

DIGITAL DUE DILIGENCE: A PRACTICAL GUIDE TO AI AND ETHICS IN THE LEGAL PROFESSION

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INTRODUCTION

Lawyers have been using various forms of artificial intelligence (AI) in their practice for decades without incident. Extractive AI helps find caselaw in legal research databases. Corrective AI helps with spellcheck. And collaborative AI helps augment your work by surfacing suggestions to evaluate and approve, such as relevance sorting and tagging in e-discovery or document automation and improvement.

Generative AI (GenAI) introduces a new dimension of responsibility and risk. Unlike prior advancements in legal tech, many GenAI providers seek to replace the entire process of writing. Legal writing is not simply assembling words or producing text; it is the result of analysis, strategy, and judgment. From research to drafting to proofing, each stage ensures that the final document represents a thoughtful, accurate, and effective legal argument.

Writing is where lawyers do the real work of representing their clients, so removing ourselves from this process raises a variety of ethics issues ranging from competence and confidentiality to judgment, truthfulness, and supervision.

To fully grasp the ethical stakes, we must examine each of the ABA Model Rules that applies. Writing provides an ideal case study to understand how our ethical obligations intersect with daily work.

Legal writing is not simply assembling words or producing text; it is the result of analysis, strategy, and judgment.

PART 1

BROAD CATEGORIES OF AI

Like any other field of technology, AI changes and grows as the creators seek to expand capabilities and incorporate them into our everyday work. But not all technology is AI, and not all AI is generative AI—the distinction matters.

Four broad categories of AI tools stand out: extractive AI, corrective AI, collaborative AI, and generative AI.

» **Extractive AI** supports retrieving information from databases. Most lawyers use this for legal research. Built for precision recall and matching, it's safe because the databases are highly curated and the ability to pull from them is constrained. It also does not incorporate your data into its database. Extractive AI relies on a form of natural language processing called BERT (bidirectional encoder representations from transformers), known for its ability to handle complex, sentence-based questions and provide highly relevant answers. However, BERT relies on the user to construct a good Boolean search query. The burden of refining the search still falls on the user.¹



» **Corrective AI** compares a string of characters to a database of known correct strings to find exact or near matches. Early examples (spellcheck and grammar check) rely on the Levenshtein edit distance calculator, which measures the number of changes needed to turn one string into another based on a known list of options. Microsoft Word's version isn't collecting, storing, or transmitting any information; it's generally accurate; and the stakes are low. Newer versions have incorporated generative AI functionality that relies on collecting user data, [but you can turn it off](#).

» **Collaborative AI** includes guided tools that bring information to your attention so you can decide what to do with it. These expert systems are designed for narrow use; for example, technology-assisted review (TAR) handles the review phase of e-discovery by deploying algorithms based on pre-programmed input from expert reviewers to classify documents that other human reviewers then manually review. TAR provides better statistics, categorization, and reporting than humans alone. Other examples would be tools like WordRake, which gives you legal-specific editing corrections, or guided document automation tools, which help you create a will by asking questions then producing a templated document. These are high-engagement, high-curation tools. Most do not collect data, but when they do, the data is stored in an environment governed by access rights management.

» Finally, **generative AI** will be today's main topic. Generative pre-trained transformers (GPTs) can understand and generate humanlike text, images, and sound. They were designed to mimic style, not for precision recall and factual accuracy. This allows for incredible flexibility in the requests GPTs can handle—and variation and creativity in outputs—but also means their hallucinations are considered a "feature." They can be reduced—but not eliminated—by adding more accurate data. The ability to quickly pattern-match and produce plausible responses is what makes this type of AI so alluring—and misleading.

Extractive, corrective, and collaborative AI tools do not require much change to how lawyers work. But GenAI requires new ways of thinking.

¹ Existing BERT-based research tools have added generative AI features on top to create retrieval-augmented generation, but they are prone to hallucination 17–33% of the time.

WHAT'S DIFFERENT ABOUT GENERATIVE AI?

Traditionally, law firms have deployed specialized, high-cost tools under controlled conditions. But GenAI has shifted who can access advanced technology, including how it's used in legal practice.

Unlike AI that relies on formalized queries and databases of known resources, GenAI enables anyone to type an informal request (called a prompt) and get outputs of text, images, and even music based on a vast library of largely uncurated resources. This flexibility and availability makes it seem more appealing at first.

"[G]enerative AI represents a significant change and a dramatic step forward in legal applications, because instead of only analyzing content, it can also generate new content... Generative AI creates this content using large language models, in which a model is 'trained' on vast amounts of data, rendering it able to generate new content by referring back to the data it has ingested. The release of OpenAI's ChatGPT in November 2022 ushered in this new era of technological development."²

Harried professionals can now get (and accept) AI-generated outputs without scrutiny, which introduces new risks. Its free and easy access—including from personal devices beyond firm oversight—can tempt users to let AI take over significant parts of the writing process.

We must question, verify, and scrutinize how we use GenAI tools—and learn to act with wisdom and accountability.

"Before using any particular form of [GenAI], attorneys should have a reasonable and current understanding of how it works and what it does, with due regard for (a) its potential dangers, including the risk of 'hallucinations' or misuse or exposure of Client Confidential Information, (b) its limitations, including whether it uses a narrow dataset that could generate incomplete, out-of-date, or inaccurate results, and (c) its cost. Attorneys also should have a reasonable basis for trusting the [GenAI] outputs, or must review and validate [GenAI] outputs, before incorporating these outputs in their work product for clients or relying on them in support of a legal proceeding."³

As we expand our use of AI in law, it is ever more important to be careful custodians of our clients' information.

"Some [GenAI] tools are described as 'self-learning,' meaning they will learn from themselves as they [...] 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."⁴

In short, GenAI introduces new ways to get yourself into trouble if:

- » You see text generation as a temptation to dabble outside your practice area
- » You do not learn about how GenAI borrows, stores, and shuffles information

These issues come down to lawyer competence, and the other ethics issues are filtered through that lens. These new considerations are the focus of this presentation and this paper.

Applicable Ethics Rules

- » **Competence (ABA Model Rule 1.1):** Ensure familiarity with tools, as well as their benefits, risks, and limitations.
- » **Communication (ABA Model Rule 1.4):** Inform clients about AI use and its potential impact on their case.
- » **Confidentiality (ABA Model Rule 1.6):** Be careful about client data retention and potential reuse.
- » **Independent Judgment (ABA Model Rule 2.1):** Control all legal strategy, using GenAI as a supplement, not a replacement.
- » **Candor (ABA Model Rule 3.3):** Confirm accuracy of all law and facts in any documents or communications to avoid misleading others.
- » **Supervision (ABA Model Rule 5.3):** Oversee and track GenAI use by subordinates and staff, and communicate about its use. Any person using GenAI must supervise the tool.

We must question, verify, and scrutinize how we use GenAI tools—and learn to act with wisdom and accountability.

² PA Bar Association Committee on Legal Ethics and Professional Responsibility and PA Bar Association Professional Guidance Committee, Joint Formal Opinion 2024-200, [Ethical Issues Regarding the Use of Artificial Intelligence](#), June 2024.

³ DC Bar, Ethics Opinion 388, [Attorneys' Use of Generative Artificial Intelligence in Client Matters](#), April 2024.

⁴ American Bar Association, Formal Opinion 512, [Generative Artificial Intelligence Tools](#), July 2024.

NEW WRINKLES FOR OLD DUTIES

Your ethical duties have not changed, and while there's no need to introduce new ones, there are surprising new ways problems could arise. Mistakes and misunderstandings can usually be undone, but because of how GenAI works, there's no way to reverse course once information is shared.⁵

It's critical to understand what could go wrong before you start experimenting. Thus, competence is the key duty that connects the other duties. Here is an overview of the applicable rules and how they've changed with GenAI:

ABA Model Rule 1.1: Competence

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

—[ABA Model Rules of Professional Conduct Rule 1.1.](#)

Duty to competently represent clients, including technology skills for the business and practice of law. Lawyers should not dabble outside of their practice area but may partner with other lawyers to competently represent a client if the client consents. "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 tech, engage in continuing study and education and comply with all [CLE] requirements to which the lawyer is subject."⁶

How the Duty Has Changed: GenAI makes it appear that a lawyer may dabble without issue. But for [technology competence](#), lawyers should know that GenAI is fundamentally different from any tools they have used before, even though it seems similar to well-known search engines or legal research platforms. GenAI doesn't work that way, and lawyers who assume it does are likely to pass on "hallucinations" to clients, colleagues, and courts. They should remember that any client information entered may be permanently retained and incorporated.

ABA Model Rule 1.4: Consent

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

—[ABA Model Rules of Professional Conduct Rule 1.4.](#)

Duty to communicate with clients about their representation and obtain informed consent to disclose information or experiment with novel methods and technologies. Clients should be informed that, for example, sharing information through technology may waive privilege.

How the Duty Has Changed: Lawyers would not typically discuss document creation or legal research methods with clients. But GenAI may permanently incorporate confidential information or introduce false information. Further, since clients also have free access to these tools, they may not realize their use could affect confidentiality and privilege.

ABA Model Rules 1.6, 1.18(b), and 1.9(c): Confidentiality

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

—[ABA Model Rules of Professional Conduct Rule 1.6.](#)
(See also [1.18\(b\)](#), [1.9\(c\)](#).)

Duty to protect information relating to the representation of a client, such as avoiding inadvertent access or disclosure. This covers any information not widely known or intentionally released to the public. Duty not to use information from clients to their own detriment, or to benefit others, beyond enhancing the lawyer's general know-how gained from representation.

How the Duty Has Changed: GenAI may reproduce information entered to another user. Terms of service may allow for human review, long-term retention, and incorporation into training data sets, which may expose confidential information in recognizable chunks to other users, clients, or lawyers, potentially harming a current client or giving others an unfair advantage.

Before GenAI, accidental access to a tool could be deliberately ended (and eventually forgotten). Now, accidental disclosure may have permanent consequences.

ABA Model Rule 2.1: Judgment

"[A] lawyer shall exercise independent professional judgment and render candid advice."

—[ABA Model Rules of Professional Conduct Rule 2.1.](#)

Duty to use independent professional judgment and give clients well-informed advice. Lawyers are responsible for all decisions and must direct case strategy. No decisions should be assigned to technology without further evaluation.

How the Duty Has Changed: This rule was largely overlooked before GenAI because lawyers would research the law, synthesize findings, and develop a theory of the case. However, now that it is possible to prompt the tool to write a whole brief, overworked lawyers might let the tool decide what to argue and emphasize, without evaluating whether it serves the client's best interests.



⁵ Removing information requires retraining the large language model, which most firms and users cannot do.

⁶ ABA, [Comment 8 on Model Rule 1.1](#), accessed February 2025.

ABA Model Rules 3.1 and 3.3: Truthfulness

"A lawyer shall not knowingly 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."

—ABA Model Rules of Professional Conduct Rule 3.3. (See also 3.1.)

Duty of candor to the tribunal, which requires a lawyer to:

- » Avoid misleading the court about laws or fact
- » Avoid bringing or defending any proceeding not based in fact, law, or good faith
- » Correct any known errors in law or fact

Verify any output or results from tools to confirm that they do not contain errors or misstatements.

How the Duty Has Changed: While lawyers have always been required to be honest with courts and colleagues, the tendency of GenAI to "hallucinate" (make up or shuffle facts, cases, and quotes) means that lawyers must validate all information before submitting it to the court. Before GenAI became available, lawyers would typically validate information before including it in a document, then validate it again when cite-checking. It's now possible to skip the initial step—but it should not be skipped.

ABA Model Rules 5.1 and 5.3: Supervision

Duty to supervise subordinates, vendors, and software, and ensure they comply with all ethical rules. When working with people or software, lawyers may delegate work, but they may not assign it. Delegating requires the lawyer to know enough about the task to ensure ethical rules are followed, give direction, and evaluate whether the work meets requirements and ethical duties.

How the Duty Has Changed: This rule was originally more concerned with assigning work to inexperienced lawyers or vendors and then not reviewing the work or having adequate quality control measures. Now, a lawyer could conceivably ask GenAI to handle an entire task without verifying its output, as if the tool's skills were equal or superior to the lawyer's. Where a human might ask for more direction or feedback, these tools are designed to create outputs, even with incomplete information. They may fill in the gaps with hallucinations but will not tell you they did, which increases the appearance that the result is ready to submit.

Additional Considerations

Though outside the scope of this paper, lawyers should also consider the broader ethical considerations that arise from using GenAI, such as:

- » The rights of those who created the content on which the AI was trained
- » The [environmental impacts](#) of using AI
- » How bias may be inherent in the training data, algorithms, and results

Lawyers should bill ethically, passing along any cost savings from efficiency to clients, as required by ABA Model Rule 1.5 and further discussed in ABA Formal Opinion 512.

For a discussion of new ethics considerations related to GenAI, review Ivy B. Grey's [A Practical Guide to AI and Ethics](#) and [Exploring GenAI Ethics through Storytelling](#).

Writing is where lawyers do the real work of representing their clients, so removing ourselves from this process raises a variety of ethics issues.

TOOLS: COMPARING TRADITIONAL LEGAL TECH TO GENERATIVE AI

GenAI has transformed aspects of legal practice by helping lawyers quickly generate drafts, summaries, and analyses based on minimal input. While it can streamline some tasks, it raises ethical concerns because of how it works.

- » **Document management systems** (DMSs) securely store information and allow firms to segregate access. GenAI permanently retains data, irreversibly combines information, and may serve up data that would otherwise be walled off.
- » **Unlike traditional electronic legal research tools**, GenAI quickly produces outputs that may seem correct but could easily contain errors or fabricated information.
- » **Unlike traditional electronic editing tools**, GenAI can generate new material but, when asked to edit written material, rewrites each sentence. It also stores information it receives.

GenAI is freely and easily accessible without training from unsecured personal devices, which means lawyers and clients may unwittingly expose data. These differences present new ethical challenges for lawyers who must protect client data, provide competent representation, exercise independent judgment, and supervise AI use carefully. **Confidentiality missteps cannot be undone in consumer-grade tools. You must understand the risks.**

TOOLS: CONSUMER-GRADE V. ENTERPRISE-GRADE GENERATIVE AI

Lawyers and clients may find it tempting to use consumer-grade GenAI like ChatGPT to simplify or summarize legal documents. But there is a stark difference between the confidentiality, security, and privacy offered from consumer-grade and enterprise-grade GenAI tools. You can only learn this by reading the terms of service and reviewing them whenever they're updated.

Legal-specific enterprise-grade tools were specifically designed for use in law practice, so they meet industry expectations of privacy, confidentiality, explainability, and reliability. When legal technology providers added GenAI functionality, most negotiated to avoid human review and minimize data retention. Read terms of service for any activity that triggers human review and how long information is stored. For those who have negotiated these terms, data retention is typically from 0 to 10 minutes.

Comparatively, consumer-grade tools are designed to collect, store, and incorporate all user-supplied data to continuously expand the training dataset.⁷ They also have built-in flags for human review to ensure they are not being used for illegal or antisocial purposes. Most legal issues involve facts or queries likely to be flagged for review and therefore expose confidential or privileged client information.

⁷ Most consumer-grade tools store data for about 30 days.

PART 2

From truthfulness in representations to the careful supervision of non-lawyer assistance, every ethical rule must be carefully considered with respect to generative AI usage. Each rule's intricacies are explored below in detail, with practical guidance to help lawyers identify risks and uphold their professional responsibilities.

Ethical missteps—whether through unverified AI-generated outputs, breaches of client confidentiality, or failure to supervise AI-integrated workflows—carry real consequences, from client harm to professional sanctions. By engaging deeply with the ethical framework, lawyers will be better equipped to leverage new technologies, ensuring that innovation enhances practice without undermining their ethics.

At the heart of competence is the deliberate effort required to remain engaged and accountable.

COMPETENCE—HOW TO COMPETENTLY USE GENERATIVE AI

To provide competent representation, lawyers must understand the strengths, weaknesses, and risks of GenAI, and how it fits within their workflows. GenAI tools are fundamentally different in terms of risks, benefits, and information permanence. Once lawyers decide to use GenAI, they must work to verify accuracy, critically analyze, maintain control over case direction, and protect client confidences.

- » **Substantive competence** requires that lawyers understand the substantive area of law in which they practice and don't dabble in others.⁸
- » **Technology competence** requires that lawyers develop technology awareness, grasp its risks and benefits, keep up with changes, and develop reasonable skill in the tools they use. Every state has a duty of competence, and 40 states have a duty of technology competence.

These requirements have not changed, and GenAI use falls well within them. In fact, every incident discussed in [Breaking Bad Briefs](#),⁹ including the infamous *Mata v. Avianca* filing,¹⁰ was a failure of professional and technological competence.

Risk of Hallucinations and Verification of Outputs

Hallucinations refer to any GenAI tool's outputs that sound plausible but are inaccurate or entirely fictional. In any AI-generated content, lawyers must double-check citations, confirm facts, and make sure the reasoning in a draft is sound and based on actual, verified sources. The verification process might outweigh the perceived time savings of GenAI use. This should be factored into deciding to use it because including hallucinations in a pleading may violate ABA Model Rules 1.1, 3.1, and 3.3.

Understanding GenAI's Long-Term Data Retention

Lawyers must also understand that GenAI tools can pool knowledge across matters. Once data is incorporated, it's impossible to "forget" it. The risk of negative consequences increases when the system is used with multiple clients in the same industry. If a lawyer shares confidential information and it harms the client, they may violate ABA Model Rules 1.1, 1.6, 1.9, and 1.18.

Directing Focus and Controlling Strategy

Lawyers must confirm that any AI-generated arguments or conclusions align with legal principles and precedents. Lawyers have a duty to provide well-informed advice based on independent judgment. GenAI may suggest legal theories that could weaken the case if not thoroughly vetted. Letting GenAI direct focus and strategy may violate ABA Model Rules 1.1, 2.1, and 5.3.

How to Develop Competence and Judgment

A competent lawyer selects tasks that match what the technology can actually do, and engages with the input and output enough to feel comfortable being responsible for it—because they are responsible.

Incompetent use typically looks like trying to accomplish 100% of a task with one prompt and expecting complete accuracy. Bad prompts look like these:

- » "Hey Chatbot, write a brief for me."
- » "What's the law on ____?"
- » "Thanks for the cite, can you confirm it's real?"

Competent use involves understanding the risks, benefits, and appropriate use cases. For example, GenAI can:

- » Summarize text you've pasted in or linked to
- » Explain topics, so long as the user encourages "I don't know" responses
- » Suggest ways to reorganize text pasted in
- » Provide insights or connections from uploaded notes
- » Create new text from a topic already researched (so the user can spot inaccuracies)
- » Rewrite text the user previously created

At the heart of competence is the deliberate effort required to remain engaged and accountable. A competent lawyer pauses, thinks, and verifies.

⁸ If less than 20% of your practice time is within a specific field, you are probably dabbling.

⁹ Professor Heidi K. Brown, [Breaking Bad Briefs: A Snapshot of Lawyers', Litigants', and Experts' Use \(and Misuse\) of GenAI in Court Filings](#), November 2024.

¹⁰ CNN, [Lawyer apologizes for fake court citations from ChatGPT](#), May 2023.

The quality of a user's prompt reflects the quality of their thinking and their understanding of the tool:

- » **Low-quality** engagement starts with a vague and superficial prompt and the expectation that the tool will complete the task correctly the first time.
- » **A minor improvement** would include multiple specific prompts. The user still expects GenAI to eventually do 100% of the task with general accuracy, so they verify details but not premises. This approach asks too much and essentially assigns the thinking to the tool.
- » **Proficient** engagement would use a multi-step process with personas. The user would then question the results and refine their requests. Here, the tool contributes to the task.
- » **Ideal use** for GenAI tools involves leveraging the tools [to support critical thinking](#). Begin with personas, and then have those personas question the user to create a debate. The prompts are not designed to lead to a final output but to engage a different way of thinking.

Always engage with the output to modify it and make it your own. Weigh the value of the information presented, then decide what information to include or strategies to pursue. Never include confidential or proprietary information in prompts.

Remember that GenAI is a tool—it serves the user, not the other way around.

The verification process might outweigh the perceived time savings of GenAI use

Case Study: Steven A. Schwartz and Peter LoDuca from *Mata v. Avianca*

Let's take a closer look at [Mata v. Avianca](#).¹¹ This is a classic case of incompetence.

The lawyer took a case in an area of law he didn't often practice, which means he was dabbling.¹² (ABA Model Rule 1.1.) He didn't have access to LexisNexis or Westlaw, standard tools for litigators, and he did not turn to other reliable free resources like Google Scholar. (ABA Model Rule 1.1, Comment 5: "use of methods and procedures meeting the standards of competent practitioners.") Instead, he prompted ChatGPT to write a complete brief and submitted it without checking any of the citations. (ABA Model Rule 1.1, Comment 8, used a tool not fit for purpose without understanding its risks.)

All the citations were fake, which he was not aware was possible. (ABA Model Rule 1.1, Comment 8; ABA Model Rule 3.3.) When he asked ChatGPT if the cases were real, ChatGPT said they were. (ABA Model Rule 1.1, Comment 8.) Confronted by the judge, Schwartz insisted that the cases were real. (ABA Model Rule 3.3.) Eventually, Schwartz admitted the cases were false, and he was sanctioned \$5,000 under FRCP 11, which allows judges to sanction lawyers who submit pleadings that contain frivolous arguments or lack support. (ABA Model Rule 3.3; FRCP 11.)

Schwartz made several avoidable missteps. He did not understand the area of law or the technology he was using. Because of this, he could not recognize any errors and had no idea how to check his work. Even if the case were in his practice area, he would have to understand that:

- » GenAI tools are not search engines.
- » Consumer-grade tools do not have access to caselaw.
- » They can make up information or reconnect facts with incorrect sources.
- » They are programmed to give you answers and validation.



CONFIDENTIALITY—HOW TO SAFELY USE GENERATIVE AI AND WHAT TO DISCUSS WITH CLIENTS

Confidentiality is key in legal practice. Though this is well known, sometimes lawyers fail to grasp the breadth of information that should be protected—and that the duty extends beyond the representation.

GenAI's data handling creates unique challenges. Lawyers cannot unwind a mistake by simply deleting the information—once submitted, it's virtually permanent. This requires thinking more broadly. Even seemingly minor details—facts about a case, interpretations of the law—fall under confidentiality protections if they require passwords or other specialized access. In practical terms, the ethical duty of confidentiality may severely limit GenAI's use.

Accidental disclosure may have permanent consequences.

¹¹ Association of Corporate Counsel, [Practical Lessons from the Attorney AI Missteps in Mata v. Avianca](#), August 2023 (Mata v. Avianca, No. 22-cv-1461, 2023; @L 4114965, S.D.N.Y., June 22, 2023).

¹² Though we have warned against dabbling, a lawyer may develop their own understanding of a substantive topic based on advice from competent colleagues, substantive legal research from traditional legal research tools, and firm knowledge management resources. Give greater weight to traditional legal resources (such as published and peer-reviewed practice guides and firm-created checklists) than AI-suggested strategies.

Reasonable Confidentiality Measures

According to ABA Model Rule 1.6, lawyers must take reasonable care to prevent the inadvertent or unauthorized disclosure of confidential information. This may even include publicly available information, if not widely known.

This 11-level confidentiality classification system developed by Ivy B. Grey at WordRake provides a structured way to think about the sensitivity of various types of information. It's adapted from the [five-level](#) confidentiality protocol of [Harvard University's governance office](#).

From lowest to highest level of concern, consider these 11 types of information:

- » **Publicly released**, such as press releases or published articles
- » **Low-risk, local**, such as general business activities known in the community
- » **Commonly known, neutral**, such as general facts that are publicly recognized
- » **Publicly available, not commonly known**, such as neutral information found in public records but not widely recognized
- » **Low-risk anonymized**, such as data in case studies with masked identities
- » **Sensitive anonymized**, such as health data that is not personally identifiable information (PII)
- » **Embarrassing, publicly available**, such as court records that are accessible online
- » **Controlled release, sensitive**, such as upcoming business deals or announcements intended to be released at a specific time
- » **Secret, nonprivileged**, such as strategic business plans that could harm business interests if released early
- » **High-risk confidential information**, such as PII, Social Security numbers, personal finances
- » **Critical security information**, such as details of a client's security arrangements or vulnerabilities

[ABA Formal Opinion 479](#) provides guidance on the factors that should determine our level of care:

- » Sensitivity of the information
- » Likelihood of disclosure if additional safeguards are not employed
- » Cost of employing those safeguards
- » Difficulty of implementing the safeguards
- » To what extent the safeguards hinder the lawyer's ability to represent clients (e.g., making an important piece of software harder to use)

Confidentiality Issues Arise Earlier in the Representation

Lawyers usually consider confidentiality issues after they have started writing, rarely during. But lawyers using GenAI must consider confidentiality concerns as soon as they access and import client data—and throughout the representation.

"Before lawyers input information relating to the representation of a client into a [GenAI] tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm [or] others inside the firm who will not adequately protect the information from improper disclosure or use because, for example, they are unaware of the source of the information and that it originated with a client of the firm.... [C]lients 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 [GenAI] tool."⁶

The safest practice is to always avoid entering sensitive information into GenAI tools.

Possibility of Human Review

In addition to actual disclosure, the duty of confidentiality requires lawyers to protect client information from access that could lead to potential or inadvertent disclosure. With consumer-grade GenAI tools, lawyers should be concerned about policies that allow for human review, data retention, and data incorporation.

Prompts may be flagged and checked by human reviewers to make sure use complies with the terms of service. Terms of service usually prohibit using the tools to create or process sensitive, illegal, or antisocial content. However, as this describes most legal problems, prompts about legal matters are highly likely to be reviewed.

If you are using consumer-grade GenAI tools, you must move beyond older anonymization techniques because even partially anonymized data can be reidentified with a handful of data points. Effective anonymization methods include adding "noise" to obscure details. Some legal companies are responding to these confidentiality concerns by building their own enterprise-grade tools based on law firm needs.



Cross-Matter Knowledge Pooling and Data Cross-Pollination Risks

In a firm where experienced lawyers collaborate, knowledge-sharing is natural and often beneficial. However, GenAI introduces the risk of unintentionally using information from one client to help another, potentially harming the original client. Unlike humans, GenAI cannot “forget” information once it has been incorporated into its dataset. This is why ABA Formal Opinion 512 cautions against integrating GenAI into a firm’s DMS—doing so may compromise confidentiality and create conflicts of interest.

This risk of data cross-pollination can lead to ethical breaches under ABA Model Rules 1.18(b) and 1.9(c). When GenAI has access to a firmwide DMS, previously segregated information may become widely usable. The risk is especially high when clients are competitors because proprietary insights or technical details could be inadvertently shared.

Firms should consider client-specific data lakes and anonymized data layers to balance firmwide knowledge-sharing with the need to protect and separate client data. Lawyers also need a basic understanding of how GenAI tools function and impact client confidentiality. This knowledge is essential to recognize when to seek informed client consent and effectively communicate the associated risks.

Finally, traditional DMS platforms allow controlled access to specific documents, enabling firms to enforce ethical walls and restrict access based on file structure. If a lawyer inadvertently accessed unauthorized information, they could recognize the mistake, close the file, consciously decide not to use the information, and ultimately forget it. This human ability to filter and forget helped minimize confidentiality breaches. But once GenAI processes information, it remains embedded in the system, making unintentional misuse a persistent risk.

Lawyers Must Discuss Confidentiality and Privilege with Clients

Though most lawyers would not expect ABA Model Rule 1.4 to require them to discuss technology with their clients, GenAI raises new issues of privilege waiver and confidentiality breach. According to a January 2025 Harmonic study, nearly [10% of prompts](#) include sensitive information. In a [16-country study](#) of 15,000+ adults by the Oliver Wyman Forum done in January 2024, [84% of workers](#) had exposed important company data to public GenAI tools.

A lawyer must communicate relevant issues and potential risks related to case confidentiality. This includes how the matter may be impacted by a firm’s technology plans as well as the client’s own technology use. Proactively advise clients on these risks to help protect confidentiality and reinforce the importance of maintaining privilege over sensitive communications.

Think of it like the discussion of risks associated with social media or email. The widespread availability, user-friendly interfaces, and free access make using GenAI seem natural and easy. It is faster and easier to access a consumer-grade GenAI tool than it is to log in to a client portal. Lawyers routinely caution clients about forwarding emails or posting about their case on social media, and this is similar.

Consider a scenario where a client receives a long legal analysis from their lawyer. Finding it difficult to understand, they prompt a consumer GenAI tool to simplify it. Without understanding the risks,

the client has shared privileged information and may inadvertently waive attorney-client privilege.

TRUTHFULNESS—HOW TO EVALUATE GENERATIVE AI OUTPUTS AND WHEN TO DIG DEEPER

According to ABA Model Rules 3.1 and 3.3, lawyers may not submit false or misleading information to courts or to other lawyers. Lawyers are responsible for verifying every output, ensuring citations exist, are accurate, and represent the propositions stated. The duty of candor has received great attention since the introduction of GenAI because of its hallucinations. This differs from Westlaw or LexisNexis using standard extractive AI because their design limits them to real, verified legal authority. Failure to understand the risks and benefits of these tools and to plan around them may be a violation of ABA Model Rules 1.1, 3.1, and 3.3.

Nearly 10% of prompts include sensitive information. In a 16-country study of 15,000+ adults ... 84% of workers had exposed important company data to public GenAI tools.

Avoiding Hallucinations of Law or Fact

Inaccurate facts or citations can mislead the court and damage the lawyer’s credibility. So, GenAI drafts and legal research require lawyers to triple-check the accuracy of arguments, citations, and interpretations. This is even true for tools provided by well-known legal research companies because they may hallucinate 17% to 33% of the time, [according to a May 2024 Stanford HAI study on GenAI in law](#). (Consumer-grade hallucination probability is much higher.)

Lawyers are responsible for any false or misleading information submitted to the court, even unintentionally. Lawyers who sign pleadings with false or misleading statements can be sanctioned under Rule 11 if the court finds frivolous arguments or a lack of evidentiary support. As of January 2025, there were [82 Standing Orders](#) addressing the use of GenAI, which mostly focus on candor.

When Is Accuracy More Likely?

Lawyers should have a sense of any tool’s accuracy or inaccuracy. GenAI is more likely to produce accurate information when plentiful factual associations exist in the dataset. If a topic has been widely analyzed by sophisticated legal bloggers, who each refer to similar quotes and examples, the training data will reflect this, which increases the statistical rate of association and thus the rate of accuracy.

Because let’s be clear: with Gen AI, factual accuracy is purely a matter of statistics—not an awareness or understanding of truth.

ACCOUNTABILITY—HOW TO EXERCISE INDEPENDENT JUDGMENT AND SUPERVISION

Lawyers must take accountability for all the work they do. This shows up as responsibility for the direction of the case (ABA Model Rule 2.1) and responsibility for anyone—or anything—that works on the case (ABA Model Rules 5.1 and 5.3).

Supervision is not passive. Lawyers must oversee the quality of any work product, whether human- or AI-generated. There is a distinction between delegating and assigning tasks. Delegation involves directing a subordinate to handle a task under supervision, while assignment is simply offloading a task without oversight or accountability.

It is tempting to fully assign tasks to GenAI tools, but this approach is flawed. A lawyer must review all AI-generated content thoroughly. If a task falls outside a lawyer's expertise, the lawyer may delegate this review task to a lawyer with that expertise. But it is not acceptable to ask a GenAI tool to review other GenAI output.

Avoiding AI-Driven Decision-Making

Lawyers must exercise independent judgment, making decisions based on their legal expertise and not any single outside source, including technology. Ground every decision—which arguments to make, which evidence to use, whether citations support propositions—in your expertise and experience. GenAI cannot provide the judgment needed to make sound choices.

GenAI outputs can seem authoritative, but be careful not to let the tool lead you to prioritize unsupported arguments or to neglect firm guidelines. While it may seem faster, using GenAI can lead to many pages of irrelevant material. So if lawyers use GenAI tools, they must be ready to not use any of the output at all. Letting an AI tool lead the case may violate ABA Model Rule 2.1.

GenAI cannot provide the judgment needed to make sound choices.

Supervising Lawyers, Vendors, Staff, and the Tools They Use

ABA Model Rules 5.1 and 5.3 require lawyers with supervisory responsibilities to oversee subordinate lawyers, non-lawyers, and vendors, making sure all meet the lawyer's professional obligations. Supervising lawyers should develop clear policies regarding when and how AI tools can be used. This includes when to verify AI-generated content, limiting the use of consumer-grade AI, and training team members on data protection. Policies should specify that there are no blanket approvals.

Creating and Enforcing Firm Policies

Under ABA Model Rule 5.1, law firms should develop firmwide GenAI policies that outline appropriate use, confidentiality requirements, security requirements, and verification standards. The firm must help employees understand the limited scope of approved tools and uses.

Supervisors are responsible for enforcing the firm's policies and training lawyers and staff to recognize risks. Topics to cover in policies and discussions may include:

- » **Training employees that ethical tool use involves choosing the right tool and knowing its risks, benefits, and limitations.** While employees may understand that they cannot use consumer-grade GenAI tools for legal research, they may not grasp the risk of using them for other tasks like editing completed documents, so be clear about the distinction. Employees should understand the scope of the tool's database and data collection process and for which tasks it is appropriate.¹³
- » **Creating a process for receiving work from subordinates that includes discussing how decisions were reached and what tools were used.** These decisions should become a regular part of the decision-making process. Supervisors must review documents for overall accuracy and quality of analysis, not just style and typos. Even a supervisor who has a long, positive relationship with the subordinate should still check the work to verify accuracy.
- » **Reiterating the need to verify AI outputs.** Though lawyers should be accustomed to confirming all facts and verifying all citations, including string-cites without checking all sources is a widely known problem. The ease of perpetuating this inaccuracy only increases with GenAI. Train employees to maintain control over the tool and the decisions about whether to use its suggestions.
- » **Emphasizing the heightened risk of failure to recognize hallucinations.** GenAI is often said to enable newer employees to take on higher level tasks, but hallucinations can be hard for a non-expert to spot. So, it's even more important to discourage working beyond a person's skillset. Make sure that the person responsible for the task is aware that they must know enough about the matter to judge whether it was done well. If the user cannot tell the difference, they have assigned the work, not delegated it, which violates the duty of supervision.

Vetting Third-Party AI Vendors

Under ABA Model Rule 5.3, lawyers must make sure vendors and software providers will comply with lawyers' ethical duties, including data privacy and ethical standards. Review terms of service for all vendors, and negotiate any terms that affect the potential for human review and data sharing and use. Any contracts should include confidentiality protections, data isolation requirements, and accountability measures.



¹³ For example, expecting to create a new document with a tool designed to summarize, or treating a brainstorming tool as one designed for research.



COMMUNICATION—HOW TO DISCUSS GENERATIVE AI WITH CLIENTS

According to ABA Model Rule 1.4, lawyers must keep clients informed about the material aspects of their representation and the methods used. Lawyers should discuss GenAI's confidentiality risks related to the firm's use of GenAI before the client's information is included in any GenAI tool. Also discuss risks that may arise if the client decides to use GenAI.

Obtaining Client Consent When Needed

Discuss with clients that information entered into GenAI cannot easily be removed and might influence future outputs. The potential for problems from cross-pollination only increase as firms represent more competing clients. Do not enter client information into GenAI without informed consent. In addition to confidentiality concerns, tell the client about the tool's role and discuss any accuracy risks, as well as their tolerance for novel legal theories.

Additionally, lawyers should detail both the benefits and potential risks when predictive, strategic, or experimental GenAI tools will play a significant role. Clients must understand that GenAI is not infallible and that any AI-assisted outputs will be subject to further review to ensure accuracy. Be candid with clients about increased risks introduced by the tool as well as the trade-offs that make the risks worthwhile.

PART 3

A PRACTICAL APPROACH TO AI: THE AI ENGAGEMENT FRAMEWORK

Ethical use of GenAI depends on how effectively you control the inputs and how deeply you engage with the outputs. You determine the quality and reliability of GenAI's assistance. Rather than treating technology as "safe" or "unsafe," take a more nuanced approach that empowers you to try new things without taking risks that can harm clients.

The AI Engagement Framework, an original concept developed by Ivy B. Grey at WordRake, is a tool for managing risk—and a guide for navigating the future. GenAI can potentially change the profession, but it also raises unprecedented challenges. Without intentional friction, lawyers risk sacrificing accuracy, confidentiality, and ethical standards in favor of convenience.

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Current guidelines often lack clear direction, which creates ambiguity. By categorizing tools, reintroducing intentional friction, and emphasizing critical engagement, the framework provides clear yet flexible guidelines to integrate GenAI into workflows with confidence and accountability.

Introduction to the Framework

The framework consists of three key dimensions: engagement, knowledge, and curation and validation.

Engagement examines the level of critical thinking applied, ranging from passive acceptance to active scrutiny. This directly impacts the ethical use of GenAI.

A low engagement user copies an AI-generated legal argument directly into a brief. The high-engagement user critically evaluates the argument, cross-referencing with primary sources and applying professional judgment. Only high engagement aligns with the [duty of competence](#) (ABA Model Rule 1.1) and the obligation to exercise independent professional judgment (ABA Model Rule 2.1).

Knowledge assesses the level of subject matter expertise and technical understanding needed to effectively use a GenAI tool and interpret its outputs. This dimension relates to technological competence (ABA Model Rule 1.1).

Tools that can be used effectively with minimal legal or technical expertise have a low knowledge requirement. Other tools, such as one that requires precise query formulation and deep legal knowledge to interpret the results, may have a high knowledge requirement. Higher knowledge requirements need more extensive training and expertise. This can limit the risk of misuse but also restrict accessibility.

The Sandwich Method: Engaging with GenAI Responsibly

One method to ensure ethical compliance while using GenAI in writing tasks is the "sandwich" approach. This technique involves:

- » **Starting with human input:** Begin each task by setting clear goals, outlining arguments, and structuring the document. This controls the direction of the document before GenAI enters the process.
- » **Using GenAI to expand on specific tasks:** Instead of drafting entire documents, GenAI can assist with discrete tasks, such as suggesting specific language, adding structure, or reviewing the pros and cons of a strategy. By limiting GenAI's involvement to support, lawyers maintain control over flow and focus.
- » **Reviewing and validating:** Thoroughly review all AI-generated content, verifying facts, citations, and reasoning to ensure that nothing compromises its integrity. The AI suggestions are merely one element of a lawyer's broader writing strategy.

Curation and validation evaluate the reliability of the tool's knowledge base and the built-in safeguards to ensure accuracy. Tools low in this dimension may be trained on unverified internet data with few built-in checks for accuracy. An example of a high-curation or high-validation tool could be a specialized legal GenAI tool trained exclusively on verified caselaw, statutes, and reputable secondary sources, with automatic citation generation.

Higher levels of curation and validation reduce the risk of presenting inaccurate information to courts or clients. This is particularly relevant to a lawyer's duty of candor to the tribunal (ABA Model Rule 3.3) and the overall obligation to provide competent representation.

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Risk Quadrants

Four factors determine the level of risk involved in using GenAI in law and the level of oversight each tool requires when used—this determines a tool's initial placement in the matrix:

1. How legal professionals **engage** with GenAI outputs and whether that involves critical inquiry or passive acceptance; whether the tool promotes active over passive participation, encouraging lawyers to critically verify AI-generated content for accuracy and relevance
2. How much a legal professional must **know** about their topic, the database, and the platform to obtain an acceptable response and recognize errors in responses
3. What level of **curation** underlies the training data and what guardrails are in place to validate responses before they are served to the user; how transparent, predictable, and reliable the outputs are so lawyers may explain and justify how they used AI to reach conclusions
4. What level of **confidentiality** protections are included in the tool; confidentiality concerns increase as matters move from minor inquiries to a client's specific facts or legal advice

AI Engagement Matrix - Adding Friction Reduces Risk



By combining these dimensions, we can create a matrix of risk quadrants:

- » Tools in the **low-risk** quadrant (high engagement, high knowledge, high curation/validation)—such as legal research tools used by experienced lawyers—are comparatively the safest.
- » The **moderate-risk** quadrant (moderate levels across all dimensions) might include AI-powered document review tools used by paralegals under lawyer supervision.
- » Commercial grade GenAI chatbots would fall into the **high-risk** quadrant (low engagement, low knowledge, low curation/validation) when used by non-lawyers for legal tasks, presenting significant ethical concerns.
- » Tools with mixed levels are of **variable risk** and require careful consideration.¹⁴

Benefits of the Framework

So far, the fear-driven response to the introduction of GenAI has produced great confusion without much flexibility regarding the rapid advancements that we see daily. Integrating new technologies into legal practice offers significant benefits and unique ethical challenges. The AI Engagement Framework will be essential in navigating the complex intersection of GenAI and legal ethics.

The AI Engagement Framework:

- » Emphasizes that the responsibility for tech use and outcomes is on the user
- » Helps us make informed decisions on what information AI tools should have access to, and which tools to use for specific tasks
- » Determines the level of scrutiny, knowledge, and interaction required to accept GenAI outputs and teaches responsible engagement
- » Guides ethical practices, firm policies, and training
- » Ensures governance and regulatory consistency and reasonableness while avoiding overbreadth
- » Avoids placing unreasonable burdens on tried-and-true, responsibly built legal tech
- » Creates a flexible guideline that can adapt as new tech comes to market

GenAI tools can be powerful aids for legal work, but they are only as good as the engagement and scrutiny you bring to them. The AI Engagement Framework serves as a guide to help you maintain full control over your professional judgment and ethical duties.

The AI Engagement Framework will be essential in navigating the complex intersection of GenAI and legal ethics.

¹⁴ For example, a highly curated tool used with low engagement might still present substantial risks.



THE ROLE OF GENAI-FREE WRITING TOOLS

GenAI can automate some writing tasks, but it’s not always the best tool for the job. In traditional practice, legal writing follows a process of research, drafting, editing, and finalizing. Each step requires critical oversight if GenAI is to be integrated:

- 1. Research:** While the right tool can expedite research, lawyers must verify all GenAI-provided information against trusted sources to ensure reliability.
- 2. Drafting:** AI-generated text should be treated as a rough draft. You remain responsible for guiding and refining content to align with legal standards and client objectives.
- 3. Editing:** If you need a complete rewrite, GenAI may be helpful because it necessarily rewrites your text. But GenAI may not be a good fit if you would like to keep what you have and improve upon it. It’s more like going back to the start than improving a nearly completed work product.
- 4. Finalizing:** Because GenAI tends to rewrite text entirely, it is not a good fit for finalizing tasks.

As part of the duty of competence, lawyers must decide when GenAI provides a practical advantage and when traditional tools might be better. For example, a simple legal document might be completed efficiently with a word processing program and templates or citation management.

The AI Engagement Framework in Action

Let’s practice applying the AI Engagement Framework and the ethics rules to a legal writing workflow. Though often viewed as a routine task, writing is the product of detailed analysis, intentional organization, and critical thought. Using GenAI responsibly demands a heightened awareness of how each step serves our goals.

Writing and editing tools that do not use GenAI, such as WordRake, continue to play a crucial role in legal practice. These tools offer several benefits that align well with ethical obligations and professional needs, while avoiding many of the problems inherent in AI.

Reliability and Consistency

GenAI-free tools like WordRake provide consistent editing algorithms based on established writing principles, offering a level of predictability that’s essential in legal writing, unlike GenAI tools that may produce unpredictable or hallucinated content. This reliability helps lawyers maintain the high standards of accuracy required in legal documents.

Assurance of Confidentiality

Tools that operate locally on a user’s device, without cloud connectivity, offer robust protection for client confidentiality. This aligns perfectly with the ethical duty to safeguard client information—and avoids the risks associated with transmitting sensitive data to external servers.

Ethical Compliance

By not using GenAI, lawyers can enhance their work product without navigating the complex ethical landscape. This simplifies compliance with ethical rules, particularly those related to competence (1.1), confidentiality (1.6), and independent judgment (2.1). Lawyers can improve their writing without worrying about such issues as data privacy, algorithmic bias, or the need for client consent for AI use.

Technology Competence

Using GenAI-free tools demonstrates a commitment to technology competence in a way that’s accessible and low risk. Lawyers can show that they are keeping abreast of relevant technology advancements while maintaining ethical compliance.

Focus on Human Expertise

These tools complement and enhance a lawyer’s own skills rather than attempting to replace them. The lawyer remains in control of the content while benefiting from technology-assisted improvements. WordRake, for example, suggests edits to improve clarity and concision but leaves the final decision to the lawyer. This supports the ethical requirement for lawyers to maintain independent professional judgment and provide competent representation.

Efficiency Without Compromise

Improve efficiency without introducing the risks associated with AI-generated content. By quickly identifying areas for improvement in writing, these tools allow lawyers to produce higher-quality documents in less time, benefiting both the lawyer and the client. Lawyers can meet their ethical obligations to work efficiently and keep fees reasonable.

Clear Audit Trail

Unlike some GenAI tools where the process of generating or modifying text can be opaque, GenAI-free tools often provide a clear, trackable editing process. This transparency is valuable for both quality control and potential ethical reviews. Lawyers can easily see what changes were suggested and made, maintaining a clear record.

Framework for considering AI



BALANCING INNOVATION WITH INTEGRITY

The future of legal practice will see increased reliance on technology, but the principles of ethical representation, professional judgment, and client-centered service remain timeless. All software tools must be evaluated on their ability to serve these values, ensuring that innovation improves rather than undermines the quality of legal practice. GenAI-free writing tools (like WordRake) can provide a bridge between tradition and the unknown, allowing lawyers to enhance their work while maintaining full control and compliance.

Legal writing reflects a lawyer's thought process, judgment, and commitment to analytical reasoning. But it's also difficult and time-consuming. That's why it serves as a great lens through which to consider new technology.

To navigate the ethical challenges of technology in legal practice, lawyers must first develop a solid understanding of available tools and their limitations. This comes from regularly testing and evaluating tools with and without AI, staying informed about updates and changes, and participating in continuing education.

As professionals, we must approach technology adoption thoughtfully, always prioritizing ethical obligations and the client's best interests. No increase in efficiency is worth a loss of trust.

GenAI-free writing tools can provide a bridge between tradition and the unknown, allowing lawyers to enhance their work while maintaining full control and compliance.

USE WORDRAKE TO WRITE WITH CLARITY, BREVITY, AND SIMPLICITY—100% SECURELY

WordRake is editing software designed by legal-writing expert and *New York Times* bestselling author Gary Kinder. Our software is based on linguistic and subject matter expertise, as well as our founder's decades of experience teaching writing programs for the American Bar Association, AMLAW 100 firms, government agencies, and Fortune 500 companies.

WordRake offers over 50,000 edits to improve clarity, brevity, and simplicity. Like an editor or helpful colleague, WordRake searches your document for extra words, cumbersome phrases, jargon and legalese, nominalizations, redundancies, and more. It runs in Microsoft Word and Outlook and suggests changes in the familiar track-changes style.

Designed for legal, business, and government writers, WordRake respects legally operative phrases and converts writing to plain English. Editing for clarity and concision has never been easier.

WordRake Enterprise is the preferred editing software for companies that handle confidential information. The software does not rely on user-reported data or machine learning and has no access to track usage or transmit your data. It runs exclusively on the local machine, and never communicates with the cloud or any other device—ever.

WordRake will help you write better, more effective prose; meet word limits; save time; and write to the point. And at \$149 to \$229 per year, any lawyer, writer, or businessperson can afford it—and save even more with term and volume discounts. Learn more about WordRake at www.WordRake.com.



ABOUT THE AUTHOR

Ivy B. Grey is the Chief Strategy & Growth Officer for WordRake. Before joining the WordRake team, she practiced corporate bankruptcy law for ten years. During her decade of legal practice, Ivy was named a Rising Star in the New York Metro Area for five consecutive years. Her significant representations included American Airlines, Columbia House, Kodak, and Dewey & LeBoeuf.

Now, Ivy is a regular ethics and innovation speaker. In 2020, she was recognized as an Influential Woman in Legal Tech by ILTA. She has also been recognized as a Fastcase 50 Honoree and included in the Women of Legal Tech list by the ABA Legal Technology Resource Center.