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## Ethics Of Artificial Intelligence For Lawyers: I'm Sorry Dave, I'm Afraid I Can't Do That: Competence, Confidentiality, And Communication

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# ETHICS OF ARTIFICIAL INTELLIGENCE FOR LAWYERS: I'M SORRY DAVE, I'M AFRAID I CAN'T DO THAT: COMPETENCE, CONFIDENTIALITY, AND COMMUNICATION

Cliff McKinney\*

## I. INTRODUCTION

In Stanley Kubrick's *2001: A Space Odyssey*, the spaceship's onboard computer, HAL, calmly refuses to follow the astronaut's command with the chilling words, "I'm sorry, Dave, I'm afraid I can't do that."<sup>1</sup> HAL's response has become a cultural shorthand for what happens when human expectations collide with machine limitations. The line endures because it captures the chilling reality that machines may appear capable, but they cannot always be trusted to act in ways humans expect or need.

Lawyers today face a similar dilemma when using artificial intelligence. Artificial intelligence tools can draft memos, summarize discovery, and even generate arguments, but the tools cannot replace the independent judgment, candor, and ethical responsibility that define the practice of law. In July 2024, the American Bar Association issued Formal Opinion 512 as the first comprehensive attempt to guide lawyers in the use of artificial intelligence.<sup>2</sup>

This installment explores three pillars of Formal Opinion 512: competence, confidentiality, and communication.<sup>3</sup> These pillars focus on what lawyers need to understand about artificial intelligence, how they must safeguard client information when

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1. 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968).

2. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024), at 1.

3. See *infra* Part II.

using these new tools, and when they are required to disclose its use to clients.<sup>4</sup>

## II. BREAKDOWN OF ABA FORMAL OPINION 512

On July 29, 2024, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512 (“ABA Opinion”).<sup>5</sup> The fifteen-page ABA Opinion discusses the ethical issues related to the use of artificial intelligence and provides general guidance on its ethical use. The ABA Opinion focuses primarily on the use of generative artificial intelligence because of its ability to replicate human responses.<sup>6</sup> The ABA Opinion notes that artificial intelligence is “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.”<sup>7</sup> It begins with a series of questions:

What level of competency should lawyers acquire regarding a GAI [i.e., generative artificial intelligence] 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?<sup>8</sup>

To answer these questions, the ABA Opinion includes a discussion divided into six subparts: 1. Competence, 2. Confidentiality, 3. Communication, 4. Meritorious Claims and Contentions and Candor Toward the Tribunal, 5. Supervisory Responsibilities, and 6. Fees. We will consider each of these parts in turn.<sup>9</sup>

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4. *See infra* Part II.

5. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024), at 1.

6. *Id.* at 1-2.

7. *Id.* at 2 (emphasis in original).

8. *Id.* at 2.

9. There may be other ethical risks beyond those identified by the ABA Opinion, and many commentators are beginning to explore this complicated issue. *See, generally*, Carol M. Bast, *Artificial Intelligence and Ethics*, 50 RUTGERS COMPUTER & TECH. L.J. 283, 307 (2024).

### A. Competence

The longest subpart in the ABA Opinion is on the issue of competence, though the topic of fees is a close second. The discussion centers on the role of Rule 1.1 of the ABA Model Rules of Professional Conduct.<sup>10</sup> Model Rule 1.1 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.<sup>11</sup>

The ABA Opinion recognizes that a lawyer “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.”<sup>12</sup> The ABA Opinion also states that a lawyer “need not become [a] GAI expert[]” to competently use artificial intelligence tools.<sup>13</sup> However, “lawyers must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use.”<sup>14</sup> Lawyers can achieve this understanding through self-study or by relying on the guidance and expertise of others to understand the tools’ “benefits and risks.”<sup>15</sup> Lawyers are encouraged to read about artificial intelligence tools, attend relevant continuing legal education classes, and consult with others who are already proficient.<sup>16</sup>

The ABA Opinion cautions that the risk of hallucinations threatens the potential for improved efficiency and quality of legal work from using artificial intelligence.<sup>17</sup> The hallucinations can lead to giving inaccurate legal advice to clients or making

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10. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 2.

11. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2025).

12. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 2.

13. *Id.*

14. *Id.* at 2-3.

15. *Id.* at 2.

16. *Id.*

17. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 3.

misleading representations to courts and other parties.<sup>18</sup> The ABA Opinion states that artificial intelligence “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.”<sup>19</sup> A lawyer must use “an appropriate degree of independent verification or review of [the] output” to ensure accuracy before relying on artificial intelligence.<sup>20</sup> Put differently, Model Rule 1.1 requires lawyers to be skeptical of the results of artificial intelligence and verify their accuracy.<sup>21</sup>

The appropriate level of verification or review depends on the tool and the task.<sup>22</sup> For example, the ABA Opinion suggests manually testing the accuracy of an artificial intelligence tool on a small set of documents before relying on it to summarize a larger set.<sup>23</sup> Less independent verification and may be necessary when artificial intelligence is used for a limited task, such as brainstorming ideas.<sup>24</sup> In contrast, more thorough verification is required when artificial intelligence is used to generate an analysis that forms the basis of legal advice or a draft of a legal document.<sup>25</sup> The ABA Opinion states, “[R]egardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.”<sup>26</sup> Lawyers must also be aware that artificial intelligence tools may contain outdated or biased content due to the material used for training, which could lead to discriminatory results that require careful review.<sup>27</sup>

The ABA Opinion observes, “Competent representation presupposes that lawyers will exercise the requisite level of skill

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18. *Id.* at 3.

19. *Id.* at 4.

20. *Id.* at 4.

21. Samuel D. Hodge, Jr., *Revolutionizing Justice: Unleashing the Power of Artificial Intelligence*, 26 SMU SCI. & TECH. L. REV. 217, 245 (2023).

22. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 4.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 3. See also Martin E. Hsia, *From Typewriters to Artificial Intelligence: Issues in Everyday Legal Practice as Technology Evolved over the Last 40 Years*, HAW. B.J., September 2024, at 4, 13.

and judgment regarding all legal work.”<sup>28</sup> As the quality and accuracy of artificial intelligence continue to improve, it could become so ubiquitous and necessary that lawyers will be expected to use it in practice.<sup>29</sup> Artificial intelligence could become essential in the same way that computers, email, and online legal research tools like Westlaw and Lexis are now necessary to the competent practice of law.<sup>30</sup> Rule 1.1 does not require attorneys to become experts in artificial intelligence, but it does require attorneys to “have a reasonable understanding of the benefits and drawbacks of using generative artificial intelligence, including the capabilities and limitations of the particular generative artificial intelligence technology which they might utilize in their practice.”<sup>31</sup> The ABA Opinion concludes that “even in the absence of an expectation for lawyers to use GAI as a matter of course,” lawyers still have a professional obligation to become aware of relevant artificial intelligence tools so 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.”<sup>32</sup> In other words, complying with the duty of competency under Model Rule 1.1 might involve more than just fact-checking the output of artificial intelligence; the rule may also require lawyers to learn to use the technology the same way that a competent lawyer must now be able to use computers and conventional software.<sup>33</sup> Notably, Florida has added the following official commentary to its version of Rule 1.1:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, *including generative artificial*

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28. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 4.

29. *Id.*

30. *Id.* at 4-5.

31. Blake A. Klinkner, *Generative Artificial Intelligence and Attorney Competence*, WYO. LAW., October 2024, at 40.

32. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 5.

33. See Hodge, *supra* note 21, at 245. See also GEORGE NINO & BRADLEY C. WEBER, *The Real Ethics of Artificial Intelligence-Considerations for Legal Professionals*, in NAT. RES. & ENERGY L. INST. 28-1, 28-19. See also Trisha Rich, *The Only Constant Is Change: A Look at ChatGPT*, Chicago Bar Assoc. Rec. (May/June 2023), at 40.

*intelligence*, and comply with all continuing legal education requirements to which the lawyer is subject.<sup>34</sup>

## B. Confidentiality

The next topic covered by the ABA Opinion was the duty of confidentiality. The duty of confidentiality is found in Model Rule 1.6, Model Rule 1.9(c), and Model Rule 1.18(b). Model Rule 1.6 requires a lawyer “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.”<sup>35</sup> Model Rule 1.9(c) and Model Rule 1.18(b) require a lawyer to provide similar confidentiality to former and prospective clients.<sup>36</sup> The rules require a lawyer to consider “the likelihood of disclosure and unauthorized access, the sensitivity of the information, the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer’s ability to represent the client.”<sup>37</sup>

These rules require a lawyer to consider the risk of exposure of confidential information prior to inputting information into an artificial intelligence tool.<sup>38</sup> The ABA Opinion notes two scenarios where artificial intelligence risks inadvertent disclosure: (1) information input into a closed system inside the firm that inadvertently provides information to other lawyers within the firm who then use the information without knowing it is confidential or who are prohibited from having the information under an ethics wall; or (2) information input into an open system that uses it for training and may disclose it to third parties.<sup>39</sup>

The ABA Opinion emphasizes the requirement for informed consent before inputting information related to the representation into an artificial intelligence tool.<sup>40</sup> However, the ABA Opinion recognizes situations where informed consent is unnecessary

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34. Fla. State Bar R. 4-1.1 (emphasis added).

35. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 6.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 6-7.

40. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 7.

because the use of the tool does not constitute “inputting information relating to the representation.”<sup>41</sup> The ABA Opinion, though, fails to define what “information relating to the representation” is. Does that include information that has been de-identified through methods such as generalization and anonymization so that there is no linkage back to a client?<sup>42</sup> De-identification is a recognized technique for preserving confidentiality while using artificial intelligence, but the ABA Opinion fails to even mention or consider it. The ABA Opinion also fails to address the role of settings within artificial intelligence, such as those that delete user data, prohibit sharing or training, or block third-party access.

The ABA Opinion discusses at greater length the requirement to obtain *informed* consent.<sup>43</sup> It states, “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.”<sup>44</sup> A lawyer must explain the extent of the risk that “later users or beneficiaries” of the artificial intelligence tool might have access to the information.<sup>45</sup> The ABA Opinion says that “merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.”<sup>46</sup> Interestingly, though, the ABA Opinion has a seeming disconnect on this issue because the following section title, *Communication*, advises using the engagement letter to disclose the use of artificial intelligence, even concluding, “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.”<sup>47</sup>

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41. *Id.*

42. Paris Roditis, *How to Use AI Without Breaching Confidentiality*, LEGALVISION (Jan. 13, 2025), [<https://perma.cc/VS63-ZAGL>].

43. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 7.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 9.

The ABA Opinion says that “it will be difficult to evaluate the risks 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.”<sup>48</sup> It goes on to say, “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.”<sup>49</sup> While the ABA Opinion advises consulting with IT professionals and cyber security experts, the ABA Opinion does not explain how this might change the requirements for obtaining informed consent, especially if the artificial intelligence tool has integrated confidentiality protections.

This Confidentiality section of the ABA Opinion leaves several ethical questions unanswered and does not address common methods of using artificial intelligence while retaining confidentiality. Additionally, the Confidentiality section emphasizes the importance of obtaining informed consent from clients, suggesting that this is necessary almost every time artificial intelligence is used. However, this notion is contradicted—or perhaps clarified—in the subsequent section, Communication. While confidentiality is certainly a significant concern, it is interesting to note that none of the Twenty-Five Cases involved a breach of attorney-client confidentiality, and there are numerous ways to use artificial intelligence while minimizing the risk of disclosing confidential information. Commentators note that a lawyer may not be required to disclose the use to clients or obtain consent if a lawyer concludes there is no risk of revealing confidential information by using artificial intelligence.<sup>50</sup> An attorney can comply with Rule 1.6’s confidentiality requirements by ensuring that client data is properly protected.<sup>51</sup> Depending on the artificial intelligence tool

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48. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 7.

49. *Id.*

50. Sarah E. Peterson, *Ethical Dilemma: Ethical Considerations When Using Generative Artificial Intelligence*, WIS. LAW., October 2024, at 29, 31.

51. See Hodge, *supra* note 21, at 246.

being used, it may be possible to comply with this rule through settings that limit the ability of the tool to collect or retain information inputted by the lawyer.<sup>52</sup> Utilizing a reputable artificial intelligence vendor with appropriate confidentiality policies might also help satisfy this rule.<sup>53</sup>

### C. Communication

The ABA Opinion states that Model Rule 1.4 may require disclosure and informed consent of artificial intelligence usage in certain circumstances.<sup>54</sup> The ABA Opinion cites Model Rule 1.4(a)(2) and (b) as especially important in the context of artificial intelligence usage.<sup>55</sup> Model Rule 1.4 states:

- (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.<sup>56</sup>

The ABA Opinion says, "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

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52. Keith A. Call, *Artificial Intelligence and the Lawyer's Duty of Confidentiality*, UTAH B.J., January/February 2025, at 51, 52.

53. See Nino, *supra* note 33, at 28-21.

54. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 8.

55. *Id.*

56. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2025).

use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.”<sup>57</sup> A lawyer is required to disclose the use of artificial intelligence if the client expressly asks or if the engagement letter expressly requires disclosure.<sup>58</sup> The question is when the use of artificial intelligence has to be disclosed, even when the client has not asked.<sup>59</sup> The ABA Opinion says that communication and informed consent are required if the lawyer proposes to input “information relating to the representation” or if artificial intelligence is the “basis or reasonableness of a lawyer’s fee.”<sup>60</sup> The ABA Opinion says that communication about using artificial intelligence is also required when it “will influence a significant decision in the representation, such as when a lawyer relies on GAI technology to evaluate potential litigation outcomes or jury selection.”<sup>61</sup> Stated another way, “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.”<sup>62</sup> The ABA Opinion also says, “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.”<sup>63</sup>

The ABA Opinion goes on to acknowledge that there are circumstances where disclosure and informed consent are not required.<sup>64</sup> Factors such as “the client’s needs and expectations, the scope of the representation, and the sensitivity of the information involved” can weigh for or against required disclosure.<sup>65</sup> The ABA Opinion says, “Potentially relevant

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57. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 8.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 8-9.

62. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 9.

63. *Id.*

64. *Id.*

65. *Id.*

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.”<sup>66</sup>

Some commentators argue that an attorney may have a duty to communicate a decision to use artificial intelligence, as well as a decision not to use it, implying that a discussion about artificial intelligence could be required in every attorney-client relationship.<sup>67</sup> Arguably, this means that all attorneys should begin addressing artificial intelligence in engagement letters, whether they choose to use the tools or not. This is, however, a debated ethical area.<sup>68</sup> There will likely be an eventual assumption that artificial intelligence is being used as it becomes more widespread. I am not aware of any attorneys who include a section in their engagement letter stating their intention to use specific tools, such as computers, email, Microsoft Word, cellphones, Westlaw, or Lexis. In the meantime, though, attorneys should add a disclosure in their engagement letters.<sup>69</sup>

### III. CONCLUSION

The message of the ABA Opinion is that, regardless of how advanced artificial intelligence becomes, it cannot replace a lawyer's independent judgment. Competence requires lawyers to understand both the strengths and limitations of these tools. Confidentiality requires vigilance to ensure client information is never exposed carelessly. Communication requires candor with clients about when and how artificial intelligence is being used in their matters.

The next part of this series will continue with the ABA Opinion, examining candor toward the tribunal, supervisory

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66. *Id.*

67. Reginald A. Hirsch & Patrick A. Wright, *Ethics for Texas Family Law Attorneys Using AI*, 2024 TXCLE Advanced Family L. 21-III, 2024 WL 3875306.

68. See Nino, *supra* note 33, at 28-21.

69. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, at 9.

responsibilities, and the difficult questions surrounding fees in an era of artificial intelligence.