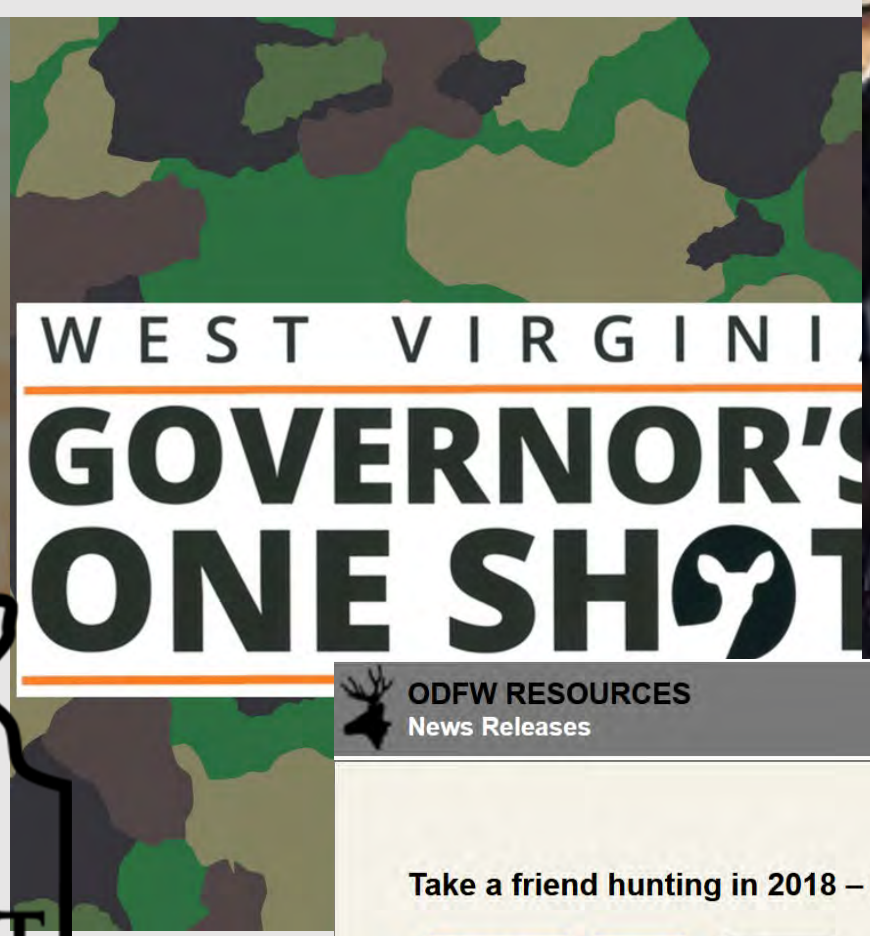
What Is the Best Available Science?

- The ESA, NEPA, and other laws require agencies to act on the "best available science."
- This requirement "prohibits an agency from disregarding available scientific evidence that is in some way better than the evidence it relies on"
- Essentially, agencies cannot ignore available biological information
- This standard focuses on "available" science, not "the best scientific data possible"
- *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014)

What Is the Best Available Science?

- Research cuts both ways when it comes to hunting and control to promote social tolerance
- Research on use of hunting contests is limited
- Are concerns about public perceptions “science”?

The Slippery Slope: After Predator Hunting and Management, What's Next?



ODFW RESOURCES
News Releases

Take a friend hunting in 2018 – Enter to win a prize!

Like 11 Share Post

Wednesday, August 1, 2018

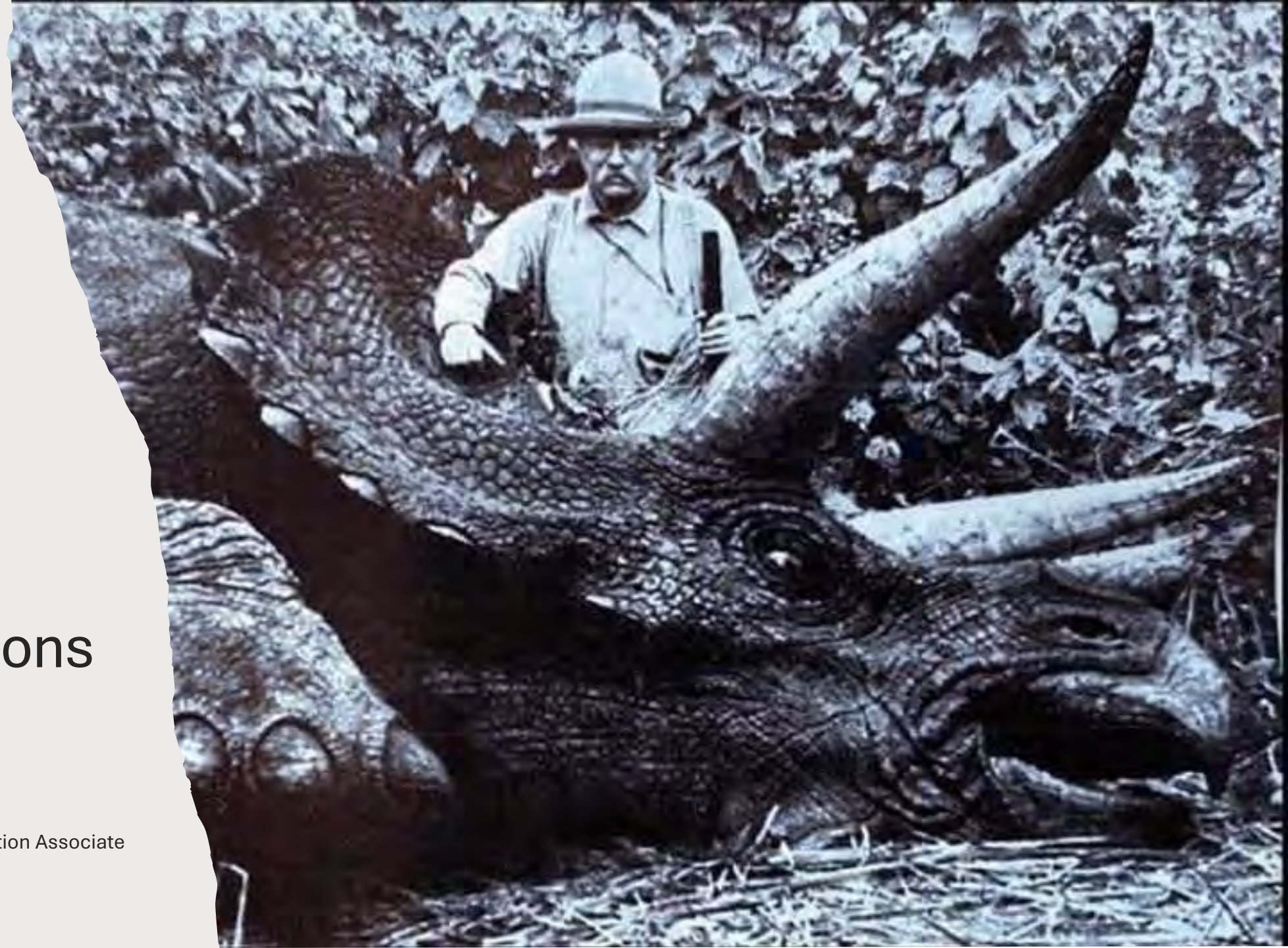
SALEM, Ore.—Take a friend new to the sport out hunting this year—you might win a prize!


Thank You!
Questions?

Ethics Considerations of Using AI

Madeline Demaske

Safari Club International's Litigation Associate

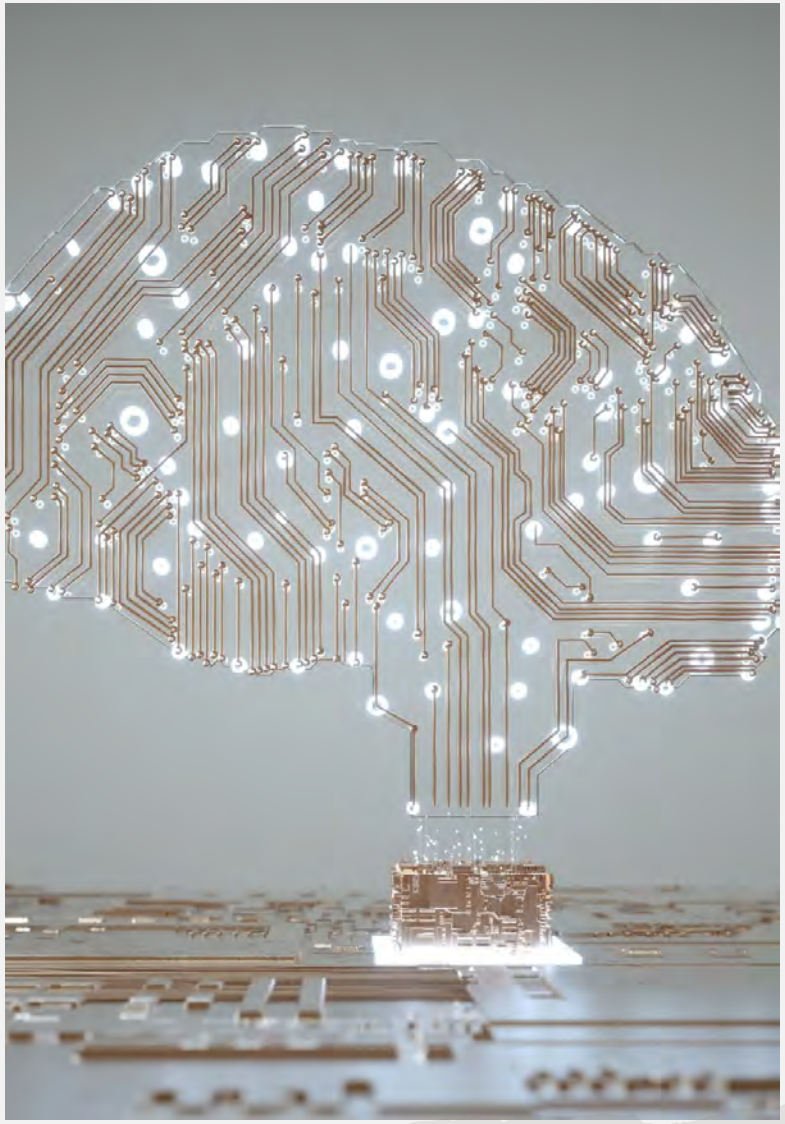


Agenda

- What is AI?
- Why do we care?
- Model Rules Most Affected by AI
- Judicial Ethics Considerations
- Key Takeaways

What is AI?

- AI = artificial intelligence
- **No single definition** of AI
  - “the capability of a machine to imitate intelligent human behavior”
  - “cognitive computing”
  - “machine learning”
- AI at its core encompasses tools that are **trained rather than programed**
- AI involves teaching computers how to perform tasks that typically require human intelligence



What is generative AI?

- Subset of AI technology
- Generative AI can create various types of new content in response to a user's prompts and questions
- Generative AI tools that produce new text are prediction tools that generate a statistically probably output when prompted
- Some Generative AI tools are "self-learning"

So, you might me asking yourself, why should I care?

Common Uses of AI

Electronic discovery

Contract analysis

Litigation analysis

Legal research

Drafting documents

Proofreading documents

Electronic signatures

Task management

Risk assessment

Why do we care?

- Essential for lawyers to be aware of how AI can be used in their practices
- AI allows lawyers to provide better, faster, and more efficient legal services
- In the next few years, the use of AI will be no different than the use of email by lawyers – an indispensable part of the practice of law

Why do we care?

To ensure clients are protected, lawyers using artificial intelligence tools must fully consider their applicable **ethical obligations**, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

Model Rules Most Affected by AI

- Competence
- Confidentiality of Information
- Communications
- Fees
- Unauthorized Practice of Law
- Additional rules:
  - Responsibilities of Partners, Managers, and Supervisory Lawyers
  - Responsibilities of a Subordinate Lawyer
  - Responsibilities Regarding Nonlawyer Assistance

*Make sure to check the ethics rules in your state.

Competence

Model Rule 1.1: Competence – Client-Lawyer Relationship

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

Competence

- The ABA adopted “technology amendments” to the Model Rules, including updating the comments to Rule 1.1
- Comment [8] to Model Rule 1.1 states that lawyers should understand “the benefits and risks associated with relevant technology” used to deliver legal services to clients
- Any informed decision about whether to employ AI must consider the client’s interests and objectives

Competence – ABA Formal Opinion 512

- Do not need to become AI experts
- Must have a reasonable understanding of the capabilities and limitations of AI
- “Technological competence presupposes that lawyers remain vigilant about the tools’ benefits and risks”
- Lawyers should consider:
  - Reading about AI tools targeted at the legal profession
  - Attending relevant CLE programs
  - Consulting others who are proficient in AI technology

Competence – ABA Formal Opinion 512

- Must recognize inherent risks in using AI:
  - Inaccurate outputs
  - AI is only as good as its data
  - Lacks the ability to understand the meaning of text
  - Prone to “hallucinations”
- Failure to verify or review AI outputs could violate Model Rule 1.1

Competence – ABA Formal Opinion 512

- Lawyers **must** exercise an appropriate degree of independent verification and review
- AI **cannot** replace the judgment and experience necessary for lawyers to competently advise clients
- Level of verification or review to satisfy Model Rule 1.1 will depend on the AI tool and task
- Regardless of the level of review the lawyer selects, the lawyer is still **fully responsible for the work** on behalf of the client

How to Stay Competent Using AI – Tips and Tricks

- Have a basic understanding of AI
- Analyze the risks associated with using AI
- Determine which areas of practice can be improved by AI
- Determine where AI use may not be appropriate
- Learn how to optimize prompts for better results
- Identify issues that may require new policies

Confidentiality

Model Rule 1.6: Confidentiality of Information – Lawyer-Client Relationship

(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).

Confidentiality – ABA Formal Opinion 512

- Under Model Rule 1.6, a lawyer using AI must remember the duty of confidentiality
- Must make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client”
- Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients

Confidentiality – ABA Formal Opinion 512

- Before lawyers input client's information into an AI tool, they must evaluate the risks of disclosure
- By its very nature, self-learning AI tools raise the risk of improper disclosure
- Safeguarding information will depend on the AI tool, the client, the matter, and the task
- Lawyers should read the AI tool's Terms of Use, privacy policy, and related contractual terms and policies

Confidentiality – Informed Consent

- Informed consent is required prior to inputting information regarding representation into an AI tool
- For consent to be informed, a lawyer **must** tell the client:
  - **Why** the AI tool is being used,
  - **Extent of and specific information** about the risk ,
  - Ways **others might use** the information against the client's interests, and
  - A clear explanation of the AI tool's **benefits** to the representation
- Adding general boilerplate provisions to engagement letters is not sufficient
- Informed consent isn't necessary when the lawyer will not be inputting information related to representation

How to Maintain Confidentiality Using AI – Tips and Tricks

Analyze the risks associated with using AI

Determine reasonable efforts to prevent the inadvertent or unauthorized disclosure of confidential information

Understand the AI tool’s Terms of Use, privacy policy, and related contractual terms and policies

Develop informed consent policies and procedures

Communications

Model Rule 1.4: Communications – Client-Lawyer Relationship

(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 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 to the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of professional Conduce or other law.

Communications

- Model Rule 1.4(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- Comment [5] to Model Rule 1.4 explains, “the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation”
- **Might ask**: whether and when to disclose the use of AI tools?

Communications - ABA Formal Opinion 512

- Facts of each case will determine whether to disclose
- Lawyers **must** disclose if:
  - Asked by a client how they conducted their work
  - Asked by a client whether AI technologies were employed
  - The terms of the engagement agreement require disclosure
  - The client's outside counsel guidelines require disclosure
  - The lawyer intends to input information relating to the representation into the AI tool
- Depending on the circumstances, client disclosure may be unnecessary

Communications - ABA Formal Opinion 512

- Lawyers should consider whether the specific circumstances warrant client consultation about the use of an AI tool, including:
  - The client's **needs and expectations**
  - The **scope** of the representation
  - The **sensitivity** of the information involved

Communications - ABA Formal Opinion 512

- Potentially relevant considerations include:
  - The **AI tool's importance** to a particular task
  - The **significance of the task** to the overall representation
  - How the AI **tool will process** the client's information
  - Extent to which knowledge of the lawyer's use of AI would **affect the client's confidence** in the lawyer

Fees

Model Rule 1.5: Fees – Client-Lawyer Relationship

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses…

(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…

Fees – ABA Formal Ethics Opinion 93-379 – Billing

- Must **only bill** for time actually expended on the client's behalf
- Not allowed to charge the client for more hours even if the lawyer is particularly efficient
- Goal should be solely to compensate the lawyer fully for time reasonably expended
- **For example**: If a lawyer uses AI to draft a pleading and expends 15 minutes to input the relevant information into the AI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness

Fees – ABA Formal Ethics Opinion 93-379 - Expenses

- Model Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable
- Lawyers should not add a surcharge for expenses
- Lawyers may not bill clients for general office overhead
- These principles apply when a lawyer utilizes AI tools

Fees – ABA Formal Ethics Opinion 93-379 - Overhead

- If AI functions similarly to equipping or maintaining a legal practice, cost should be considered overhead
- Most difficult issue is determining how to charge clients for in-house services that are not general office overhead and which the lawyer seeks reimbursement
- Must ensure that the amount charged is not duplicative of other charges

How to Bill Using AI – Tips and Tricks

- May not charge clients to learn how to use an AI tool or service UNLESS a client explicitly requests that a specific AI tool be used
- Do not add a surcharge for expenses
- Do not bill clients for general office overhead
- Ensure AI charges are not duplicative of other charges
- Memorialize terms relating to billing and the use of AI in an agreement

Unauthorized Practice of Law

Model Rule 5.5: Unauthorized Practice of Law – Law Firms and Associations

- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - 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
  - Hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Unauthorized Practice of Law

- Lawsuits against AI developers claim they engaged in the unauthorized practice of law
- In *Lola v. Skadden*, the court implied that machines could not engage in the practice of law
- In *Janson v. LegalZoom.com, Inc*., the court held that filing out blank forms "is not in and of itself the unauthorized practice of law"
- AI programs can direct clients to the forms they need to fill out, but they may not give any advice as to the substance of the client's answers

Judicial Ethics Considerations

- Ex Parte Communications
  - Model Code 2.9[A] prohibits considering “other communications made to the judge outside the presence of the parties or their lawyers”
  - Model Code 2.9[C] bars independent investigation
  - Model Code 2.4 deems external influences on judicial conduct an issue
- Confidentiality
- Impartiality and Fairness
  - Model Code 2.2 requires judicial officers to perform their duties fairly and impartially

Judicial Ethics Considerations

- Bias, Prejudice, and Harassment
  - Model Code 2.3 requires judicial officers to perform their duties without bias or prejudice
- Hiring and Administrative Appointments
  - Model Code 2.13 requires judicial officers to make appointments and hire staff impartially and based on merit
- Duty to Supervise
  - Model Code 2.12 obligates judicial officers to supervise staff and make sure they are aware of their obligations

Key Takeaways

Lawyers must be informed about AI’s ability to deliver efficient and accurate legal services

Lawyers must keep in mind the ethical requirements and limitations when using AI

Lawyers must exercise independent judgment, communicate with clients, and charge reasonable fees when using AI

AI should act as a legal assistant, not as a substitute for a lawyer.

Questions?

NASHVILLE BAR ASSOCIATION

Sources - Rules

- Model Code of Judicial Conduct (“Model Code”)
- Model Rules of Professional Conduct (“Model Rule”)

Sources – Formal Opinions

- ABA Formal Opinion 512
- ABA Formal Opinion 93-379

Sources - Cases

- *Janson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053 (W.D. Mo. 2011).
- *Lola v. Skadden, Arps, Slate, Meagher & Flom*, No. 14-3845 (2d Cir. 2015).

Sources – Other

- ABA Issues First Ethics Guidance on a Lawyer's Use of AI Tools
- AI and Ethical Concerns for Legal Practitioners
- AI and the Courts: Judicial and Legal Ethics Issues
- Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands
- Definition: Artificial Intelligence
- Legal Ethics in the Use of Artificial Intelligence
- What are the Risks of AI in Law Firms?

Rule 1.1: Competence

Share:

Client-Lawyer Relationship

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 | Table of Contents | Next Rule

Rule 1.1 Competence - Comment

Client-Lawyer Relationship

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. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. 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 can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably

necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

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.

Back to Rule | Table of Contents | Next Comment

Rule 1.4: Communications

Client-Lawyer Relationship

(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 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.

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Rule 1.4 Communication - Comment

Share:

Client-Lawyer Relationship

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the

status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the

client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

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April 14, 2020

Rule 1.5: Fees

Client-Lawyer Relationship

(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, if apparent to the client, 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;

(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.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

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Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship

(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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or 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;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the

client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) 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.

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April 17, 2019

Rule 1.9: Duties to Former Clients

Share:

Client-Lawyer Relationship

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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April 13, 2020

Rule 1.18: Duties to Prospective Client

Client-Lawyer Relationship

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

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April 17, 2019

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Law Firms And Associations

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

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

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

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

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

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February 14, 2020

Rule 2.2: Impartiality and Fairness

Share:

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

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February 14, 2020

Rule 2.3: Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

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February 14, 2020

Rule 2.4: External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

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February 14, 2020

Rule 2.9: Ex Parte Communications

Share:

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the

parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

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February 14, 2020

Rule 2.12: Supervisory Duties

Share:

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

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February 14, 2020

Rule 2.13: Administrative Appointments

(A) In making administrative appointments, a judge:

(1) shall exercise the power of appointment impartially* and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) A judge shall not appoint a lawyer to a position if the judge either knows* that the lawyer, or the lawyer's spouse or domestic partner,* has contributed more than $[insert amount] within the prior [insert number] year[s] to the judge's election campaign, or learns of such a contribution* by means of a timely motion by a party or other person properly interested in the matter, unless:

(1) the position is substantially uncompensated;

(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or

(3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.

(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512 **July 29, 2024**

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

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[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] 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?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

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

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[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

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.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

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[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

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.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

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[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

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[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

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[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "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; (2) fail to disclose to the tribunal 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; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that 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;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- 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;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

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[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.
[54] *See* ABA Formal Op. 08-451, *supra* note 15.
[55] Fla. Bar Advisory Op. 12-3 (2013).
[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].
[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.
[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (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, if apparent to the client, 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; (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.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

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[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-379 **December 6, 1993**
Billing for Professional Fees, Disbursements and Other Expenses

Consistent with the Model Rules of Professional Conduct, a lawyer must disclose to a client the basis on which the client is to be billed for both professional time and any other charges. Absent a contrary understanding, any invoice for professional services should fairly reflect the basis on which the client's charges have been determined. In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time than she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour). A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office; however, the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered. A lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third-party services.

The legal profession has dedicated a substantial amount of time and energy to developing elaborate sets of ethical guidelines for the benefit of its clients. Similarly, the profession has spent extraordinary resources on interpreting, teaching and enforcing these ethics rules. Yet, ironically, lawyers are not generally regarded by the public as particularly ethical. One major contributing factor to the discouraging public opinion of the legal profession appears to be the billing practices of some of its members.

It is a common perception that pressure on lawyers to bill a minimum number of hours and on law firms to maintain or improve profits may have led

some lawyers to engage in problematic billing practices. These include charges to more than one client for the same work or the same hours, surcharges on services contracted with outside vendors, and charges beyond reasonable costs for in-house services like photocopying and computer searches. Moreover, the bases on which these charges are to be assessed often are not disclosed in advance or are disguised in cryptic invoices so that the client does not fully understand exactly what costs are being charged to him.

The Model Rules of Professional Conduct provide important principles applicable to the billing of clients, principles which, if followed, would ameliorate many of the problems noted above. The Committee has decided to address several practices that are the subject of frequent inquiry, with the goal of helping the profession adhere to its ethical obligations to its clients despite economic pressures.

The first set of practices involves billing more than one client for the same hours spent. In one illustrative situation, a lawyer finds it possible to schedule court appearances for three clients on the same day. He spends a total of four hours at the courthouse, the amount of time he would have spent on behalf of each client had it not been for the fortuitous circumstance that all three cases were scheduled on the same day. May he bill each of the three clients, who otherwise understand that they will be billed on the basis of time spent, for the four hours he spent on them collectively? In another scenario, a lawyer is flying cross-country to attend a deposition on behalf of one client, expending travel time she would ordinarily bill to that client. If she decides not to watch the movie or read her novel, but to work instead on drafting a motion for another client, may she charge both clients, each of whom agreed to hourly billing, for the time during which she was traveling on behalf of one and drafting a document on behalf of the other? A third situation involves research on a particular topic for one client that later turns out to be relevant to an inquiry from a second client. May the firm bill the second client, who agreed to be charged on the basis of time spent on his case, the same amount for the recycled work product that it charged the first client?

The second set of practices involves billing for expenses and disbursements, and is exemplified by the situation in which a firm contracts for the expert witness services of an economist at an hourly rate of $200. May the firm bill the client for the expert's time at the rate of $250 per hour? Similarly, may the firm add a surcharge to the cost of computer-assisted research if the per-minute total charged by the computer company does not include the cost of purchasing the computers or staffing their operation?

The questions presented to the Committee require us to determine what constitute reasonable billing procedures; that is, what are the services and costs for which a lawyer may legitimately charge, both generally and with regard to the specific scenarios? This inquiry requires an elucidation of the

Rule of Professional Conduct 1.5,[1] and the Model Code of Professional Responsibility DR 2-106.[2]

Disclosure of the Bases of the Amounts to Be Charged

At the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed.

Authority for the obligation to make disclosure at the beginning of a representation is found in the interplay among a number of rules. Rule 1.5(b) provides that

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

The Comment to Rule 1.5 gives guidance on how to execute the duty to communicate the basis of the fee:

In a new client-lawyer relationship ... an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially

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1. Rule 1.5 states in relevant part:

(a) A lawyer's fee shall be reasonable. 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, if apparent to the client, 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;
   (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)When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

2. DR 2-106 contains substantially the same factors listed in Rule 1.5 to determine reasonableness, but does not require that the basis of the fee be communicated to the client "preferably in writing" as Rule 1.5 does.

inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

This obligation is reinforced by reference to Model Rule 1.4(b) which provides that

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

While the Comment to this Rule suggests its obvious applicability to negotiations or litigation with adverse parties, its important principle should be equally applicable to the lawyer's obligation to explain the basis on which the lawyer expects to be compensated, so the client can make one of the more important decisions "regarding the representation."

An obligation of disclosure is also supported by Model Rule 7.1, which addresses communications concerning a lawyer's services, including the basis on which fees would be charged. The rule provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

It is clear under Model Rule 7.1 that in offering to perform services for prospective clients it is critical that lawyers avoid making any statements about fees that are not complete. If it is true that a lawyer when advertising for new clients must disclose, for example, that costs are the responsibility of the client, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), it necessarily follows that in entering into an actual client relationship a lawyer must make fair disclosure of the basis on which fees will be assessed.

A corollary of the obligation to disclose the basis for future billing is a duty to render statements to the client that adequately apprise the client as to how that basis for billing has been applied. In an engagement in which the client has agreed to compensate the lawyer on the basis of time expended at regular hourly rates, a bill setting out no more than a total dollar figure for unidentified professional services will often be insufficient to tell the client what he or she needs to know in order to understand how the amount was determined. By the same token, billing other charges without breaking the charges down by type would not provide the client with the information the client needs to understand the basis for the charges.

Initial disclosure of the basis for the fee arrangement fosters communication that will promote the attorney-client relationship. The relationship will be similarly benefitted if the statement for services explicitly reflects the basis for the charges so that the client understands how the fee bill was determined.

Professional Obligations Regarding the Reasonableness of Fees

Implicit in the Model Rules and their antecedents is the notion that the attor-

ney-client relationship is not necessarily one of equals, that it is built on trust, and that the client is encouraged to be dependent on the lawyer, who is dealing with matters of great moment to the client. The client should only be charged a reasonable fee for the legal services performed. Rule 1.5 explicitly addresses the reasonableness of legal fees. The rule deals not only with the determination of a reasonable hourly rate, but also with total cost to the client. The Comment to the rule states, for example, that "[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." The goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client.

Ethical Consideration 2-17 of the Model Code of Professional Responsibility provides a framework for balancing the interests between the lawyer and client in determining the reasonableness of a fee arrangement:

> The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

The lawyer's conduct should be such as to promote the client's trust of the lawyer and of the legal profession. This means acting as the advocate for the client to the extent necessary to complete a project thoroughly. Only through careful attention to detail is the lawyer able to manage a client's case properly. An unreasonable limitation on the hours a lawyer may spend on a client should be avoided as a threat to the lawyer's ability to fulfill her obligation under Model Rule 1.1 to "provide competent representation to a client." Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." Model Rule 1.1. Certainly either a willingness on the part of the lawyer, or a demand by the client, to circumscribe the lawyer's efforts, to compromise the lawyer's ability to be as thorough and as prepared as necessary, is not in the best interests of the client and may lead to a violation of Model Rule 1.1 if it means the lawyer is unable to provide competent representation. The Comment to Model Rule 1.2, while observing that "the scope of services provided by a lawyer may be limited by agreement," also notes that an agreement "concerning the scope of representation must accord with the Rules.... Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1...." [3]

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3. Beyond the scope of this opinion is the question whether a lawyer, with full disclosure to a sophisticated client of the risks involved, can agree to undertake at the request of the client only ten hours of research, when the lawyer knows that the resulting work product does not fulfill the competent representation requirement of Model Rule 1.1.

On the other hand, the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spent on the client's behalf.[4] In addressing the hypotheticals regarding (a) simultaneous appearance on behalf of three clients, (b) the airplane flight on behalf of one client while working on another client's matters and (c) recycled work product, it is helpful to consider these questions, not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned. A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules. Model Rule 1.5.

Moreover, continuous toil on or overstaffing a project for the purpose of churning out hours is also not properly considered "earning" one's fees. One job of a lawyer is to expedite the legal process. Model Rule 3.2. Just as a lawyer is expected to discharge a matter on summary judgment if possible rather than proceed to trial, so too is the lawyer expected to complete other projects for a client efficiently. A lawyer should take as much time as is reasonably required to complete a project, and should certainly never be motivated by anything other than the best interests of the client when determining how to staff or how much time to spend on any particular project.

It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client, not give rise to an opportunity to bill a client phantom hours. This is not to say that the lawyer who agreed to hourly compensation is not free, with full disclosure, to suggest additional compensation because of a particularly efficient or outstanding result, or because the lawyer was able to reuse prior work

4. Rule 1.5 clearly contemplates that there are bases for billing clients other than the time expended. This opinion, however, only addresses issues raised when it is understood that the client will be charged on the basis of time expended.

product on the client's behalf. The point here is that fee enhancement cannot be accomplished simply by presenting the client with a statement reflecting more billable hours than were actually expended. On the other hand, if a matter turns out to be more difficult to accomplish than first anticipated and more hours are required than were originally estimated, the lawyer is fully entitled (though not required) to bill those hours unless the client agreement turned the original estimate into a cap on the fees to be charged.

Charges Other Than Professional Fees

In addition to charging clients fees for professional services, lawyers typically charge their clients for certain additional items which are often referred to variously as disbursements, out-of-pocket expenses or additional charges. Inquiries to the Committee demonstrate that the profession has encountered difficulties in conforming to the ethical standards in this area as well. The Rules provide no specific guidance on the issue of how much a lawyer may charge a client for costs incurred over and above her own fee. However, we believe that the reasonableness standard explicitly applicable to fees under Rule 1.5(a) should be applicable to these charges as well.

The Committee, in trying to sort out the issues related to these charges, has identified three different questions which must be addressed. First, which items are properly subject to additional charges? Second, to what extent, if at all, may clients be charged for more than actual out-of-pocket disbursements? Third, on what basis may clients be charged for the provision of in-house services? We shall address these one at a time.

A. General Overhead

When a client has engaged a lawyer to provide professional services for a fee (whether calculated on the basis of the number of hours expended, a flat fee, a contingent percentage of the amount recovered or otherwise) the client would be justifiably disturbed if the lawyer submitted a bill to the client which included, beyond the professional fee, additional charges for general office overhead. In the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services.

B. Disbursements

At the beginning of the engagement lawyers typically tell their clients that they will be charged for disbursements. When that term is used clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if the lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.

It is the view of the Committee that, in the absence of disclosure to the contrary, it would be improper if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements.

C. In-House Provision of Services

Perhaps the most difficult issue is the handling of charges to clients for the provision of in-house services. In this connection the Committee has in view charges for photocopying, computer research, on-site meals, deliveries and other similar items. Like professional fees, it seems clear that lawyers may pass on reasonable charges for these services. Thus, in the view of the Committee, the lawyer and the client may agree in advance that, for example, photocopying will be charged at $.15 per page, or messenger services will be provided at $5.00 per mile. However, the question arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. We conclude that under those circumstances the lawyer is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator).

It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.

Conclusion

As the foregoing demonstrates, the subject of fees for professional services and other charges is one that is fraught with tension between the lawyer and the client. Nonetheless, if the principles outlined in this opinion are followed, the ethical resolution of these issues can be achieved.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

TODD JANSON, GERALD T. ARDREY, CHAD M. FERRELL, and C&J REMODELING LLC, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No. 2:10-4018-CV-C-NKL
v.	)	
LEGALZOOM.COM, INC.,	)	
Defendant.	)	

ORDER

Plaintiffs Todd Janson, Gerald T. Ardrey, Chad M. Ferrell, and C&J Remodeling LLC allege that Defendant LegalZoom is liable to them because it sold them legal documents via its website. Plaintiffs filed this putative class action in state court in Cole County, Missouri. LegalZoom removed the action to this Court. Before the Court is LegalZoom's Motion to reconsider the Court's ruling on its motion to dismiss for improper venue or, in the alternative, to transfer venue under 28 U.S.C. § 1404(a) [Doc. # 31]. For the following reasons, the Court denies the motion.

I. Factual Background[1]

LegalZoom is in the business of providing an online platform for customers to prepare legal documents. Customers can choose from a variety of products or services, and input data into a questionnaire. The LegalZoom platform generates a document using the product and data provided by the customer. LegalZoom conducts its business with customers only through its website, www.legalzoom.com, and has its headquarters in California.

Plaintiffs are Missouri residents. The Petition alleges that Plaintiffs purchased documents from LegalZoom through its website in 2008 and 2009. At that time, customers entered their contact, payment, and shipping information on the "Payment Information" page on LegalZoom's website. That page contained a confirmation button reading "Proceed to Checkout." During the relevant time, next to that button, there was a legend reading "By clicking the Proceed to Checkout button, you agree to our Terms of Service." The words "Terms of Service" were hyperlinked to LegalZoom's Terms of Service page. That page included a forum selection clause reading:

> LegalZoom exists solely within the County of Los Angeles in the state of California. I agree that regardless of where I reside or where my browser is physically located, my viewing and use of LegalZoom occurs solely within the County of Los Angeles in the State of California, and that all content and services shall be deemed to be served from, and performed wholly within, Los Angeles, California, as if I had physically traveled there to obtain such service.

[1] The parties do not dispute the facts relevant to LegalZoom's motion, which are drawn from their briefs on this motion and on Legal Zoom's Rule 12(b)(3) motion to dismiss [Doc. # 17].

The Terms of Service page further stated, "I agree that California law shall govern any disputes arising from my use of this website, and that the courts of the city of Los Angeles, state of California, shall have exclusive jurisdiction over any disputes." LegalZoom's website also contains a choice of law provision directing that California law applies. Plaintiffs did not negotiate the Terms of Service provisions with LegalZoom.

Plaintiffs seek to represent a class of "all persons or entities in the state of Missouri that paid fees to LegalZoom for the preparation of legal documents from December 18, 2004 to the present." Count I of their Petition alleges that LegalZoom engaged in the unlawful practice of law in the state of Missouri. Count II alleges a claim for money had and received. Counts III and IV allege claims under the Missouri Merchandising Practices Act.

Based on the forum selection clause on the Terms of Service page, LegalZoom filed a motion to dismiss pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. [Doc. # 17.] The Court denied that motion, finding that venue is proper in the Western District of Missouri where Plaintiffs reside and LegalZoom is subject to personal jurisdiction. [*See* Doc. # 29.] The Court determined that a motion to dismiss pursuant to 28 U.S.C. § 1406 or Rule 12(b)(3) was not the proper procedure for enforcing a forum selection clause. [*See id.*] LegalZoom subsequently filed its motion for reconsideration or, in the alternative, for transfer under § 1404(a).

II. Discussion

If venue is proper in a district court and a forum selection clause permits venue in another federal district court, 28 U.S.C. § 1404(a) governs the question of whether the Court should give effect to that clause and dismissal is not proper. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (considering a forum selection clause stating that claims concerning a contract should be brought in a state or federal district court in the Borough of Manhattan, New York City, New York); Charles Alan Wright, Arthur R. Miller, *Federal Practice & Procedure* § 3803.1 (stating that § 1404(a) analysis is proper even where movants seek dismissal for improper venue). There is no dispute that venue is proper in this Court under 28 U.S.C. § 1391. The forum selection clause in this case permits venue in another federal district court. Therefore, § 1404(a) provides the proper analysis. Plaintiffs agree, and Defendants cite to no authority indicating otherwise. The Court declines LegalZoom's request to reconsider the denial of LegalZoom's Rule 12(b)(3) motion.

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." "[I]n general, federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under section 1404(a) typically bears the burden of proving that a transfer is warranted." *In re Apple, Inc.*, 602 F.3d 909, 913 (8th Cir. 2010) (citation omitted). The convenience of the parties, the convenience of witnesses, and the interests of justice weigh into § 1404(a) analysis, though this list is not exhaustive. *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 692 (8th Cir. 1997).

Having declined to "offer an 'exhaustive list of specific factors to consider,'" the Eighth Circuit informs that district courts should "weigh 'case-specific factors' relevant to convenience and fairness" when considering whether to transfer is warranted. *In re Apple, Inc.*, 602 F.3d 909, 913 (8th Cir. 2010) (citation omitted).

A. Validity and Applicability of the Forum Selection Clause

A valid and applicable contractual forum selection clause is among such factors. *Terra*, 119 F.3d at 691.[2] The Court need not decide which law governs whether the forum selection clause here is valid and applicable because the law of each of the three jurisdictions whose law could govern – federal, Missouri, and California – is congruent. In general, the Eighth Circuit has confirmed that "forum selection clauses are prima facie valid and are enforced unless they are unjust or unreasonable or invalid." *Servewell*, 439 F.3d at 789. Missouri courts have adopted the federal standard and "modern trend toward enforcement of these clauses." *See Chase Third Century Leasing Co., Inc. v. Williams*, 782 S.W.2d 408, 412 (Mo. App. Ct. 1989). California courts have done the same. *See Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1209 (Cal. 1976) ("[W]e are in accord with the modern trend which favors enforceability of such forum selection clauses."); 14 Cal. Jur. 3d Contracts § 187 (2010) ("Because forum selection clauses are important in facilitating national and international commerce, California law favors them."). Under both Missouri

[2] The parties discussed the validity and applicability of the forum selection clause on LegalZoom's motion to dismiss. They have incorporated that discussion into their briefing on this motion by reference.

and California law, parties seeking to avoid forum selection clauses have the burden of showing they are not enforceable. *Major v. McCallister*, 302 S.W.3d 227, 229 (Mo. App. Ct. 2009); *Net2Phone, Inc. v. Superior Court*, 109 Cal. App. 4th 583, 588 (Cal. Dist. Ct. App. 2003).

The Court then turns to whether the contract at hand is unjust or unreasonable or invalid. Plaintiffs do not argue that online agreements cannot be valid.

1. Contract in Violation of Missouri Public Policy

Instead, among other points, Plaintiffs argue that the forum selection clause is void because it violates Missouri public policy. Neither California nor Missouri will enforce forum selection clauses where there is a strong state interest in regulating the conduct at issue. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.3d 493, 499-500 (Mo. 1992) (refusing to enforce a forum selection clause in an agreement concerning wine distribution because of Missouri's strong interest in protecting licensed liquor distributors) (citing *Hall v. Superior Ct. in & for County of Orange*, 150 Cal. App. 3d 411, 418-19 (Cal. App. Dist. Ct. 1983) (refusing to enforce forum selection clause in an agreement which allegedly violated California securities laws)). Forum selection clauses may be set aside where enforcement would contravene a strong public policy set out in statutes or judicial decisions. *Servewell Plumbing, LLC v. Federal Ins. Co.*, 439 F.3d 786, 790 (8th Cir. 2006). Here, both states have articulated a policy of prohibiting the unauthorized practice of law in their statutes and case law. *See* Mo. Rev. Stat. § 484.020; West's Ann. Bus. & Prof. Cod. §§ 6125, 6126, 6126.5, and 6127; *In re First Escrow, Inc.*, 840 S.W.2d 839, 845 (Mo. 1992)

(citation omitted) (finding that escrow companies may fill in standardized real estate closing documents only in limited circumstances); *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 6 (Cal. 1998) (stating that the unauthorized practice of law includes giving legal advice and drafting legal documents).

One Missouri Court of Appeals has addressed the issue of whether a foreign forum selection clause violates a strong Missouri public policy against the unauthorized practice of law such that the clause will not be enforced. In *Jitterswing, Inc. v. Francorp, Inc.*, the court considered whether a forum selection clause in a franchise agreement was enforceable as to the franchisee's claim that the franchisor had engaged in the unauthorized practice of law. — S.W.3d —, No. ED 93045, 2010 WL 933763 (Mo. Ct. App. March 16, 2010). The *Jitterswing* court stated that, even if the clause did encompass the claims at hand, it was unenforceable as to the unauthorized practice of law claim because the plaintiff's "claim for practice of law without a license occurred in Missouri and arises under Section 484.020." *Id.* The *Jitterswing* court expressed concern over whether an Illinois court was the appropriate forum for deciding a tort created by a Missouri statute. *Id.* In the absence of ruling from the Supreme Court of Missouri, the Court must consider the ruling of a Missouri Court of Appeals. *Bockelman v. MCI Worldcom, Inc.*, 403 F.3d 528, 531 (8th Cir. 2005) (noting that, in a diversity case controlled by Missouri law, the court is bound to apply the decisions of the Missouri Supreme Court regarding substantive issues, but, where the Missouri Supreme Court has not ruled, the decisions of Missouri's intermediate appellate

court would be "'particularly relevant,' and must be followed when they are the best evidence of Missouri law.").

While the *Jitterswing* decision is not controlling in a federal court, it demonstrates that Missouri has a strong public policy – expressed in its statute – against the unauthorized practice of law. The documents produced by LegalZoom here will impact legal issues – such as corporate and estate matters – that will likely need to be addressed by Missouri courts under Missouri law for the benefit of Missouri citizens. Under either California or Missouri law, forcing litigation to a foreign forum under these circumstances would run contrary to a state's interest in resolving matters tied closely to the unauthorized practice of law within its borders. The forum selection clause in this case is invalid because enforcing it would run contrary to a strong public policy.

B. Other Rule 1404(a) Factors

Finding that the forum selection clause is unenforceable does not end the Court's § 1404(a) analysis, as the Court must still examine whether other factors weigh in favor of transfer. *See Terra*, 119 F.3d at 695. Courts contemplating transfer look to § 1404's reference to the convenience of the parties, the convenience of witnesses, and the interests of justice; courts "may consider a myriad of factors, including the convenience of the parties, the convenience of the witnesses, the availability of judicial process to compel the attendance of unwilling witnesses, the governing law, the relative ease of access to sources of proof, the possibility of delay and prejudice if a transfer is granted, and practical considerations indicating where the case can be tried more expeditiously and inexpensively." *Houk v.*

Kimberly-Clark Corp., 613 F. Supp. 923, 927 (W.D. Mo. 1985). The trial court has discretion in weighing these factors. *See Hubbard v. White*, 755 F.2d 692, 694 (8th Cir. 1985). Here, even if the forum selection clause was enforceable – making it a significant factor in favor of transfer, *see Terra*, 119 F.3d at 695 – LegalZoom has not shown that the balance of all factors weighs in favor of transfer.

Many of the factors outlined above are neutral and favor neither party. Looking to convenience of the parties, LegalZoom – a corporation – is inconvenienced by litigating in Missouri, but Plaintiffs – individuals – would be equally inconvenienced by litigating in California. This factor is at best neutral.

As to convenience of the witnesses, LegalZoom has identified eight witnesses, all employees of LegalZoom; Plaintiffs have identified themselves and one third-party witness who may have relevant information. The LegalZoom witnesses are in California. Plaintiffs' witnesses are in Missouri. Presumably, if Plaintiffs' proposed class is certified, it will consist of additional witnesses who are also located in Missouri. This factor is not "a battle of numbers." *See American Std., Inc. v. Bendix Corp.*, 487 F. Supp. 254, 263 (W.D.Mo.1980). Instead, witnesses are evaluated on "the nature and quality of their testimony in relationship to the issues of the case." *Houk*, 613 F.Supp. at 928. Where both parties identify witnesses with information critical to the issues in this case, this factor is also neutral.

LegalZoom notes that its documents are stored in California, but "any such documents can easily be photocopied and transported from their place of storage." *Id.* at 932; *see also American Std.*, 487 F. Supp. at 264 ("[B]ecause usually many records, or copies thereof, are

easily transported, their location is not entitled to great weight."). Additionally, electronic presentation of evidence would reduce the expense of transporting documents. *See, e.g., Employers Reins. Corp. v. Massachusetts Mut. Life Ins. Co.*, No. 06-0188, 2006 WL 1235957, at *3 (W.D. Mo. May 4, 2006). In a case concerning an internet transaction with a company whose business is transacted primarily online, the location of hard-copy documents does not weigh heavily in favor of transfer.

Turning to the interests of justice, the Court considers: judicial economy, plaintiffs' choice of forum, the comparative costs to the parties of litigating, the ability to enforce judgment, obstacles to a fair trial, conflict of law issues, and the advantages of having a local court determine questions of local law. *Terra*, 119 F.3d at 696. With regard to judicial economy, this case is well under-way in this Court: the parties are engaging in discovery; a trial date has been set for August 2011; and the Court is familiar with the case. Transfer would, to some extent, delay resolution of the case.

As to Plaintiffs' choice of forum, federal courts give considerable deference to plaintiffs' choice of forum. *Id.* at 691. Plaintiffs have chosen a Missouri forum. LegalZoom suggests that Plaintiffs chose a California forum in entering an agreement containing a California forum selection clause. Had the Court found that clause enforceable, this factor would be neutral. As the clause is unenforceable, this factor weighs against transfer.

Looking to comparative costs to the parties of litigating in each forum, each party will bear expense if the case is not heard in its preferred forum. Plaintiffs would likely need to travel to California to depose LegalZoom's witnesses, but LegalZoom would bear additional

costs if litigating in a foreign forum. The relative means of the parties may be considered in determining transfer, *Hines v. Overstock.com*, 668 F. Supp. 2d 362, 370 (E.D.N.Y. 2009). Plaintiffs here are individuals whereas LegalZoom is a corporation with a national presence. This factor weighs against transfer.

The parties agree that the ability to enforce judgment and obstacles to a fair trial are neutral factors.

The parties both note that there are conflict of laws issues in this case. LegalZoom argues that the choice of law provision in the parties' agreement favors transfer. Plaintiffs argue that the provision cannot be applied to their Missouri-law-governed claims. Transfer is not favored where there is uncertainty as to which law applies. *American Std.*, 487 F. Supp. at 263-64. This factor weighs against transfer.

Finally, the advantages of having a Missouri court determine issues of Missouri law are pronounced in this case. Plaintiffs' claims do turn on application of Missouri statutes. Again, the documents sold by LegalZoom to Plaintiffs implicate Missouri law issues beyond the sale transaction itself – they are legal documents that may well be considered and interpreted under Missouri law. This factor weighs strongly against transfer.

Considering all factors, LegalZoom has not met its burden of showing that the balance of interests weighs in favor of transfer. Accordingly, the Court exercises its discretion and declines transfer.

III. Conclusion

Accordingly, it is hereby ORDERED that LegalZoom's motion [Doc. # 17] is DENIED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: July 27, 2010
Jefferson City, Missouri

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: May 29, 2015 Decided: July 23, 2015)

Docket No. 14-3845-cv

DAVID LOLA, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, TOWER LEGAL STAFFING, INC.,

Defendants-Appellees.

Before: POOLER, LOHIER, DRONEY, *Circuit Judges*.

David Lola, on behalf of himself and all others similarly situated, appeals from the September 16, 2014 opinion and order of the United States District Court for the Southern District of New York (Sullivan, *J.*) dismissing his putative

collective action seeking damages from Skadden, Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing, Inc. for violations of the overtime provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA"), arising out of Lola's work as a contract attorney in North Carolina. We agree with the district court that: (1) state, not federal, law informs FLSA's definition of "practice of law;" and (2) North Carolina, as the place where Lola worked and lived, has the greatest interest in this litigation, and thus we look to North Carolina law to determine if Lola was practicing law within the meaning of FLSA. However, we disagree with the district court's conclusion, on a motion to dismiss, that by undertaking the document review Lola allegedly was hired to conduct, Lola was necessarily "practicing law" within the meaning of North Carolina law.

Vacated and remanded.

D. MAIMON KIRSCHENBAUM, Joseph & Kirschenbaum LLP (Denise A. Shulman, *on the brief*), New York, NY, *for Plaintiff-Appellant David Lola, on behalf of himself and all others similarly situated.*

BRIAN J. GERSHENGORN, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Stephanie L.

Aranyos, *on the brief*) New York, N.Y. *for Defendants-Appellees Skadden, Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing, Inc.*

POOLER, *Circuit Judge*:

David Lola, on behalf of himself and all others similarly situated, appeals from the September 16, 2014 opinion and order of the United States District Court for the Southern District of New York (Sullivan, *J.*) dismissing his putative collective action seeking damages from Skadden, Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing, Inc. for violations of the overtime provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA"), arising out of Lola's work as a contract attorney in North Carolina. We agree with the district court's conclusion that: (1) state, not federal, law informs FLSA's definition of "practice of law;" and (2) North Carolina, as the place where Lola worked and lived, has the greatest interest in this litigation, and thus we look to North Carolina law to determine if Lola was practicing law within the meaning of FLSA. However, we disagree with the district court's conclusion, on a motion to dismiss, that by undertaking the document review Lola allegedly was hired to conduct, Lola was necessarily "practicing law" within the meaning of North Carolina law. We find that accepting the allegations as pleaded, Lola adequately alleged in his

complaint that his document review was devoid of legal judgment such that he was not engaged in the practice of law, and remand for further proceedings.

BACKGROUND

Lola commenced this FLSA collective action against Skadden, Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing Inc. In his first amended complaint, Lola alleged that Skadden, a Delaware limited liability partnership, is based in New York City. He alleges that Tower is a New York corporation that provides attorneys and paralegals on a contract basis to various law firms and corporate law departments. Lola alleges that Skadden and Tower (together, "Defendants") were joint employers within the meaning of FLSA.

Lola, a North Carolina resident, alleges that beginning in April 2012, he worked for Defendants for fifteen months in North Carolina. He conducted document review for Skadden in connection with a multi-district litigation pending in the United States District Court for the Northern District of Ohio. Lola is an attorney licensed to practice law in California, but he is not admitted to practice law in either North Carolina or the Northern District of Ohio.

Lola alleges that his work was closely supervised by the Defendants, and his "entire responsibility . . . consisted of (a) looking at documents to see what

search terms, if any, appeared in the documents, (b) marking those documents into the categories predetermined by Defendants, and (c) at times drawing black boxes to redact portions of certain documents based on specific protocols that Defendants provided." App'x at 20 ¶ 28. Lola further alleges that Defendants provided him with the documents he reviewed, the search terms he was to use in connection with those documents, and the procedures he was to follow if the search terms appeared. Lola was paid $25 an hour for his work, and worked roughly forty-five to fifty-five hours a week. He was paid at the same rate for any hours he worked in excess of forty hours per week. Lola was told that he was an employee of Tower, but he was also told that he needed to follow any procedures set by Skadden attorneys, and he worked under the supervision of Skadden attorneys. Other attorneys employed to work on the same project performed similar work and were likewise paid hourly rates that remained the same for any hours worked in excess of forty hours per week.

Defendants moved to dismiss the complaint, arguing that Lola was exempt from FLSA's overtime rules because he was a licensed attorney engaged in the practice of law. The district court granted the motion, finding (1) state, not federal, standards applied in determining whether an attorney was practicing

law under FLSA; (2) North Carolina had the greatest interest in the outcome of the litigation, thus North Carolina's law should apply; and (3) Lola was engaged in the practice of law as defined by North Carolina law, and was therefore an exempt employee under FLSA. *Lola v. Skadden, Arps, Slate, Meagher & Flom, LLP*, No. 13-cv-5008 (RJS), 2014 WL 4626228 (S.D.N.Y. Sept. 16, 2014). This appeal followed.

DISCUSSION

"We review *de novo* a district court's dismissal of a complaint for failure to state a claim, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in plaintiffs' favor." *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 137 (2d Cir. 2013).

Pursuant to FLSA, employers must generally pay employees working overtime one and one-half times the regular rate of pay for any hours worked in excess of forty a week. 29 U.S.C. § 207(a)(1). However, employees "employed in a bona fide . . . professional capacity" are exempt from that requirement. *Id.* § 213(a)(1). The statute does not provide a definition of "professional capacity," instead delegating the authority to do so to the Secretary of the Department of Labor ("DOL"), who defines "professional employees" to include those

employees who are:

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . ; and
>
> (2) Whose primary duty is the performance of work:
>
> (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of intellectual instruction; or
>
> (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300. These requirements, however, do not apply to attorneys engaged in the practice of law. 29 C.F.R. § 541.304(d) ("The requirements of § 541.300 and subpart G (salary requirements) of this part do not apply to the employees described in this section."). Instead, attorneys fall under 29 C.F.R. § 541.304, which exempts from the overtime requirement:

> Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof[.]

Id. § 541.304(a)(1). While it is undisputed that Lola is an attorney licensed to practice law in California, the parties dispute whether the document review he allegedly performed constitutes "engaging in the practice of law."

I. "Practice of law."

Lola urges us to fashion a new federal standard defining the "practice of law" within the meaning of Section 541.304. We decline to do so because we agree with the district court that the definition of "practice of law" is "primarily a matter of state concern." *Lola,* 2014 WL 4626228, at *4 (citation omitted).

In *Kamen v. Kemper Financial Services, Inc*., 500 U.S. 90 (1991), the Supreme Court examined whether, in an action based on a federal statute, federal common law should incorporate state law. There, the issue was whether the contours of the demand futility requirement of the Investment Company Act of 1940 must be discerned by reference to state law or by reference to federal law. *Id.* at 97-98. The *Kamen* Court explained "that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand." *Id.* at 98 (citation omitted). "Otherwise," the Court continued:

> we have indicated that federal courts should incorporate state law as the federal rule of decision, unless application of the particular state law in question

> would frustrate specific objectives of the federal programs. The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.

Id. (internal citation, quotation marks and alterations omitted).

Applying these principles, the Supreme Court explained that "where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute." *Id.* at 108 (emphasis omitted). Thus, the *Kamen* court concluded that "the scope of the demand requirement" must be determined by the law of the state of incorporation. *Id.* at 108.

De Sylva v. Ballentine, 351 U.S. 570 (1956), is also instructive in determining whether state or federal law should define the sweep of a federal right.. In *De Sylva*, the Supreme Court examined the question of whether an illegitimate child was a "child" within the meaning of the Copyright Act. Noting that "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its

content is not to be determined by state, rather than federal law," *id.*, the court also observed that "[t]his is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *Id.* The Court then relied on state law to define "child" within the meaning of the federal Copyright Act. *Id.* at 581.

Just as "there is no federal law of domestic relations," here there is no federal law governing lawyers. Regulating the "practice of law" is traditionally a state endeavor. No federal scheme exists for issuing law licenses. As the district court aptly observed, "[s]tates regulate almost every aspect of legal practice: they set the eligibility criteria and oversee the admission process for would-be lawyers, promulgate the rules of professional ethics, and discipline lawyers who fail to follow those rules, among many other responsibilities." *Lola*, 2014 WL 4626228, at *4. The exemption in FLSA specifically relies on the attorney possessing "a valid license . . . permitting the practice of law." 29 C.F.R. § 541.304(a)(1). The regulation's history indicates that the DOL was well aware that such licenses were issued by the states. *See* Wage and Hour and Public Contracts Divisions, U.S. Department of Labor, Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part

541, at 77 (1949) (noting that the exemption for attorneys was based in part on "the universal requirement of licensing by the various jurisdictions"). In rejecting a proposal to exempt librarians from the overtime rules, the DOL noted that "states do not generally license the practice of library science, so that in this respect . . . the profession is not comparable to that of law or medicine." *Id.* A similar distinction was drawn in a discussion of extending the exemption to architects and engineers:

> The practice of law and medicine has a long history of state licensing and certification; the licensing of engineers and architects is relatively recent. While it is impossible for a doctor or lawyer legally to practice his profession without a certificate or license, many architects and engineers perform work in these fields without possessing licenses, although failure to hold a license may limit their permissible activities to those of lesser responsibilities.

Id. We thus find no error with the district court's conclusion that we should look to state law in defining the "practice of law."

II. Choice of law.

We turn to the question of which state's law to apply. "Where jurisdiction is based on the existence of a federal question . . . we have not hesitated to apply a federal common law choice of law analysis." *Barkanic v. Gen. Admin. of Civil*

Aviation of the People's Republic of China, 923 F.2d 957, 961 (2d Cir. 1991). "The federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation." *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992). Here, there are four possible forum states: North Carolina (where Lola worked and lived); Ohio (where the underlying litigation is venued); California (where Lola is barred); and New York (where Skadden is located).

"[W]hen conducting a federal common law choice-of-law analysis, absent guidance from Congress, we may consult the Restatement (Second) of Conflict of Laws." *Eli Lilly Do Brasil, Ltda v. Fed. Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007). The Restatement provides in relevant part that:

> The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which [ ] event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 196 (1971). Here, the services were

rendered in North Carolina. Moreover, as the state where Lola resides, North Carolina possesses a strong interest in making sure Lola is fairly paid. We find no error in the district court's decision to apply North Carolina law.

III. Definition of "practice of law" under North Carolina law.

North Carolina defines the "practice of law" in its General Statutes, Section 84–2.1, which provides that:

> The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including . . . the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation . . . .

N.C. Gen. Stat. § 84–2.1. North Carolina courts typically read Section 84–2.1 in conjunction with Section 84–4, which defines the unauthorized practice of law as follows:

> Except as otherwise permitted by law, . . . it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, [or] perform for or furnish to another legal services . . . .

Id. § 84–4; *see N.C. State Bar v. Lienguard, Inc.*, No. 11–cvs–7288, 2014 WL 1365418, at *6–7 (N.C. Super. Ct. Apr. 4, 2014).

The North Carolina General Statutes do not clarify whether "legal services" includes the performance of document review. Nevertheless, the North Carolina State Bar issued a formal ethics opinion shedding light on what is meant by "legal services."[1] The question considered in the ethics opinion was: "May a lawyer ethically outsource legal support services abroad, if the individual providing the services is either a nonlawyer or a lawyer not admitted to practice in the United States (collectively 'foreign assistants')?" In its opinion, the Bar's Ethics Committee opined that:

> A lawyer may use foreign assistants for administrative support services such as document assembly, accounting, and clerical support. A lawyer may also use foreign assistants for limited legal support services such as reviewing documents; conducting due diligence; drafting contracts, pleadings, and memoranda of law; and conducting legal research. Foreign assistants may not exercise independent legal judgment in making decisions on behalf of a client. . . . The limitations on the type of legal services that can be outsourced, in

[1] The ethics opinion technically referred only to "legal support services." Nothing in the opinion or in the relevant North Carolina caselaw suggests that there is any meaningful difference between "legal services" and "legal support services."

> conjunction with the selection and supervisory requirements associated with the use of foreign assistants, insures that the client is competently represented. *See* Rule 5.5(d). Nevertheless, when outsourcing legal support services, lawyers need to be mindful of the prohibitions on unauthorized practice of law in Chapter 84 of the General Statutes and on the prohibition on aiding the unauthorized practice of law in Rule 5.5(d).

N.C. State Bar Ethics Committee, 2007 Formal Ethics Op. 12 (Apr. 25, 2008).

The district court found that (1) under North Carolina law, document review is considered "legal support services," along with "drafting contracts, pleadings, and memoranda of law[,] and conducting legal research;" (2) the ethics opinion draws a clear line between legal support services, like document review, and "administrative support services," like "document assembly, accounting, and clerical support;" and (3) by emphasizing that only lawyers may undertake legal work, the ethics opinion makes clear that "document review, like other legal support services, constitutes the practice of law and may be lawfully performed by a non-lawyer only if that non-lawyer is supervised by a licensed attorney." *Lola*, 2014 WL 4626228, at *11–12 (alteration in the original). Thus, the district court concluded, any level of document review is considered the "practice of law" in North Carolina. *Id.* at 12. The district court also concluded that because

FLSA's regulatory scheme carves doctors and lawyers out of the salary and duty analysis employed to discern if other types of employees fall within the professional exemption, a fact-intensive inquiry is at odds with FLSA's regulatory scheme. *Id.* at *13.

We disagree. The district court erred in concluding that engaging in document review per se constitutes practicing law in North Carolina. The ethics opinion does not delve into precisely what type of document review falls within the practice of law, but does note that while "reviewing documents" may be within the practice of law, "[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of a client." N.C. State Bar Ethics Committee, 2007 Formal Ethics Op. 12. The ethics opinion strongly suggests that inherent in the definition of "practice of law" in North Carolina is the exercise of at least a modicum of independent legal judgment.[2]

[2] Were it an option, we might have opted to certify the question of how to define "practice of law" to the North Carolina courts. *See AGI Assocs. LLC v. City of Hickory, N.C.*, 773 F.3d 576, 579 n.4 (4th Cir. 2014) ("A lack of controlling precedent on the state rule of decision can merit certification of the issue to the state's highest court. The State of North Carolina, however, has no certification procedure in place for federal courts to certify questions to its courts.").

Although the parties do not cite, and our research did not reveal, a case directly on point, two decisions of the North Carolina courts that relied, in part, on the exercise of legal judgment to support a finding of unauthorized practice of law also support such a conclusion. *Lienguard*, 2014 WL 1365418, at *9–11 (lien filing service engaged in unauthorized practice of law in preparing claims of lien); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11–cvs–15111, 2014 WL 1213242, at *12 (N.C. Super. Ct. Mar. 24, 2014) (noting that the "scrivener's exception" to the unauthorized practice of law allows "unlicensed individuals [to] record information that another provides without engaging in [the unlicensed practice of law] as long as they do not also provide advice or express legal judgments").

Moreover, many other states also consider the exercise of some legal judgment an essential element of the practice of law. *See, e.g., In re Discipline of Lerner*, 197 P.3d 1067, 1069-70 (Nev. 2008) ("exercise of legal judgment on a client's behalf" key to analysis of whether a person engaged in the unauthorized practice of law); *People v. Shell*, 148 P.3d 162, 174 (Colo. 2006) ("[O]ne of the touchstones of Colorado's ban on the unauthorized practice of law is an unlicensed person offering advice or judgment about legal matters to another person for use in a specific legal setting"); *Or. State Bar v. Smith*, 942 P.2d 793, 800

(Or. Ct. App. 1997) ("The 'practice of law' means the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance."); *In re Discipio*, 645 N.E.2d 906, 910 (Ill. 1994) ("The focus of the inquiry" into whether person engaged in unauthorized practice of law is, in fact, "whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent."); *In re Rowe*, 80 N.Y.2d 336, 341–42 (1992) (authoring an article on the legal rights of psychiatric patients who refuse treatment did not constitute the practice of law because "[t]he practice of law involves the rendering of legal advice and opinions directed to particular clients").

The gravamen of Lola's complaint is that he performed document review under such tight constraints that he exercised no legal judgment whatsoever—he alleges that he used criteria developed by others to simply sort documents into different categories. Accepting those allegations as true, as we must on a motion to dismiss, we find that Lola adequately alleged in his complaint that he failed to exercise any legal judgment in performing his duties for Defendants. A fair reading of the complaint in the light most favorable to Lola is that he provided services that a machine could have provided. The parties themselves agreed at

oral argument that an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law. We therefore vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

CONCLUSION

For the reasons given above, the judgment of the district court is vacated, and this matter remanded.

July 29, 2024

ABA issues first ethics guidance on a lawyer's use of AI tools

Share:

CHICAGO, July 29, 2024 — The American Bar Association Standing Committee on Ethics and Professional Responsibility released today its first formal opinion covering the growing use of generative artificial intelligence (GAI) in the practice of law, pointing out that model rules related to competency, informed consent, confidentiality and fees principally apply.

Formal Opinion 512 states that to ensure clients are protected, lawyers and law firms using GAI must "fully consider their applicable ethical obligations," which includes duties to provide competent legal representation, to protect client information, to communicate with clients and to charge reasonable fees consistent with time spent using GAI.

"This opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape," the formal opinion said. It added that the ABA committee and state and local bar association ethics committees will likely continue to "offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop."

The 15-page opinion specifically outlined that lawyers should be mindful of a host of model rules in the ABA Model Rules of Professional Conduct, including:

- Model Rule 1.1 (Competence). This obligates lawyers to provide competent representation to clients and requires they exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In addition, the model rule states

lawyers should understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.

- Model Rule 1.6 (Confidentiality of Information). Under this model rule, a lawyer using GAI must be cognizant of the duty to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent. Other model rules require lawyers to extend similar protections to former and prospective clients' information.

- Model Rule 1.4 (Communications). This model rule addresses lawyers' duty to communicate with their clients and builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive." Of particular relevance to GAI, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult" with the client about the means by which the client's objectives are to be accomplished.

- Model Rule 1.5 (Fees). This rule requires a lawyer's fees and expenses to be reasonable and includes criteria for evaluating whether a fee or expense is reasonable. The formal opinion notes that if a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the program, the lawyer may charge for that time as well as for the time necessary to review the resulting draft for accuracy and completeness. But, in most circumstances, the lawyer cannot charge a client for learning how to work a GAI tool.

"With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected," Formal Opinion 512 concluded.

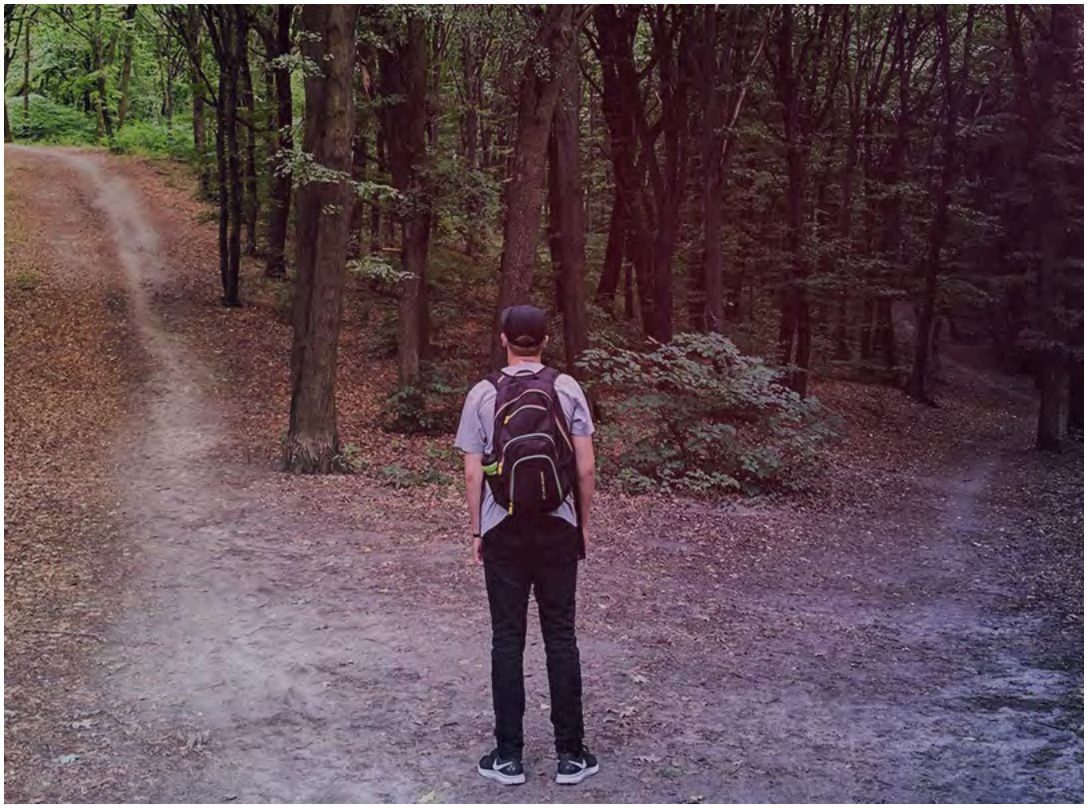
The standing committee periodically issues ethics opinions to guide lawyers, courts and the public in interpreting and applying ABA model ethics rules to

specific issues of legal practice, client-lawyer relationships and judicial behavior. Other recent ABA ethics opinions are available here.

The ABA is the largest voluntary association of lawyers in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. View our privacy statement online. Follow the latest ABA news at www.americanbar.org/news and on X (formerly Twitter) @ABANews.

AI and Ethical Concerns for Legal Practitioners

January 08, 2024 (5 min read)



By Tracy Duplantier

Practicing lawyers knows that **Rule 1.1** of the ABA Model Rules of Professional Conduct requires that "a lawyer shall provide competent representation to a client" and that this duty "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

More than 40 states **have adopted** Comment 8 to Rule 1.1, which says that "to maintain the requisite knowledge and skill, a lawyer should

It was my pleasure to recently host a CLE webinar, "Technology and the Legal Practitioner: Ethical Concerns and Best Practices," which reviews the ethical duties that lawyers have with respect to the use of technology in their everyday practice. In this session we reviewed specific areas of technology and how various legal ethical rules apply to each of them: Email; Word; Redaction; Cybersecurity; Artificial Intelligence; Social Media; and Legal research.

The topic on the list that is arguably attracting the most attention in the legal industry right now is the emergence of generative artificial intelligence (AI), leading attorneys to actively consider: What are the ethical concerns surrounding the use of AI by legal practitioners?

And on the flipside: Do Ethical Rules Require Use (or at least the consideration of the use) of AI?

After all, there was a time when email, computer-assisted research and document redaction were considered novel — perhaps AI is simply the latest example of a technology that is on its way to becoming standard practice in the profession. And if that's the case then Lawyers would certainly need to consider whether (and under what circumstances) the ABA Model Rule 1.1, Comment 8, would create an ethical duty for lawyers to embrace AI in their practices.

Legal observers also point to other ethical duties that may be attached to the use of AI in legal practice. "A lawyer's failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer's fees to be reasonable," **reported Corporate Counsel**, in a story headlined, "Could It Be Unethical Not to Use AI?" The article cites a report from the ABA, which contemplates that "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."

abstaining from AI runs afoul of the promptness requirement under Rule 1.3," writes *Corporate Counsel*.

3 Key Areas of Legal Ethics and AI

The inclusion of Generative AI in the legal world creates additional ethical considerations for lawyers seeking to implement the new technology in their day-to-day legal practices. In "**AI and Legal Ethics: What Lawyers Need to Know**," a practice note published by Lexis Practical Guidance, a trio of attorneys from HWG LLP — Hilary Gerzhoy, Julienne Pasichow and Grace Wynn — explore the various ethical issues that legal professionals must be aware of when considering the use of generative AI technology in their practices.

"AI is perhaps the single most 'relevant technology' of our time," write the authors. "Lawyers may therefore find themselves in an increasingly fraught situation, where the ethical rules encourage use of AI, but also impose discipline for the various ways it can be misused."

The authors note three key areas of legal ethics and accountability when it comes to the use of AI in client representations:

Lawyers must oversee any work done by AI

Proper oversight is essential to the use of AI tools in the practice of law. Relying on AI-generated or informed work product does not meet the ethical duty of professional competence if a lawyer does not understand how the AI operates and play an active role in the oversight of any work product it generates. Work product and conclusions reached by AI cannot replace human judgment and must be reviewed by lawyers for completeness and accuracy.

Client confidentiality must be protected

operative security policies, including the extent to which documents are retained, the time frame for which they are preserved, any encryption technology, who can view the information, and incident response plans in the event of a data breach.

Lawyers have a duty to communicate with the client regarding use of AI

As a general matter, clients choose the objectives of a legal representation and lawyers choose the strategy to achieve those objectives — but lawyers are **required by the Model Rules** to "consult with the client" about the means they choose in pursuit of their client's goals. This means that if an AI tool is writing legal documents, a client must be told and given the opportunity to object. It follows that when a lawyer plans to use AI, including document review or generation technology, the client should be kept apprised of such plans so that the client can make informed decisions regarding the representation.

Lexis+ AI

To support legal professionals with the ethical and responsible adoption of this exciting new technology, Lexis has developed **Lexis+ AI**, a generative AI platform that will transform legal workflows by meeting users wherever they are in their legal research or drafting task while leveraging the latest in generative AI technology with trusted insights from LexisNexis. Lexis+ AI is built on the largest repository of accurate and exclusive legal content, providing lawyers with trusted comprehensive results that are backed by verifiable and citable authority.

Lexis+ AI uses the fastest legal generative AI with conversational search, drafting, summarization, document analysis and linked hallucination-free legal citations.

May 2024

from the **AI Rapid Response Team** *at the National Center for State Courts*

AI and the Courts:
Judicial and Legal Ethics Issues

Courts need to anticipate the ethical issues that arise from the use of artificial intelligence (AI) in the legal profession. Principles in the Model Code of Judicial Conduct (MCJC) and the Model Rules of Professional Conduct (MRPC) for lawyers are implicated when AI is used in the courts.

Competence in Technology is an Ethical Requirement

Judicial officers and lawyers have a basic duty to be competent in technology relevant to their profession. MCJC 2.5 imposes a duty of competence on judicial officers and an obligation to keep current with technology and to know the benefits and risks associated with all types of technology relevant to service as a judicial office . MRPC 1.1 states that lawyers must provide competent representation to their clients which includes technical competence.

Judicial officers and lawyers must

- Have a basic understanding of AI, including generative AI, and its capabilities. This includes knowledge of the terms of use and how the data will be used by the AI tool, as well as general familiarity with machine learning algorithms, natural language processing, and other AI techniques relevant to legal tasks.
- Analyze the risks associated with using AI for research and drafting, such as bias or hallucinations (made up responses).
- Determine which areas of practice or processes can be improved with AI.
- Determine where AI may not be appropriate for use in the legal profession or the judicial system.
- Learn how to optimize prompts to get better results when using generative AI models such as Chat-GPT, Gemini, or Co-Pilot.
- Identify which issues may require new policies or rules for AI use in the court system.

Ethical Standards for Consideration

Judicial Ethics Issues

Judicial officers should be aware of the potential for ethical issues arising from AI usage and keep the following rules in mind when using or considering AI.

Ex Parte Communication (MCJC 2.9)

The Rule prohibiting ex parte communication also prohibits considering "other communications made to the judge outside the presence of the parties or their lawyers" (MCJC 2.9[A]), and material generated by AI could arguably be viewed as information outside the case that is improperly introduced into the judicial decision-making process. Rather than merely reviewing and summarizing case law, many AI-generated results have built-in biases. Relying on such information could also result in a violation of the Rule's provision barring independent investigation (MCJC 2.9[C]). External influences on judicial conduct (MCJC 2.4) could also be an issue when a judge relies on an AI program that sets forth an opinion on legal policy.

Confidentiality

Judicial officers have a duty of confidentiali , and they must be cognizant of whether they — or their clerks or staff — are entering confidential, sensitive, or draft information into an open AI system when conducting legal research or drafting documents, and how that information is being retained and used by the AI technology. In an open system, it is possible the AI tool will use the shared information to train the model, potentially breaching confidentialit . Judges must avoid inadvertently releasing confidential information. This is also true for lawyers per MRPC 1.6.

Impartiality and Fairness (MCJC 2.2)
The Rule requiring judges to perform their duties fairly and impartially could be triggered if a judge is influenced by an AI tool that produces results infected by bias or prejudice.

Bias, Prejudice, and Harassment (MCJC 2.3)
Judicial officers need to be aware of the potential bias or prejudice inherent in certain AI technology and that using it could violate the Rule against acting with bias or prejudice if the AI tool has biased data in its algorithm or training data.

Hiring and Administrative Appointments (MCJC 2.13)
Judicial officers should be aware of the risks of bias or discrimination if AI tools are used to help screen prospective clerks or other staff or to otherwise assist in the hiring process. If the algorithmic recruiting program is biased, it could produce results or recommendations based on discriminatory information, which could violate the rule requiring judges to make appointments impartially and on the basis of merit, as well as Title VII. Attorneys using AI technology in making hiring decisions should be mindful of a similar provision, which forbids engaging in invidious discrimination in conduct related to the practice of law. MRPC 8.4(g).

Duty to Supervise (MCJC 2.12)
Judicial officers have a duty to supervise sta f and to make sure they are aware of the obligations under the rules which extend to ensuring staff are using AI technologies appropriately.

Attorney Ethics Issues

Along with the Rules referenced above, lawyers should consider the following rules when using AI.

Responsibilities of a Partner or Supervisory Lawyer (MRPC 5.1)
Partners and other lawyers with "managerial authority" (MRPC 5.1[a]) will be held accountable for ensuring that other lawyers in the firm comply with the Rules of Professional Conduct. Therefore, training in the ethical use of artificial intelligence and policies for lawyers in the firm is necessar . Of course, this also presupposes competence with technology, as discussed earlier.

Responsibilities Regarding Nonlawyer Assistants (MRPC 5.3)
The Rule governing oversight of the work of nonlawyers could be triggered when a subordinate is tasked with deciding which particular AI tool to use, and further while implementing those tools. In addition, the AI technology itself arguably could be considered nonlawyer assistance.

Fees (MRPC 1.5)
Lawyers will have to navigate the issues of using AI to the financial benefit of the client, not usin AI if a client specifically chooses not to have it used on their legal matters, and determining proper fee schedules for using, supervising, and editing a product that relies on generative AI.

Rules that may also be germane to the use of artificial intelligence in the practice of law include MRPC 5.5 (Unauthorized Practice of Law), MRPC 3.2 (Expediting Litigation), and MRPC 3.3 (Candor towards the Tribunal), among others.

In sum, understanding AI's capabilities and risks, especially regarding bias and confidentialit , is a necessity for technological competence. Court professionals must stay up to date on developments in AI and the potential ethical implications of using it.

Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands

NICOLE YAMANE*

INTRODUCTION

Over the last decade, artificial intelligence ("AI") has grown increasingly advanced, and numerous industries have incorporated AI programs into their operations. The use of AI is finally beginning to permeate the legal field as well, bringing change to the practice of law.[1] Many of these changes are positive as the use of advanced AI programs has the potential to both improve the quality of legal services and increase individual access to justice.[2]

The use of AI in the legal field, however, also invokes many legal ethics concerns. Because the *Model Rules of Professional Conduct*, which serve as ethics guidelines for legal practitioners, were written far before advanced AI programs existed,[3] their governance over such programs remains unclear. Nonetheless, it is important to establish how to use AI programs ethically because they will likely play an increasingly important role in the legal field, especially in the context of legal research, legal forms, and contract review. Specific concerns about the duty of lawyers to provide competent representation to clients and AI programs not to engage in the unauthorized practice of law are especially relevant to the use of AI in the legal field.

In exploring the ethical implications of the use of AI in the legal field, this Note will argue that as long as lawyers use AI to augment rather than replace their work and AI programs that do not involve human attorneys refrain from giving legal advice, AI can be an effective tool to improve the quality of legal services and increase individual access to justice while operating well within the parameters of legal ethics. There should always be a human element to the work of lawyers to ensure that lawyers are upholding their ethical obligations to clients.

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1. David Lat, *The Ethical Implications of Artificial Intelligence*, ABOVE THE LAW (Feb. 21, 2020, 4:48 PM), https://abovethelaw.com/law2020/the-ethical-implications-of-artificia -intelligence/ [https://perma.cc/KV7Q-DSYK].

2. *Id*.

3. MODEL RULES OF PROFESSIONAL CONDUCT: ABOUT THE MODEL RULES (2009), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/QLF3-EPSR] ("The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983.").

This Note will proceed in four parts. Part I will define AI in the context of the legal field and provide background information on some of the AI programs currently in use in the legal field, including advanced legal research platforms, self-help legal applications, and contract review systems. Part II will explain how AI can be used to improve the quality of legal services and the ethical implications that flow from this benefit. Part III will discuss how AI can be used to increase individual access to justice and the accompanying ethical concerns. Finally, Part IV will summarize why the use of AI to completely replace the work of a human lawyer would be unethical.

I. AI IN THE LEGAL PROFESSION DEFINED AND CURRENTLY USED PROGRAMS

AI has been defined in several ways over the course of its existence, but generally AI is "the capability of a machine to imitate intelligent human behavior."[4] This includes "recognizing speech and objects, making decisions based on data, and translating languages."[5] AI can mimic human intelligence in two ways: first, AI programs can be trained by data input, which historically was the only way AI programs could mimic human intelligence; second, more advanced AI programs can learn on their own through trial and error.[6]

While the concept of AI has been around for a long time, the use of more advanced programs in the legal field is a recent development.[7] AI's start in the legal field was modest.[8] There were only a handful of companies that developed AI programs tailored to legal work, and the program functions were generally confined to eDiscovery,[9] contract review, and due diligence.[10] Furthermore, originally the only entities using AI in the legal field were the largest law firms working on the biggest deals.[11]

Over time, the uses for and developers and users of AI in the legal field expanded. Today, more companies are looking at how AI can be used

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4. *Artificial intelligence*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/artificial%20intelligence [https://perma.cc/3ZBP-PLAJ] (last visited Mar. 19, 2020).

5. Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, HARV. J. L. & TECH. (Jan. 3, 2018), http://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-inte ligence-in-the-legal-profession [https://perma.cc/H65H-6A5A].

6. *Id*.

7. Keith Mullen, *Artificial Intelligence: Shiny Object? Speeding Train?*, AM. BAR ASS'N RPTE EREPORT 2018 FALL ISSUE, https://www.americanbar.org/groups/real_property_trust_estate/publications/ereport/rpte-ereport-fall-2018/artificial-intelli ence/ [https://perma.cc/HCE7-WNWV] (last visited Mar. 20, 2020).

8. *Id*.

9. E-discovery is the "discovery of records and documents (as e-mails) kept in electronic form." *E-discovery*, MERRIAM-WEBSTER LEGAL DICTIONARY, https://www.merriam-webster.com/legal/e-discovery [https://perma.cc/JKT9-5S72] (last visited Mar. 20, 2020).

10. Donahue, *supra* note 5.

11. Mullen, *supra* note 7 ("As recent as 2014, only a handful of companies pointed artificial intelligence ("AI") at legal documents. For uses outside of eDiscovery, it was a narrow focus: contract reviews and legal due diligence – used by the largest of law firms on the grandest of deals.").

successfully in the legal field, and AI is no longer only accessible to the wealthiest law firms. As of February 2018, the National Law Journal identified over fifty companies offering AI programs created for the legal industry.[12] AI can now be used for contract drafting, contract review, digital signature, legal and matter management, expertise automation, legal analytics, task management, title management, and lease abstracts.[13] Smaller firms are also starting to rely on AI technology to help them compete in the legal market.[14] Around "85 percent of lawyers at smaller law firm … have been using AI to level the playing field, diminishing or eliminating what were once the resource and staffing advantages at the bigger law firms. [15] As AI technology becomes more advanced, AI's functions, producers, and user base will likely continue to grow.

A. ADVANCED LEGAL RESEARCH PLATFORMS

Legal research is one area in which AI has made significant advancements. Legal research has come a long way since the days when law students and associates needed to read through heavy casebooks to find relevant precedent. Today, most lawyers use online legal research platforms like LexisNexis or Westlaw that utilize AI technology. In recent years, even more advanced legal research platforms that incorporate more modern AI technologies have been developed.[16]

One example is ROSS Intelligence. ROSS Intelligence launched in 2018 and advertises itself as "the world's first artificiall intelligent attorney."[17] The program costs $69 per month on an annual plan,[18] and is being used by several big law firms including Baker Hostetler, Latham & Watkins, Jackson Lewis, and Dentons.[19]

The main way ROSS Intelligence differs from older legal research platforms like LexisNexis and Westlaw is in its ability to generate search results from natural language queries.[20] Westlaw and Lexis' standard functions are only capable of generating search results based on keywords or Boolean searches. Boolean

12. *Id*.

13. *Id*.

14. Jake Heller, *Is AI the Great Equalizer For Small Law?*, ABOVE THE LAW (Aug. 15, 2018), https://abovethelaw.com/2018/08/is-a-i-the-great-equalizer-for-small-law/ [https://perma.cc/7UPA-CK4W].

15. *Id*.

16. Nicole Black, *Lawyers have a Bevy of Advanced and AI-enhanced Legal Research Tools at their Fingertips*, ABA J. (Nov. 22, 2019), https://www.abajournal.com/web/article/lawyers-have-a-bevy-of-advanced-and-ai-enhanced-legal-research-tools-at-their-fin ertips [https://perma.cc/6FBS-U736].

17. Matthew Griffin, *Meet Ross, The World's First AI Lawyer*, 311 INST. (Jul. 11, 2016), https://www.311institute.com/meet-ross-the-worlds-first ai-lawyer/ [https://perma.cc/89RH-C9M9].

18. ROSS INTELLIGENCE, https://rossintelligence.com/pricing.html [https://perma.cc/SU3E-J83F] (last visited Apr. 16, 2019).

19. *Ross Intelligence Offers A New Take on Legal Research*, ABOVE THE Law (May 29, 2019), https://abovethelaw.com/2019/05/ross-intelligence-offers-a-new-take-on-legal-research/ [https://perma.cc/9M9W-HUJ].

20. Stergios Anastasiadis, *How is Natural Language Search Changing The Face of Legal Research?*, ROSS INTELLIGENCE BLOG (Apr. 8, 2019), https://blog.rossintelligence.com/post/how-natural-language-search-changing-face-of-legal-research [https://perma.cc/7W83-CP6K] ("ROSS's natural language processing (NLP) allows lawyers to phrase their research queries the way they would phrase a question to a colleague.").

searches are those that combine words and operators like "AND," "OR," and "NOT" to limit search results.[21] Thus, when searching for cases on ROSS Intelligence, one would be able to simply enter a phrase or question like they would into Google's search bar. ROSS Intelligence claims that natural language processing ("NLP") will improve search results because a "query optimized with the help of NLP will surface the most accurate and relevant decisions because the system was assessed with the prior queries that yielded the best legal search results."[22]

After doing legal research, associates typically compile their findings into a legal memorandum or brief. Another more advanced function of ROSS Intelligence is that it is capable of generating such legal writings—ROSS Intelligence can draft legal research memoranda based on the search results it generates.[23] ROSS Intelligence can also evaluate legal writing.[24] In short, compared to older research platforms, newer programs such as ROSS Intelligence can perform more functions of a human lawyer.

B. LEGAL SELF-HELP APPS

In addition to becoming more advanced, AI programs have also become more widely accessible, especially through the legal self-help app market. One example of a legal self-help app is DoNotPay. DoNotPay was launched in 2016 by Joshua Browder who, at the time, was a nineteen-year-old college student who created the app to "help his family and friends challenge their [parking] tickets."[25] The app gained popularity, had its capabilities expanded, and now touts itself as "The World's First Robot Lawyer."[26]

The app is free to download and currently enables users to file a claim in any small claims court in the country, acquire green cards and visas, fight credit card fees, sue tech companies for data breaches, and, of course, fight parking tickets.[27] To use the app, users must simply answer a few questions relevant to their

21. Shauntee Burns, *What is Boolean Search?*, N.Y. PUB. LIBR. (Feb. 22, 2011), https://www.nypl.org/blog/2011/02/22/what-boolean-search [https://perma.cc/TJF7-8STF].

22. Anastasiadis, *supra* note 20.

23. Andrew Arruda, *Andrew Arruda, CEO of Ross Intelligence, Discusses AI in the Legal Profession*, NORTHWESTERN PRITZKER SCH. L.: NEWS (Nov. 10, 2017), http://www.law.northwestern.edu/about/news/newsdisplay.cfm?ID=892 [https://perma.cc/V8YB-WRUH] ("One of Ross Intelligence's most exciting capabilities may be that it can automatically write a legal memo from the selected results.").

24. "Casetext, ROSS Intelligence and Judicata have launched tools that use AI to analyze briefs, helping to identify missing cases or the strongest arguments." Ed Walters, *AI Practice, Not Promise, in Law Firms*, ABA L. PRAC. MAG.: TECHSHOW ISSUE (Jan. 1, 2019), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2019/january-february/JF2019Walters/ [https://perma.cc/SL5C-DHK8].

25. Julie Fishbach, *Coder, 19, Builds Chatbot That Fights Parking Tickets*, NBC NEWS (Jul. 21, 2016), https://www.nbcnews.com/feature/college-game-plan/coder-19-builds-chatbot-fi hts-parking-tickets-n612326 [https://perma.cc/UEN7-DBAM].

26. *Id*.

27. Steph Wilkins, *DoNotPay Is the Latest Legal Tech Darling, But Some Are Saying Do Not Click*, EVOLVE THE LAW: ATL'S LEGAL INNOVATION CTR. (Oct. 12, 2018), https://abovethelaw.com/legal-innovation-center/2018/10/12/donotpay-is-the-latest-legal-tech-darling-but-some-are-saying-do-not-click/ [https://perma.cc/NSZ5-F2XF].

claim.[28] The app then takes their answers to automatically fill out legal forms that can be sent directly to the necessary recipient.[29] Since its launch, the app has successfully reversed 160,000 parking tickets.[30] Furthermore, the "app claims to be successful about 50% of the time, with an average recovery around $7,000."[31] Apps like DoNotPay bypass the need for human lawyers and increase access to justice.

C. SUBSTANTIVE CONTRACT REVIEW

Contract review is another area in which AI is starting to make major advancements. Several companies—such as Salesforce, Home Depot, and eBay—use AI technology for contract review in their daily operations.[32] As more lawyers begin to use AI for contract review, the practice is becoming common-place.[33]

Before the age of AI, contract review was the job of human lawyers. As one of the more tedious tasks of lawyering, it is no wonder that it is one of the first tasks being transferred to AI programs. AI programs that can "read contracts accurately in any format, provide analytics about the data extracted from the contracts, and extract contract data much faster than would be possible with a team of lawyers" already exist.[34] Several startups including Lawgeex, Klarity, Clearlaw, and LexCheck have tailored this technology to the legal field [35] These startups seek to create programs that "automatically ingest proposed contracts, analyze them in full using natural language processing (NLP) technology, and determine which portions of the contract are acceptable and which are problematic."[36]

These emerging programs, however, are not completely devoid of the human element. Lawyers still need to make final substantive decisions on the exact content of and language used in a contract after reviewing the suggestions from the AI program. Lawyers also need to be the ones to negotiate the contract. Nonetheless, "as NLP capabilities advance, it is not hard to imagine a future in which the entire process is carried out end-to-end by AI programs that are empowered, within preprogrammed parameters, to hammer out agreements."[37] Contracting has the potential to become an increasingly automated process.

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28. Joshua Browder, *Will Bots Replace Lawyers?*, O'REILLY, https://www.oreilly.com/library/view/nexteconomy-summit-2016/9781491976067/video282513.html (last visited Apr. 17, 2020) (video).

29. *Id*.

30. Fishbach, *supra* note 25.

31. Wilkins, *supra* note 27.

32. Rob Toews, *AI Will Transform the Field Of Law*, FORBES (Dec. 19, 2019), https://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-la /#23c5a9e47f01 [https://perma.cc/47WE-QPMU].

33. *See id*. ("'We believe legal professionals should be able to leverage large datasets to make more informed decisions in the same way that marketing and sales professionals have been doing for years,' said Clearlaw CEO Jordan Ritenour.").

34. Beverly Rich, *How AI Is Changing Contracts*, HARV. BUS. REV. (Feb. 12, 2018), https://hbr.org/2018/02/how-ai-is-changing-contracts [https://perma.cc/DT54-4R5N].

35. Toews, *supra* note 32.

36. *Id*.

37. *Id*.

II. USING AI TO IMPROVE THE QUALITY OF LEGAL SERVICES

AI programs have the potential to improve the quality of legal services by increasing the accuracy and efficiency of lawyers. Advanced legal research platforms equipped with AI have made legal research both faster and easier, giving lawyers the capacity to do more in a shorter amount of time.[38] These advanced legal research platforms also enable lawyers to check their work with ease, increasing their accuracy. In the contract review context, AI programs have already demonstrated the capacity to work faster and with a higher rate of accuracy than human lawyers.[39] In a contract review contest between experienced corporate attorneys and AI, the AI program "achieved a 94% accuracy level of spotting risks in the contracts" in 26 seconds.[40] On the other hand, the lawyers, on average, "spent 92 minutes to achieve an 85% accuracy level."[41]

Increased accuracy and efficiency could also save clients money and increase profits for lawyers. Working at higher rates of accuracy faster likely means less billable hours charged by lawyers, meaning more money saved for clients.[42] While this may initially seem like a profit-loss to lawyers, it could actually produce larger profit margins. This is because working faster at a higher rate of accuracy may incentivize clients to come back for more business and allow law firms to take on more clients. For these reasons, it could actually be an extremely costly decision to not use AI technology in one's legal practice. In comparison to companies like Google and Adobe, which have gross margins of sixty to ninety percent, law firms must deal with a set cost structure and struggle to get their margins above forty percent.[43] AI can help law firms break free of their existing cost structure to increase margins as they grow in size.[44]

While increased accuracy and efficiency and lower costs are tremendous benefits to the legal industry, the use of AI also implicates legal ethics concerns. The *Model Rules of Professional Conduct*, which serve as ethics guidelines for legal practitioners, were adopted in their original form in 1983.[45] Thus, the *Model*

38. *See infra* Part I.A.

39. Audrey Herrington, *How AI Can Make Legal Services More Affordable*, SMARTLAWYER (Jul. 23, 2019), http://www.nationaljurist.com/smartlawyer/how-ai-can-make-legal-services-more-affordable [https://perma.cc/TJ97-CA4H].

40. *Id*.

41. *Id*.

42. Andrew C. Hall, *How Law Firms Can Benefit from Artificial Intelligence*, LAW TECH. TODAY (Nov. 13, 2018), https://www.lawtechnologytoday.org/2018/11/how-law-fi ms-can-benefit-from-art ficial-intellige ce/ [https://perma.cc/X8PP-4JHR] ("The technology can deliver potential savings by lessening the number of billable hours to gather necessary facts based on document review as well as create a timeframe and fact pattern.").

43. Mohanbir Sawhney, *Putting Products into Services*, HARV. BUS. REV. (Sept. 2016), https://hbr.org/2016/09/putting-products-into-services [https://perma.cc/3GL8-7DLZ].

44. *Id*.

45. MODEL RULES OF PROF'L CONDUCT: PREFACE (2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_ruler_of_professional_conduct/model_rules_of_professional_conduct_preface/ [https://perma.cc/E8K6-ZYY9].

Rules were not created to consider more advanced AI programs like ROSS Intelligence and DoNotPay. Nonetheless, the *Rules* were written with the intent of having them be adaptable to modern times.[46] The Ethics 2000 Chair's Introduction states that in establishing the *Rules*, the writers' "desire was to preserve all that is valuable and enduring about the existing *Model Rules*, while at the same time adapting them to the realities of modern law practice and the limits of professional discipline."[47] Thus, the *Model Rules of Professional Conduct* are capable of governing the use of more advanced AI programs in the legal field.

One ethical implication that arises from the use of AI in the legal field is lawyer competency. Model Rule 1.1 requires lawyers to represent clients competently.[48] The rule states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[49] Additionally, Comment 8 to Rule 1.1, which was added in 2012, expands on the concept of competent representation in light of technological advancements in the legal field:

> 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.[50]

Reading Rule 1.1 and Comment 8 together indicates that lawyers have an ethical obligation to keep up to date on the technology used in the legal field in order to provide competent representation to clients. More specifically, the Rule seems to indicate that in the age of AI, lawyers are tasked with two ethical duties. First, lawyers must have a basic understanding of the AI programs they choose to utilize in their practice.[51] Because AI is a branch of computer science and often involves technical knowledge outside of most lawyers' expertise, understanding how AI programs operate may be difficult for lawyers.[52] Nonetheless, lawyers must still maintain a baseline of knowledge about the AI programs they use, including: (1) why the AI program produces its results and (2) what the AI

46. MODEL RULES OF PROF'L CONDUCT: PREFACE, ETHICS 2000 CHAIR'S INTRODUCTION (2002), https://www.americanbar.org/groups/professional_responsibility/publications/model_ruler_of_professional_conduct/model_rules_of_professional_conduct_preface/ethics_2000_cchai_introduction/ [https://perma.cc/7F3K-N4XG].

47. *Id*.

48. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) [hereinafter MODEL RULES].

49. MODEL RULES R. 1.1.

50. MODEL RULES R. 1.1 cmt. [8].

51. Lat, *supra* note 1.

52. Jason Tashea & Nicholas Economou, *Be Competent in AI Before Adopting, Integrating It into Your Practice*, ABA J. (Apr. 23, 2019), http://www.abajournal.com/lawscribbler/article/before-lawyers-can-ethically-adopt-and-integrate-ai-into-their-practices-they-must-first-be-co petent [https://perma.cc/45P6-B72G] ("Governed by computer science and statistics, these are complex academic disciplines in which lawyers are generally untrained and cannot become experts on the fly.").

program is and is not capable of.[53] Without this baseline of knowledge, lawyers will be unable to use AI programs with full competence, thereby jeopardizing their ability to provide competent representation to their clients.

Numerous states have come to understand this and have instituted their own rules governing lawyer competency in regard to the use of technology. A total of thirty-six states have already implemented their own rules governing technology use.[54] A Florida rule "suggests that continuing education may be necessary to understand the risks associated with technology use."[55] Furthermore, "New York promulgated a rule that lawyers must use reasonable care [in]. . . stay[ing] abreast of technological advances."[56] Understanding the technology one uses in his or her practice is imperative to providing competent legal service.

The second key aspect for lawyers to understand in fulfilling the duty of competence is that AI results should not automatically be accepted as true. While many of the newer AI programs are technically sound, they still are imperfect.[57] Lawyers must still exercise care when using these programs. Therefore, lawyers must (1) regularly check to make sure that the AI program they are using is working properly and (2) review the program's results in order to provide competent legal representation.

The obligation of lawyers to review AI programs and the results they produce is further substantiated by Model Rule 5.3, which establishes a duty for lawyers to supervise nonlawyers.[58] Rule 5.3(b), the most relevant provision, states: "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*."[59] While the AI program is not a person—it is a machine—it will mimic human intelligence to perform tasks and the lawyer will incorporate its "thinking" into his or her work. Therefore, under Rule 5.3, the AI could be considered a nonlawyer that is being delegated work by the lawyer, triggering the lawyer's duty to ensure that the work produced by the AI program is competent.

Reading the *Model Rules* in modern times indicates that in order for lawyers to provide competent legal representation to clients, they must have a basic understanding of how the AI programs they use operate and not automatically accept

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53. *See generally* Lat, *supra* note 1; Tashea & Economou, *supra* note 52; Roy D. Simon, *Artificial Intelligence, Real Ethics*, 90-APR N.Y. ST. B.J. 34, 34 (2018).

54. Tashea & Economou, *supra* note 52.

55. Katherine Medianik, *Artificia ly Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1515 (2018) (citing Fla. Bar Prof'l Ethics Comm., Op. 06-2 (2006)).

56. Medianik, *supra* note 55 (quoting N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 782 (2004)).

57. Stephanie Francis Ward, *How accurate is AI in legal research?*, ABA JOURNAL (Feb. 28, 2020), https://www.abajournal.com/news/article/how-accurate-is-ai-in-legal-research [https://perma.cc/BCD7-5QYX].

58. MODEL RULES R. 5.3(b) (emphasis added).

59. MODEL RULES R. 5.3(b) (emphasis added).

the results the AI program produces as true. Currently, this may seem self-evident. After all, in the practice of law, blindly accepting the results of a program one does not completely understand how to use would not only be unethical, but reckless.[60] As AI programs become more advanced, widely used, and heavily relied on in the future, however, these basic notions of how to use AI in an ethical fashion may become much less self-evident.

Increasingly relying on AI in the legal field may also cause an additional ethics concern in regard to competent legal representation. While the aforementioned discussion warns of the ethical implications of utilizing AI, there may be ethical implications of refusing to use AI as well. As AI technology improves and becomes more widespread in the legal field, refusing to use AI in one's legal practice may considerably hamper one's ability to provide competent legal representation. This is especially true because the more one uses AI, the more benefi cial the program becomes: "the AI tools of the next few years will leverage the private data of law firms to create unique insights unattainable by other law firms because they are generated using the collective experience of lawyers and their work product from a particular firm. [61] Thus, a refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent legal representation to clients.

III. USING AI TO IMPROVE ACCESS TO JUSTICE

Another positive effect of using AI in the legal field is the ability to increase individual access to justice. The United Nations defines access to justice as "a basic principle of the rule of law."[62] The United Nations also explains what access to justice entails: "In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable."[63] Furthermore, the preamble to the *Model Rules* provides that lawyers "should seek improvement of the law, access to the legal system. . ." and "ensure access to our legal system for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."[64]

The United States is currently experiencing an access to justice crisis as not enough people are able to afford or obtain legal services when they need them.[65]

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60. Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 No. 2 HARV. J. L. & TECH. 890, 934 (2018) ("To continue to rely on AI that may be making flawed decisions or that is relying on problematic data may be evidence of willful blindness or may arise to the level of recklessness required for scienter.").

61. Walters, *supra* note 24.

62. *Access to Justice*, U.N., https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ [https://perma.cc/XL86-J8S8] (last visited Mar. 23, 2020).

63. *Id*.

64. MODEL RULES pmbl.

65. Legal Services Corp., *The Justice Gap: Measuring Unmet Civil Legal Needs*, EXECUTIVE SUMMARY OF THE 2017 THE JUSTICE GAP REPORT (2017), https://www.lsc.gov/sites/default/fi es/images/TheJusticeGap-ExecutiveSummary.pdf.

The Legal Services Corporation found that in 2017, "86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help."[66] Moreover, the Legal Services Corporation found that the majority—around eighty-five to ninety-seven percent—of civil legal problems not fully addressed was due to a lack of available resources.[67] After conducting a study in 2014, The American Bar Foundation discovered that "some 80 percent of people with legal problems don't address them through the legal system."[68] The Foundation's study also found that people who handle legal matters on their own do less well than people who have the benefit of counsel, meaning that "the vast majority of people with a legal problem are disadvantaged because they do not or cannot avail themselves of legal counsel, suggesting a latent market for legal services."[69]

Using AI in the legal field can help to solve this severe access to justice problem in the U.S. in the following two ways. First, new AI programs can expand access to legal tools, allowing more people to get legal help when they need it. Consider the legal self-help market. Mobile apps in particular have become an effective tool for legal self-help.[70] For example, DoNotPay has enabled individuals to file claims on their own without consulting an actual human lawyer.[71] Because the app offers certain services for free and others at a low cost,[72] cost is less of a barrier to accessing the resource.

Other examples of legal self-help apps include "Ask a Lawyer: Legal Help," which is free to download for iPhone and Android users, and "PaperHealth," which is free to download for iPhone users in Massachusetts only.[73] "Ask a Lawyer" gives "everyday people the ability to get preliminary legal advice from attorneys free of charge."[74] "PaperHealth" allows "people in Massachusetts who don't have the money or inclination to shell out for the creation of a living will" to use the app instead.[75] While apps such as these have helped to increase access

66. *Id*.
67. *Id*.
68. Walters, *supra* note 24.
69. *Id*.
70. "Just as the smartphone brought computing to the cyberchallenged, it is putting justice into the hands of some who may need it most." Joe Dysart, *20 Apps to Help Provide Easier Access to Legal Help*, ABA J. (Apr. 1, 2015), http://www.abajournal.com/magazine/article/20_apps_providing_easier_access_to_legal_help [https://perma.cc/E5LA-HVDX].
71. DONOTPAY, https://donotpay.com [https://perma.cc/3E2D-9NFL] (last visited Apr. 17, 2020); Jason Tashea, *DoNotPay App Aims to Help Users Sue Anyone in Small Claims Court—Without a Lawyer*, ABA J. (Oct. 10, 2018), https://www.abajournal.com/news/article/file_a smalls_claims_suit_anywhere_in_the_cocount_through_an_app [https://perma.cc/VL3R-4GMD].
72. Scotty Stump, *This Free App Can Help You Quickly File for Unemployment*, TODAY (Apr. 15, 2020), https://www.today.com/money/free-app-donotpay-can-help-you-quickly-file-unem loyment-t178657 [https://perma.cc/T5ES-NJMA].
73. Dysart, *supra* note 70.
74. *Id*.
75. *Id*.

to the legal system, they also engender ethics concerns regarding the unauthorized practice of law—a valid concern that will be addressed more fully below.

The second way AI programs can help to solve the access to justice crisis is by allowing lawyers to work more efficiently, allowing them to serve more clients. According to the ABA, if "firms can automate some of the most time-consuming tasks of providing legal services, they can provide the services at lower cost and can afford to help many more clients."[76] This will enable law firms to serve "those without the means comfortably to hire a lawyer but who nevertheless do not qualify for assistance from legal aid."[77] Admittedly, this will only work if lawyers who have the capacity to take on more clients take on clients who would not have had access to the justice system otherwise. Assuming that lawyers only take and serve clients in the jurisdiction in which they are authorized to practice, this poses less of an ethics concern regarding the unauthorized practice of law.

Model Rule 5.5 forbids lawyers from engaging in the unauthorized practice of law.[78] Section (b) provides:

> 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.[79]

While there have been lawsuits against AI program developers,[80] claiming they engaged in the unauthorized practice of law, legal precedent on this matter is still new and murky. Nonetheless, courts will need to start responding to this concern as AI programs become more widely used.[81]

In *Lola v. Skadden*, the court implied that machines could not engage in the practice of law.[82] The Second Circuit found that the plaintiff who exclusively engaged in document review was not practicing law in North Carolina because he

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76. Walters, *supra* note 24.

77. *Id*.

78. MODEL RULES R. 5.5.

79. MODEL RULES R. 5.5.

80. Steven Buse, *Disclaim What I Say, Not What I Do: Examining the Ethical Obligations Owed by LegalZoom and Other Online Legal Providers*, 37 J. LEGAL PROF. 323, 323 (2013); Alexandra M. Jones, *Old Days Are Dead and Gone: Estate Planning Must Keep Its Head Above Water with the Changing Tide of Technology*, 11 EST. PLAN. & CMTY. PROP. L.J. 161, 170 (2018).

81. Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 178 (2018) ("On the legal self-help front, courts, state legislatures, and bar associations in the near term will have to decide whether increasingly sophisticated services such as DoNotPay constitute the unauthorized practice of law.").

82. Michael Simon, Alvin F. Lindsay, Loly Sosa & Paige Comparato, *Lola v. Skadden and the Automation of the Legal Profession*, 20 YALE J.L. & TECH. 234, 248 (2018) ("According to the *Lola* decision, if a lawyer is performing a particular task that can be done by a machine, then that work is not practicing law."); Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 620 Fed. Appx. 37, 45 (2nd Cir. 2015).

only "provided services that a machine could have provided."[83] The court also interpreted North Carolina's law to imply, however, that the practice of law requires "at least a modicum of independent legal judgment."[84] Thus, a more accurate declaration of the Second Circuit's holding is not that tasks machines can do are not the practice of law, but that tasks machines can do that do not involve independent legal judgment are not the practice of law.

A Missouri court grappled with a legal question about AI and the unauthorized practice of law in *Janson v. LegalZoom.com, Inc*.[85] In this case, LegalZoom, a "well-known website that allows consumers to create their own legal documents with an online portal" was sued for engaging in the unauthorized practice of law.[86] The court held that filling out blank forms like the ones provided on LegalZoom's website "is not in and of itself the unauthorized practice of law."[87] Because apps like DoNotPay also use client answers to fill out forms, they would likely meet a similar fate in court.

LegalZoom provides a disclaimer, stating that LegalZoom is "not a law firm or a substitute for an attorney or law firm" and cannot provide any legal advice.[88] In a settlement between LegalZoom and the North Carolina Bar Association, LegalZoom agreed to have a licensed attorney review blank templates offered to customers in North Carolina and to clearly indicate to customers that that the templates do not replace the advice of an attorney to ensure LegalZoom would not engage in the unauthorized practice of law.[89]

If these AI programs simply direct clients to the forms they need to fill out and do not advise clients on the substance of their answers, there is no unauthorized practice of law. The irony here is that in limiting AI programs to being secretarial services rather than ones capable of providing legal advice, they will have a decreased ability to improve the access to justice crisis because individuals will still need to hire lawyers to receive proper legal advice. While the law in this area is still new, it currently seems that AI programs can direct clients to the forms they need to fill out, but they may not give any advice as to the substance of the client's answers because that would be replacing the work of a human lawyer.

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83. *Lola*, 620 Fed. Appx. at 45.

84. *Id*. at 44.

85. Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1057–58 (W.D. Mo. 2011).

86. Buse, *supra* note 80, at 323; *Janson*, 802 F. Supp. 2d at 1057–58.

87. Jones, *supra* note 80, at 170 (citing *Janson*, 802 F. Supp. 2d at 1064).

88. LEGALZOOM, https://www.legalzoom.com [https://perma.cc/7QBT-R8GP] (last visited Mar. 23, 2020) ("Disclaimer: Communications between you and LegalZoom are protected by our Privacy Policy but not by the attorney-client privilege or as work product. LegalZoom provides access to independent attorneys and self-help services at your specific directio . We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.").

89. Jones, *supra* note 80, at 171.

IV. LEGAL ETHICS INDICATES THAT AI SHOULD NOT REPLACE THE WORK OF A HUMAN LAWYER

While the law has not yet clearly defined how to use AI programs in accordance with principles of legal ethics, guidelines should still be inferred from the *Model Rules*. The *Model Rules* demand a human element to the work of lawyers.

Lawyers may not use AI programs to replace their work without violating their duty to provide competent representation in Rule 1.1.[90] Lawyers can use AI programs, however, to augment their work. Where the line falls between replacement and augmentation is not always clear. In order to ensure that the duty of competence is met when using AI, lawyers should adhere to the following suggestions.

To ensure competent representation, lawyers should have a basic understanding of the AI programs they choose to utilize in their practice and refrain from automatically accepting the results of AI programs they use as true. This applies to all AI programs whether it is an advanced legal research platform or program that does contract review. Having a basic understanding of the AI program one uses entails understanding why the AI program produces its results and what the program is and is not capable of. Not automatically accepting the results of the AI program one uses as true entails regularly checking the program to make sure it is working properly and reviewing the program's results.

AI programs that do not involve human lawyers should not provide legal advice because this would be the unauthorized practice of law per Rule 5.5.[91] When using programs such as legal self-help apps and robo-forms, for example, the AI program is not allowed to give substantive legal advice—this would be the unauthorized practice of law and therefore a violation of the *Model Rules of Professional Conduct*. Thus, the indispensable human element in lawyering in the age of AI works both ways. Human lawyers should not completely rely on AI programs to give legal advice and AI programs should not give legal advice unless a human lawyer is involved.

CONCLUSION

The use of AI in the legal field is likely to grow in the future and continue to bring more change to the practice of law. As discussed above, examples of AI programs already being heavily used in the legal field include advanced legal research platforms like ROSS Intelligence, legal self-help apps like DoNotPay, and contract review systems.

AI has already shown immense promise in bringing positive change to the legal world. One of these changes is improving the quality of legal services by helping lawyers work more accurately and efficiently. AI also has the potential to

90. MODEL RULES R. 1.1.
91. MODEL RULES R. 5.5.

increase individual access to justice. This is especially beneficial considering that the United States is currently experiencing an access to justice crisis as most individuals who need legal help cannot afford a lawyer. AI has the potential to help bridge this gap by enabling legal self-help tools that more people can access and by allowing lawyers to work more efficiently, thereby allowing them to serve more clients.

While AI seems to have the potential to bring positive change, the use of more advanced AI technology in the legal field also invokes legal ethics concerns. The *Model Rules of Professional Conduct*, which were written long before the age of AI, nonetheless provide guidance that is relevant to the use of AI. Specific concerns about the duty of lawyers to provide competent representation to clients and for AI programs not to engage in the unauthorized practice of law are especially relevant to the use of AI in the legal field.

As long as lawyers use AI to augment rather than replace their work and AI programs that do not involve a human attorney refrain from giving legal advice, AI can be an effective tool to improve the quality of legal services and increase individual access to justice while operating well within the parameters of legal ethics. Human lawyers should not completely rely on AI programs to give legal advice and AI programs cannot give legal advice unless a human lawyer is involved. In the age of AI, legal ethics preserves a human element in the practice of law.

Are artificial intelligence and machine learning the same?

News • Apple pulls error-prone AI-generated news summaries in its beta iPhone software • Jan. 17, 2025, 12:38 PM ET (AP) ...(Show more)

artificial intelligence (AI), the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings. The term is frequently applied to the project of developing systems endowed with the intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. Since their development in the 1940s, digital computers have been programmed to carry out very complex tasks—such as discovering proofs for mathematical theorems or playing chess—with great proficiency. Despite continuing advances in computer processing speed and memory capacity, there are as yet no programs that can match ...(100 of 5093 words)

Legal Ethics in the Use of Artificial Intelligence

Janine Cerny
Steve Delchin
Huu Nguyen

Lawyers increasingly are using artificial intelligence ("AI") in their practices to improve the efficiency and accuracy of legal services offered to their clients. But while AI offers cutting-edge advantages and benefits, it also raises complicated questions implicating professional ethics. Lawyers must be aware of the ethical issues involved in using (and not using) AI, and they must have an awareness of how AI may be flawed or biased.

Section I of this article provides an overview of AI and the different AI tools used in the practice of law. Section II, in turn, analyzes a lawyer's ethical duties in connection with AI technology. Finally, Section III explores how bias can affect AI and the importance of using diverse teams when developing AI technology.

I. OVERVIEW OF HOW ARTIFICIAL INTELLIGENCE IS CHANGING THE LAW

Artificial intelligence promises to change not only the practice of law but our economy as a whole. We clearly are on the cusp of an AI revolution. But what does all this mean, as a practical matter, for lawyers? What is AI? And how is it being used in the practice of law?

A. Defining AI.

Artificial intelligence has been defined as "the capability of a machine to imitate intelligent human behavior."[1] Others have defined it as "cognitive computing" or "machine learning."[2] Although there are many descriptive terms used, AI at its core encompasses tools that are trained rather than programmed. It involves teaching computers how to perform tasks that typically require human intelligence such as perception, pattern recognition, and decision-making.[3]

B. How AI Is Being Used In The Practice Of Law

There are many different ways that lawyers today are using AI to improve productivity and provide better legal services to their clients. Below are several of the main examples. As AI becomes even more advanced in the coming years, it fundamentally will transform the practice of law. Lawyers who do not adopt AI will be left behind.

1. Electronic Discovery/Predictive Coding.

Lawyers, predictably, use AI for electronic discovery. The process involves an attorney training the computer how to categorize documents in a case. Through a method of predictive coding, the AI technology is able to classify documents as relevant or irrelevant, among other classifications, after extrapolating data gathered from a sample of documents classified by the attorney.[4]

2. Litigation Analysis/Predictive Analysis.

AI also is being used to predict the outcome of litigation through the method of predictive analytics. AI tools utilize case law, public records, dockets, and jury verdicts to identify patterns in past and current data.[5] The AI then analyzes the facts of a lawyer's case to provide an intelligent prediction of the outcome.[6]

3. Contract Management.

AI tools are being used by lawyers to assist with contract management. This is particularly valuable to inside counsel who quickly need to identify important information in contracts. For example, AI tools can flag termination dates and alert the lawyer about deadlines for sending a notice of renewal. The AI tools also can identify important provisions in contracts, such as most favored nation clauses, indemnification obligations, and choice of law provisions, among others.[7]

4. Due Diligence Reviews.

AI is being used to assist in automated due diligence review for corporate transactions to reduce the burden of reviewing large numbers of documents.[8] Similar to contract management, due diligence review involves the computer identifying and summarizing key clauses from contracts.[9]

5. "Wrong Doing" Detection.

AI is being used to search company records to detect bad behavior preemptively. AI is able to see beyond attempts to disguise wrongdoing and identify code words.[10] AI can also review employee emails to determine morale, which may lead to identification of wrongdoing.[11] For example, in one test using emails of Enron executives, the AI was able to detect tension amongst employees that was correlated with a questionable business deal.[12]

6. Legal Research.

AI traditionally has been used to assist with legal research, but it increasingly is becoming more sophisticated. With AI, lawyers can rely on natural language queries—rather than simple Boolean queries—to return more meaningful and more insightful results.[13] AI also can be used to produce basic legal memos. One AI program called Ross Intelligence, which uses IBM's Watson AI technology, can produce a brief legal memo in response to a lawyer's legal question.[14] Over time, such AI technology will become more and more powerful.

7. AI to Detect Deception.[15]

Finally, as AI becomes more advanced, it will be used by lawyers to detect deception. Researchers, for example, are working on developing AI that can detect deception in the courtroom. In one test run, an AI system performed with 92 percent accuracy, which the researchers described as "significantly better" than humans.[16] While AI is still being developed for use in courtrooms, it already is being deployed outside the practice of law. For example, the

United States, Canada, and European Union have run pilot programs using deception-detecting kiosks for border security.[17]

C. It is Essential for Lawyers to be Aware of AI.

The bottom line is that it is essential for lawyers to be aware of how AI can be used in their practices to the extent they have not done so yet. AI allows lawyers to provide better, faster, and more efficient legal services to companies and organizations. The end result is that lawyers using AI are better counselors for their clients. In the next few years, the use of AI by lawyers will be no different than the use of email by lawyers—an indispensable part of the practice law.[18]

Not surprisingly, given its benefits, more and more business leaders are embracing AI, and they naturally will expect both their in-house lawyers and outside counsel to embrace it as well. Lawyers who already are experienced users of AI technology will have an advantage and will be viewed as more valuable to their organizations and clients. From a professional development standpoint, lawyers need to stay ahead of the curve when it comes to AI. But even apart from the business dynamics, professional ethics requires lawyers to be aware of AI and how it can be used to deliver client services. As explored next, a number of ethical rules apply to lawyers' use and non-use of AI.

II. THE LEGAL ETHICS OF AI.

To date, neither the American Bar Association nor any of the state bars have published formal ethics opinions addressing the use of AI by lawyers. Given the transformative nature of AI, it is perhaps not surprising that there are no ethics opinions. But even so, there are several ethics rules that apply to the use of AI.

A. Several Ethics Rules Apply To Lawyer's Use (And Non-Use) of AI.

There are a number of ethical duties that apply to the use of (and non-use of) AI by lawyers, including the duties of: (1) competence (and diligence), (2) communication, (3) confidentiality, and (4) supervision. These duties as applied to AI technology are discussed below.

1. Duty of Competence

Under Rule 1.1 of the ABA Model Rules, a lawyer must provide competent representation to his or her client. The rule states that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[19] The duty of competence requires lawyers to be informed, and up to date, on current technology. In 2012, this was made clear when the ABA adopted Comment 8 to Rule 1.1 which states that "[t]o maintain the requisite knowledge and skill, lawyers should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."[20]

As one author points out, there does not appear to be any instance "in which AI represents the standard of care in an area of legal practice, such that its use is necessary."[21] Nonetheless, lawyers generally must understand the technology available to improve the legal services they

provide to clients. Lawyers have a duty to identify the technology that is needed to effectively represent the client, as well as determine if the use of such technology will improve service to the client.[22]

Under Rule 1.1, lawyers also must have a basic understanding of how AI tools operate. While lawyers cannot be expected to know all the technical intricacies of AI systems, they are required to understand how AI technology produces results. As one legal commentator notes, "[i]f a lawyer uses a tool that suggests answers to legal questions, he must understand the capabilities and limitations of the tool, and the risks and benefits of those answers."[23]

2. Duty to Communicate

ABA Model Rule 1.4 governs a lawyer's duty to communicate with clients and requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[24] 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.[25] 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.[26] Indeed, the lawyer's failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer's fees to be reasonable. 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.[27]

3. Duty of Confidentiality

Under ABA Model Rule 1.6, lawyers owe their clients a generally duty of confidentiality. This duty specifically requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[28] The use of some AI tools may require client confidences to be "shared" with third-party vendors. As a result, lawyers must take appropriate steps to ensure that their clients' information appropriately is safeguarded.[29] Appropriate communication with the client also is necessary.

To minimize the risks of using AI, a lawyer should discuss with third-party AI providers the confidentiality safeguards in place. A lawyer should inquire about "what type of information is going to be provided, how the information will be stored, what security measures are in place with respect to the storage of the information, and who is going to have access to the information."[30] AI should not be used in the representation unless the lawyer is confident that the client's confidential information will be secure.

4. Duty to Supervise

Under ABA Model Rules 5.1 and 5.3, lawyers have an ethical obligation to supervise lawyers and nonlawyers who are assisting lawyers in the provision of legal services to ensure that their conduct complies with the Rules of Professional Conduct.[31] In 2012, the title of Model Rule 5.3

was changed from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."[32] The change clarified that the scope of Rule 5.3 encompasses nonlawyers whether human or not. Under Rules 5.1 and 5.3, lawyers are obligated to supervise the work of the AI utilized in the provision of legal services, and understand the technology well enough to ensure compliance with the lawyer's ethical duties. This includes making sure that the work product produced by AI is accurate and complete and does not create a risk of disclosing client confidential information.[33]

There are some tasks that should not be handled by today's AI technology, and a lawyer must know where to draw the line. At the same time, lawyers should avoid underutilizing AI, which could cause them to serve their clients less efficiently.[34] Ultimately, it's a balancing act. Given that many lawyers are focused on detail and control over their matter, it is easy to see why "the greater danger might very well be underutilization of, rather than overreliance upon, artificial intelligence."[35]

B. Key Practical Takeaways Relating to The Ethics of AI.

There clearly are a number of ethical rules that apply to lawyers' use and non-use of AI technology, and they have real-world application. Lawyers must be informed about AI's ability to deliver efficient and accurate legal services to clients while keeping in mind the ethical requirements and limitations. Ultimately, lawyers must exercise independent judgment, communicate with clients, and supervise the worked performed by AI. In many ways, the ethical issues raised by AI are simply a permutation of ethical issues that lawyers have faced before with regard to other technology. It shows that the legal ethics rules are adaptable to new technologies, and AI is no exception.

III. BIAS IN THE AI CONTEXT.

There is a final, often overlooked consideration in a lawyer's use of AI technology, and that is the problem of bias. For all the advantages that AI offers for lawyers, there also is a genuine concern that AI technology may reflect the biases and prejudices of its developers and trainers, which in turn may lead to skewed results. It is critical for lawyers using AI to understand how bias can impact AI results.

The problem of bias in the development and use of AI potentially implicates professional ethics. In August 2016, the ABA adopted Model Rule 8.4(g), which prohibits harassment and discrimination by lawyers against eleven protected classes.[36] Rule 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[37] About 20 states already have some variation of ABA Model Rule 8.4 on the books, and several other states are considering whether to adopt ABA's new expansive rule. Lawyers in jurisdictions that have adopted some form of Rule 8.4 must consider whether their use of AI is consistent with the rule. Moreover, even in jurisdictions that have not adopted some form of Rule 8.4, lawyers must consider how bias in the use of AI could create risks for clients.

Bias in AI technology stems from the nature of AI tools, which involve machine training rather than programming. If the data used for training is biased, the AI tool will produce a biased result. Microsoft, for example, recently launched an AI tool that could have text-based conversations with individuals.[38] The tool continuously learned how to respond in conversations based on previous conversations. Unfortunately, the tool began to mimic the discriminatory viewpoints of the people it previously engaged in conversation.[39]

As yet another example, the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software used by some courts to predict the likelihood of recidivism in criminal defendants has been shown by studies to be biased against African-Americans.[40] For these reasons, it is important to have diverse teams developing AI to ensure that biases are minimized. The data used for training AI should also be carefully reviewed in order to prevent bias.

In the AI world, there has been a movement away from "black box" AI, in which an AI model is not able to explain how it generated its output based on the input.[41] The preferred model is now "explainable AI,"[42] which is able to provide the reasoning for how decisions are reached. The importance of transparency in the use of AI is being recognized by governments. New York City, for example, recently passed a law that requires creation of a task force that monitors algorithms used by its government, such as those used to assign children to public schools.[43] One of the task force's responsibilities is to determine how to share with the public the factors that go into the algorithms.[44]

Ultimately, the need for lawyers to understand how AI generates outputs is important for combatting bias and providing good counsel to clients. And it may be required by legal ethics. As detailed above, lawyers have a duty to communicate with clients, and explaining why AI generates a particular outcome may be included as part of that duty. The good news is that while AI has the potential to be biased, AI is much more predictable than humans. It is easier to remedy bias in machines than it is in humans. Given their role as officers of the court, it is critical for lawyers to be on the forefront of understanding how bias in the use of can impact outcomes achieved by the legal profession and society as a whole.

CONCLUSION

Without a doubt, AI promises to fundamentally transform the practice of law. AI holds out the promise of freeing lawyers from mundane tasks and allowing them to devote more of their time to counseling clients, which after all is the core of what lawyers do. Lawyers should not fear AI, but rather should embrace it. Professional ethics requires them to do so.

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On this page

Technology

What Are the Risks of AI in Law Firms?

May 23, 2024

In June 2023, two New York attorneys filed a brief written by ChatGPT, which included citations to six nonexistent cases and erroneous quotes. This was one among several high-profile incidents that highlight some of the risks of using artificial intelligence for legal professionals without strong oversight or scrutiny.

Even as generative AI continues to become more sophisticated and have fewer instances of "hallucinations," there are still issues of inaccuracy, bias, discrimination, and confidentiality that loom especially large in the legal industry. Despite these challenges, AI will continue to transform the legal industry in fundamental ways, including how law firms are structured.

How will generative AI change the law firm model?

One of the benefits of AI in law is the ability to simplify rote tasks with the click of a button. Lawyers no longer need to dedicate countless hours to researching case law, drafting and managing contracts, or generating documents. Instead, they can leverage AI-enabled tools to do the work for them and redirect their attention to higher-value work, such as strategic legal planning and negotiations.

But in an industry that's built on billable hours, a reduction in hours poses a risk to operations and headcount. Traditionally, clients have been billed by the hour, with the bulk of time-intensive work executed by junior associates and paralegals. But if that work can be executed in seconds with the help of AI, clients might demand an alternative billing structure, which could lead to a consolidation in the number of junior staffers.

Though aspects of traditional law firms may change with the adoption of AI, human intelligence and oversight will remain critical. AI can't develop client relationships, offer discretionary judgment, or provide nuanced understanding of complex or unprecedented cases. Firms will need to contend with current business structuring and operations and make a choice on how to best adapt to the changes AI brings, striking a balance between leveraging technology and the value humans add.

A large proportion of law firms are already dedicating resources toward understanding AI. In our most recent State of Practice Survey, 41% of respondents at law firms say their workplace has established an internal team focused on evaluating AI tools for their firm, while 29% say their firm has a dedicated legal team or practice group focused on AI law for their clients.

What are the legal ethics issues with AI?

As AI in law and legal practice shape-shifts, junior and senior lawyers alike will need to adapt to market changes while also keeping ethical considerations top of mind.

The American Bar Association's (ABA) Model Rules of Professional Conduct codifies best practices and ethical guidance on how to use AI in legal work, including:

Competent representation

Lawyers need to provide competent representation to clients, including the benefits and risks associated with relevant technology. More than 40 states have adopted this language; Florida took it one step further and mandated that if lawyers don't understand a particular technology, they need to seek outside counsel from someone with that expertise.

Confidentiality

Lawyers must take reasonable steps to protect client information from unintended recipients. Because several AI applications such as ChatGPT retain queries and share inputs with third parties, legal professionals should check the terms and conditions to prevent exposing clients to risk.

Supervising nonlawyer assistants

Lawyers must supervise any nonlawyers who assist them to ensure that they adhere to rules of professional conduct. Traditionally, nonlawyers have encompassed paralegals or vendors; however, AI straddles a hazy line as to whether the technology can be considered a nonlawyer assistant. Regardless, attorneys are accountable for any ethical violations committed by nonlawyers under their supervision.

What are the litigation issues with AI?

If using generative AI during legal proceedings, litigators should consider the risks and limitations of the technology to ensure fairness and justness.

Bias and discrimination

If a generative AI platform is trained on data containing biases, then this will likely lead to discriminatory outputs, which poses risks for litigators leveraging the technology. When AI systems spit out biased outcomes, these flawed responses could influence critical aspects of the litigation process, if attorneys aren't careful.

Data privacy and security

Many AI developers rely on the information users input to train and improve their models. Litigators must uphold the client-attorney privilege by not sharing confidential or sensitive information and ensuring the platform has adequate data privacy and security safeguards in place. If not, any sensitive information could be retained within the system and accessed or sold to third parties.

Compliance and regulation

As AI tools rapidly evolve, existing legislation may fall behind, leaving lawyers in a precarious position when integrating new technologies into their legal practices. Failure to comply with AI-related regulations could result in legal consequences, impacting the credibility and reputation of the lawyer and firm.

Bloomberg Law is an intelligent approach to legal AI

While large language models can increase efficiency, AI for legal professionals can also introduce significant risks. Lawyers must balance the benefits of utilizing AI with ethical, legal, and professional considerations.

Whether you're considering using generative AI in your legal practice or advising clients on their risk, Bloomberg Law can help you navigate the legal and ethical risks of AI with confidence. Get the full picture of AI-related legal issues and professional best practices with our extensive Practical Guidance, news, and in-depth analysis of AI-related legal issues.

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The nuances and challenges of AI aren't new to us. For more than a decade, we've been perfecting the power of AI to help lawyers speed up and simplify legal tasks, and we understand that these advancements require an extraordinary level of testing and discernment. Request a demo to see how Bloomberg Law's AI-powered tools and comprehensive coverage can transform your legal practice.

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