

# The Legal Ethics of Generative AI

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## I. INTRODUCTION

The legal profession is notoriously conservative when it comes to change.<sup>1</sup> From email to outsourcing,<sup>2</sup> lawyers are often slow to embrace new methods of delivering legal services and quick to point out potential problems, especially ethics-related concerns.

The legal profession's approach to generative artificial intelligence (generative AI) is following a similar pattern. Many lawyers have readily identified the legal ethics issues associated with generative AI,<sup>3</sup> often citing a New York lawyer who cut and pasted fictitious citations from ChatGPT into a federal court filing.<sup>4</sup> Some judges have gone so far as to issue standing orders requiring lawyers to reveal when they use generative AI or have banned the use of most kinds of artificial intelligence (AI) outright.<sup>5</sup> Bar associations are chiming in on the

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1. See generally RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 1-15 (2d ed. 2017) (discussing legal profession's slow adoption of new technologies).

2. See, e.g., ABA Comm. on Ethics & Pro. Resp., Formal Op. 99-413, at 11 n.40 (1999) (noting earlier ethics opinions cautioning lawyers against using unencrypted email); AM. BAR ASS'N COMM'N ON ETHICS 20/20, REPORT ON RESOLUTION 105(c) 2 (2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_-2020/2012\\_hod\\_annual\\_meeting\\_105c\\_filed\\_may\\_2012.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_-2020/2012_hod_annual_meeting_105c_filed_may_2012.pdf) (last visited Feb. 19, 2024) [hereinafter REPORT ON RESOLUTION 105(c)] (acknowledging controversial nature of Commission's proposals regarding outsourcing).

3. LEXISNEXIS, LEGAL AI UPDATE: 2023 GENERATIVE AI & THE LEGAL PROFESSION (2023), <https://www.lexisnexis.co.uk/pdf/generative-ai-and-the-legal-profession-report.pdf> [<https://perma.cc/93PG-JL3F>] (finding that 87% of surveyed lawyers were significantly concerned about ethical implications of generative AI); Matt Reynolds, *Majority of Lawyers Have No Immediate Plans to Use Generative AI, LexisNexis Survey Finds*, AM. BAR ASS'N J. (Mar. 24, 2023) <https://www.abajournal.com/web/article/survey-finds-majority-of-lawyers-have-no-immediate-plans-to-use-generative-ai> [<https://perma.cc/PN7P-YM7Y>] (reporting that 60% of surveyed lawyers had no plans to use generative AI at that time).

4. *Mata v. Avianca*, No. 22-cv-1461, 2023 U.S. Dist. LEXIS 108263, at \*3 (S.D.N.Y. June 22, 2023) (sanctioning lawyers for filing "false and misleading statements to the Court").

5. See Sara Merken, *Another U.S. Judge Says Lawyers Must Disclose AI Use*, REUTERS (June 8, 2023), <https://www.reuters.com/legal/transactional/another-us-judge-says-lawyers-must-disclose-ai-use-2023-06-08/> (last visited Aug. 4, 2024) (comparing standing orders issued by Judge Stephen Vaden and United States District Judge Brantley Starr); Cedra Mayfield, *Judicial Crackdown: 'This Is Why I Have a Standing Order on the Use of AI'*, ALM LAW.COM (July 27, 2023), <https://www.law.com/2023/07/27/judicial-crackdown-this-is-why-i-have-a-standing-order-on-the-use-of-ai/> [<https://perma.cc/325M-AJSA>] (discussing generative AI standing orders issued by federal judges in four states); *infra* note 73 (listing standing orders on generative AI).

subject as well, though they have (so far) taken an admirably open-minded approach.<sup>6</sup>

Part II of this essay explains why the Model Rules of Professional Conduct (Model Rules) do not pose a regulatory barrier to lawyers' careful use of generative AI, just as the Model Rules did not ultimately prevent lawyers from adopting many now-ubiquitous technologies.<sup>7</sup> Drawing on my experience as the Chief Reporter of the ABA Commission on Ethics 20/20 (Ethics 20/20 Commission), which updated the Model Rules to address changes in technology, I explain how lawyers can use generative AI while satisfying their ethical obligations.<sup>8</sup> Although this essay does not cover every possible ethics issue that can arise or all of generative AI's law-related use cases, the overarching point is that lawyers can use these tools in many contexts if they employ appropriate safeguards and procedures.<sup>9</sup>

Part III describes some recent judicial standing orders on the subject and explains why they are ill-advised.<sup>10</sup>

The essay closes in Part IV with a potentially provocative claim: the careful use of generative AI is not only consistent with a lawyer's ethical duties, but the duty of competence may eventually *require* its use.<sup>11</sup> The technology is likely to become so important to the delivery of legal services that lawyers who fail to use it will be considered as incompetent as lawyers today who do not know how to use computers, email, or online legal research tools.

## II. MODEL RULES IMPLICATED BY LAWYERS' USE OF GENERATIVE AI

Generative AI refers to technologies "that can generate high-quality text, images, and other content based on the data they were trained on."<sup>12</sup> The tools have the potential to reshape law practice,<sup>13</sup> but lawyers necessarily need to consider a number of ethics-related issues. Although the list below is not comprehensive, the primary takeaway is that the Model Rules offer a helpful roadmap for the ethical use of generative AI.

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6. See, e.g. Fla. State Bar Ass'n Comm. on Pro. Ethics, Informal Opinion 24-1 (2024) (identifying ethical issues that lawyers need to address when using generative AI); CAL. STATE BAR STANDING COMM. ON PRO. RESP. AND CONDUCT, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW, 1 (Nov. 16, 2023), <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf> [<https://perma.cc/B3X4-FAEC>] (reaching a similar conclusion); N.J. CTS., NOTICE TO THE BAR, LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS 1-2 (2024), <https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf> [<https://perma.cc/LK7V-KY2R>] (reaching a similar conclusion).

7. See *infra* note 86 and accompanying text (discussing adoption of email).

8. See N.J. CTS., *supra* note 6, at 3-4 (making similar observation).

9. See *infra* Part II (describing implicated Model Rules).

10. See *infra* Part III (focusing on current standing orders).

11. See *infra* Part IV (outlining future vision of AI role in lawyering).

12. Kim Martineau, *What Is Generative AI?*, IBM: BLOG (Apr. 20, 2023), <https://research.ibm.com/blog/-what-is-generative-ai> (last visited Feb. 22, 2024).

13. Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, 30 MICH. TECH. L. REV. (forthcoming 2024).

### A. The Duty of Confidentiality Under Model Rule 1.6

Lawyers must address several confidentiality issues when inputting or uploading client-related information into a generative AI tool. These issues, however, are not especially novel.<sup>14</sup> For many years, lawyers have faced conceptually similar situations when using third-party, cloud-based technology, such as online document storage systems (e.g., Microsoft OneDrive or Dropbox) and email services (e.g., Gmail).<sup>15</sup> Lawyers have also had to navigate confidentiality issues when inputting information into third-party tools, such as when querying online legal research tools like Westlaw and Lexis. Just as lawyers can adopt appropriate safeguards when using these kinds of services, they can do so when using generative AI.

The Ethics 20/20 Commission proposed amendments to the Model Rules to help lawyers address these kinds of confidentiality concerns.<sup>16</sup> Model Rule 1.6(c), which was added in 2012, explains that “[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.”<sup>17</sup>

Comment 18 then refers lawyers to Model Rule 5.3, Comments 3-4 for guidance on how to comply with the duty when sharing information with third parties outside the lawyer’s firm.<sup>18</sup> Rule 5.3, Comment 3 is especially instructive. It counsels a lawyer to make “reasonable efforts to ensure” that outside service providers act in ways that are compatible with the lawyer’s professional obligations.<sup>19</sup> The scope of this obligation varies depending on the nature of the services involved, the terms of any arrangements concerning client information, and

14. See Fla. State Bar Ass’n Comm. on Pro. Ethics, Informal Opinion 24-1 (2024) (reaching a similar conclusion).

15. See *id.*; Andrew C. Budzinski, *Clinics, the Cloud, and Protecting Client Data in the Age of Remote Lawyering*, 29 CLINICAL L. REV. 201, 201-03 (2023) (weighing cloud storage and professional responsibility considerations). Because most client data is now electronic, “the ethical lawyer must protect that data under their duty of confidentiality, to safeguard client property, and to protect the attorney-client privilege and work-product doctrine.” See *id.* at 202-03.

16. See ABA Commission on Ethics 20/20, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/aba-commission-on-ethics-20-20/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on-ethics-20-20/) (last visited Feb. 19, 2024) (offering background and updates on Commission activities).

17. See MODEL RULES OF PRO. CONDUCT r 1.6(c) (AM. BAR ASS’N 2020).

18. See MODEL RULES OF PRO. CONDUCT r 1.6(c) cmt. [18] (AM. BAR ASS’N 2020) (referring readers to Model Rule 5.3, Comments 3-4); MODEL RULES OF PRO. CONDUCT r 5.3 cmt. [3]-[4] (AM. BAR ASS’N 2020) (commenting on how lawyers should obtain client consent before using third-party nonlawyers).

19. See MODEL RULES OF PRO. CONDUCT r 5.3 cmt. [3] (AM. BAR ASS’N 2020) (asserting standard). The Comment provides as follows:

When using . . . services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

*Id.*

the “legal and ethical environments of the jurisdictions where the services are performed.”<sup>20</sup> Put simply, lawyers can satisfy their confidentiality obligations when using generative AI tools (i.e., a “service outside the firm”) as long as they “make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.”<sup>21</sup>

This prescription means that, in the absence of informed client consent, lawyers should not insert or upload confidential information into many versions of generative AI services (like ChatGPT) because the companies operating those services typically have the right to review the prompts that are used.<sup>22</sup> The companies also can train their models on any information that a lawyer shares.<sup>23</sup>

In contrast, lawyers can satisfy their duty of confidentiality when using third-party generative AI tools by making reasonable efforts to ensure that the third parties do not access the prompts or train their models from those prompts. For example, OpenAI has a version of ChatGPT (ChatGPT Enterprise) that includes data protection procedures that likely satisfy a lawyer’s duty of confidentiality.<sup>24</sup> In that case, the use of generative AI would be analogous to a lawyer’s use of Microsoft OneDrive or a query on Westlaw or Lexis.

Other factors that lawyers need to consider include the reputation and location of the provider. For example, lawyers should be more wary of using a generative AI tool owned and operated in China versus one owned and operated in the United States.

In the absence of purchasing an instance of a third-party tool with appropriate privacy protections in place, lawyers have several options for satisfying their confidentiality obligations. First, they could use the tools without uploading or sharing client confidences. Generative AI can be quite useful even without disclosing confidential information, just as legal research tools can be helpful without disclosing such confidences.

Second, lawyers can explore whether an existing tool has an option for protecting the confidentiality of prompts and whether the terms and conditions are sufficient to safeguard client information. For example, ChatGPT has a “temporary chat” feature, which (according to the company) “won’t be used to improve

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20. *Id.* (describing multiple factors).

21. *Id.*

22. See David Canellos, *What to Know About Sharing Company Data with Generative AI*, FORBES (Aug. 10, 2023), <https://www.forbes.com/sites/forbestechcouncil/2023/08/10/what-to-know-about-sharing-company-data-with-generative-ai/?sh=1ec0fff60229> [<https://perma.cc/7HCS-3JEF>] (describing the dangers of using generative AI, including data leakage and exposing personally identifiable information); Michael Schade, *How Your Data Is Used to Improve Model Performance*, OPENAI (2023), <https://help.openai.com/en/articles/5722486-how-your-data-is-used-to-improve-model-performance> (last visited Feb. 19, 2024) (explaining how the company uses consumer data). With regard to Open AI’s Enterprise service, authorized employees are permitted to view stored inputs and outputs as are “specialized third-party contractors who are bound by confidentiality and security obligations.” See OpenAI, *API Platform FAQ*, <https://openai.com/enterprise-privacy> [<https://perma.cc/Y8VZ-KQWW>] (describing OpenAI’s policies regarding enterprise data).

23. See Schade, *supra* note 22 (describing OpenAI training policies).

24. See OpenAI, *supra* note 22 (highlighting ChatGPT Enterprise data protection procedures).

[their] models.<sup>25</sup> Whether the prompts may nevertheless be available to the company for review in other respects is less clear.

Third, lawyers could build their own generative AI tools. Although few law firms and legal departments currently have sufficient resources to do so on their own, the expense of deploying these tools internally may not be as expensive as many lawyers believe.<sup>26</sup>

A final option is for a lawyer to obtain a client's informed consent under Rule 1.6(a).<sup>27</sup> Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."<sup>28</sup> Rule 1.0 Comment 6 elaborates on the meaning of informed consent, but the essential idea is that the client must have sufficient information to make an informed decision, with lawyers having a greater obligation to disclose information to unsophisticated clients than to those who are experienced regarding the conduct for which consent is sought.<sup>29</sup> For example, before sharing confidential information with a generative AI tool, a lawyer would have to explain the implications of doing so in more detail to the typical client than to the executive of an AI company. That said, given the current lack of technological sophistication of most lawyers and clients, it may not be possible in some instances to obtain informed consent to share sensitive information with many generative AI tools.

In sum, lawyers can comply with their duty of confidentiality when using generative AI tools either by not sharing confidential information (e.g., by prompting the tool with generic information) or by using tools owned and controlled by companies that have appropriate terms and conditions on how the information can be used. An increasing number of well-established, reputable companies that have long served the legal industry are already launching generative AI tools in an attempt to satisfy these requirements.<sup>30</sup> Building a proprietary service is

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25. *Temporary Chat FAQ*, OPENAI, <https://help.openai.com/en/articles/8914046-temporary-chat-faq> (last visited Sept. 14, 2024).

26. See Robert J. Ambrogi, *Four Months After Launching Its 'Homegrown' GenAI Tool, Law Firm Gunderson Dettmer Reports on Results So Far, New Features, and a Surprise on Cost*, LAWSITES (Dec. 20, 2023) <https://www.lawnext.com/2023/12/four-months-after-launching-its-homegrown-genai-tool-law-firm-gunderson-dettmer-reports-on-results-so-far-new-features-and-a-surprise-on-cost.html> [<https://perma.cc/6N35-GVD4>] (commenting on Gunderson Dettmer's recent launch of "ChatGD"). Gunderson's Chief Innovation Officer projects that the total annual cost for providing ChatGD to the entire firm "will be less than \$10,000." See *id.*

27. See MODEL RULES OF PRO. CONDUCT r 1.6(a) (AM. BAR ASS'N 2020) (providing that "[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)").

28. See MODEL RULES OF PRO. CONDUCT r 1.0(e) (AM. BAR ASS'N 2020) (defining informed consent).

29. See MODEL RULES OF PRO. CONDUCT r 1.0 cmt. [6] (AM. BAR ASS'N 2020) (elaborating on the definition of informed consent).

30. See *LexisNexis Launches Lexis+ AI, a Generative AI Solution with Linked Hallucination-Free Legal Citations*, LEXISNEXIS (Nov. 14, 2023), <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexis-nexis-launches-lexis-ai-a-generative-ai-solution-with-hallucination-free-linked-legal-citations> [<https://perma.cc/T82P-R2QY>] (explaining development and capabilities of Lexis+ AI); *Thomson Reuters Launches Generative*

another option that is likely to become increasingly cost effective, and informed consent offers yet another possibility depending on the sophistication of the lawyer and the client.

### *B. Consulting with Clients Under Model Rule 1.4*

Rule 1.4 imposes a number of duties on lawyers to keep clients informed about a pending matter.<sup>31</sup> As applied to generative AI, the most relevant portion may be Rule 1.4(a)(2). It explains that “a lawyer shall reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”<sup>32</sup> Comment [3] elaborates on the duty this way:

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.<sup>33</sup>

Because the use of generative AI can be viewed as one of the “means to be used to accomplish the client’s objectives,” Rule 1.4(a)(2) arguably imposes on a lawyer the duty to consult with a client before using such services.<sup>34</sup> Thus, even if a lawyer can overcome the confidentiality issues described earlier—such

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*AI-Powered Solutions to Transform how Legal Professionals Work*, THOMSON REUTERS (Nov. 15, 2023), <https://www.thomsonreuters.com/en/press-releases/2023/november/thomson-reuters-launches-generative-ai-powered-solutions-to-transform-how-legal-professionals-work.html> [https://perma.cc/KS42-BY4Y] (debuting AI-Assisted Research on Westlaw Precision).

31. See MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS’N 2020). Rule 1.4 provides as follows:

(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.

See *id.*

32. See MODEL RULES OF PRO. CONDUCT r. 1.4(a)(2) (AM. BAR ASS’N 2020) (explaining that lawyers must reasonably consult with their clients on their objectives).

33. MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. [3] (AM. BAR ASS’N 2020).

34. See MODEL RULES OF PRO. CONDUCT r. 1.4(a)(2) (AM. BAR ASS’N 2020) (requiring lawyers to “reasonably consult” with clients about the means used to accomplish objectives).

as by deploying a tool that contains appropriate privacy protections—a lawyer may still have to inform the client about the tool’s use in the client’s matter. Indeed, some lawyers have begun to inform clients about these uses in their engagement letters.<sup>35</sup>

Such a consultation is only arguable because it is not entirely clear that a lawyer’s use of generative AI is sufficiently important to warrant a consultation in all circumstances. For example, lawyers already take advantage of some basic forms of generative AI without even realizing it—such as when they use the autocomplete feature in Microsoft Word—and lawyers should not need to consult clients before using such tools.<sup>36</sup>

Even when lawyers use more sophisticated forms of generative AI (e.g., using it to draft a legal memo), it is not obvious that a lawyer should have to consult with the client before doing so.<sup>37</sup> Assuming the lawyer is appropriately protecting client confidences and carefully reviewing the outputs, one could conclude that lawyers should have no greater obligation to consult with clients before using generative AI than before using online legal research tools, querying Google, or storing client documents on a network drive.

That said, at least for now, lawyers are well-advised to consult with clients before using generative AI to assist with anything other than the *de minimis* case of autocompleting simple text. Consultation aligns with the principle of transparency that underlies Rule 1.4 and aids in managing client expectations about the nature and source of the legal services provided.<sup>38</sup> Given the novelty and evolving nature of generative AI, clients may not be fully aware of its capabilities and limitations, so for the time being, lawyers should typically consult with clients before using generative AI in more substantive ways.

At the same time, this duty may evolve considerably in the future. Even if a duty of consultation currently exists under Rule 1.4, generative AI tools are likely to become so ubiquitous in the coming years that consultation will become unnecessary. In the meantime, however, such a consultation is highly advisable for anything other than the most basic of drafting tasks.

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35. See Isabel Gottlieb, *Law Firms Wrestle with How Much to Tell Clients About AI Use*, BL (Nov. 29, 2023) <https://news.bloomberglaw.com/business-and-practice/law-firms-wrestle-with-how-much-to-tell-clients-about-ai-use> [<https://perma.cc/YBN6-MQUE>] (asking numerous firms about how they disclose the use of generative AI to their clients).

36. See generally, Andrea Eoanou, *Introducing New AI Enhancements in Microsoft 365: New Features Coming to Microsoft Editor and More!*, MICROSOFT (Oct. 12, 2022), <https://techcommunity.microsoft.com/t5/-microsoft-365-blog/introducing-new-ai-enhancements-in-microsoft-365-new-features/ba-p/3643499> [<https://perma.cc/7R84-U5B2>] (describing new autocomplete features in Outlook and Word); *Welcome to Copilot in Word*, MICROSOFT, <https://support.microsoft.com/en-us/office/welcome-to-copilot-in-word-2135e85f-a467-46-3b-b2f0-c51a46d625d1> [<https://perma.cc/4QMA-JQCV>] (announcing how Word customers can use Copilot AI to draft documents).

37. See N.J. CTS., *supra* note 6, at 4-5 (reaching a similar conclusion).

38. See MODEL RULES OF PRO. CONDUCT r 1.4 (AM. BAR ASS’N 2020).

### C. Oversight of Nonlawyer Services Under Model Rule 5.3

In 2012, the Ethics 20/20 Commission proposed a two-letter change to the title of Rule 5.3 from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance.”<sup>39</sup> The change signaled that lawyers use an increasingly wide range of non-human forms of assistance when representing clients and should consider several factors when using those services.<sup>40</sup> The Ethics 20/20 Commission also proposed (and the ABA adopted) several new Comments that were designed to guide lawyers with regard to the use of such third-party services.<sup>41</sup>

As discussed earlier in the context of the duty of confidentiality, Comment 3 is especially helpful in understanding how Rule 5.3 applies to a lawyer’s use of generative AI.<sup>42</sup> The Comment has implications well beyond issues of confidentiality and suggests that lawyers who use third-party services must make reasonable efforts to ensure that those services are performed in a manner that is consistent with the lawyer’s own obligations.<sup>43</sup> The extent of the lawyer’s obligation will necessarily turn on the “education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.”<sup>44</sup>

These factors suggest that lawyers will have varying duties of oversight depending on the nature of the generative AI service that they use. For example, if a lawyer is simply using Microsoft’s autocomplete feature, the lawyer would not have an obligation to take any particular action. The feature typically inserts only a few words at the end of a sentence, making it easy for a lawyer to determine the reasonableness of the suggested wording and to either accept, reject, or modify it. The “nature of the service involved” in this example is modest and should not require a lawyer to take any additional steps under Rule 5.3.<sup>45</sup>

In contrast, if a lawyer uses more sophisticated forms of generative AI, there will be additional oversight obligations. Among other considerations, the lawyer would have to understand the “education, experience, and reputation” of the

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39. See AM. BAR ASS’N COMM’N ON ETHICS 20/20, REPORT ON RESOLUTION 105A REVISED 2 (2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120808\\_revised\\_resolution\\_105a\\_as\\_amended.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.pdf) (last visited Aug. 4, 2024) (describing change from “Assistants” to “Assistance”) [hereinafter REPORT ON RESOLUTION 105A REVISED]; MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS’N 2020) (stating modified title).

40. See REPORT ON RESOLUTION 105(c), *supra* note 2 (introducing change to Rule 5.3).

41. See ABA Commission on Ethics 20/20, *supra* note 16 (describing all accepted and proposed changes to Model Rules).

42. See MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. [3] (AM. BAR ASS’N 2020) (explaining how to use nonlawyer assistance outside firm).

43. See *id.* (noting how lawyers must make reasonable efforts to ensure nonlawyer compliance with Model Rule 5.3).

44. See *id.* (describing standard of Model Rule 5.3, Comment 3).

45. See *id.* (tying lawyer’s disclosure obligations to the nature of the services involved).



generative AI before using it.<sup>46</sup> For example, a lawyer might look into how the generative AI service was trained and what procedures are used to ensure the accuracy of outputs. The lawyer might also investigate the reputation of the tool by reviewing the increasing number of studies that document how reliable various generative AI services are (i.e., the extent to which the tool “hallucinates”).<sup>47</sup> A lawyer can have more confidence when using a generative AI tool that has a reputation for accuracy in the context of legal services than when using a tool that does not. Moreover, as the Comment suggests and as discussed earlier, the lawyer will have to assess the confidentiality implication of using the generative AI service.

A lawyer might reasonably decide to use a generative AI tool after considering these factors, but the lawyer should still carefully review all AI-generated content for accuracy before relying on it. To be clear, the high likelihood of errors does not mean that Rule 5.3 prohibits lawyers from using the service. Rather, in much the same way that lawyers have to check the work of paralegals or inexperienced summer associates (who often make mistakes), lawyers will have to do the same when generating content through AI. A high probability of error does not mean a lawyer is prohibited from using a particular service; it just means that the lawyer must vet the content more carefully.

#### *D. Billing Under Rule 1.5*

A lawyer’s use of generative AI can trigger several billing-related issues under Model Rule 1.5. One obvious point is that, when lawyers bill by the hour, they can only charge a client for the time spent on the matter.<sup>48</sup> So if generative AI enables a lawyer to complete a task more efficiently, the lawyer has an ethical obligation under Rule 1.5 to charge the client only for the (reduced) time spent on the task, not the amount of time it would have taken without generative AI.<sup>49</sup>

Another billing-related question is whether lawyers can charge clients for expenses associated with the use of generative AI services. This question is not new, as lawyers have faced conceptually similar issues when charging clients for a wide range of services that directly advance the lawyer’s work for a client. For example, lawyers have long charged clients for expenses associated from the use of online legal research tools (e.g., Westlaw or Lexis) and photocopying.<sup>50</sup> In 1993, ABA Formal Opinion 93-379 explained that a:

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46. See MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. [3] (AM. BAR ASS’N 2020).

47. See *What Are AI Hallucinations?*, IBM, <https://www.ibm.com/topics/ai-hallucinations> [<https://perma.cc/WMD4-GU6P>] (explaining what leads to generative AI hallucinations).

48. ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-379, at 6 (1993) (“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.”).

49. See MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS’N 2020) (explaining lawyer fee schedules and arrangements); Fla. State Bar Ass’n Comm. on Pro. Ethics, Informal Opinion 24-1 (2024) (making a similar observation).

50. See ABA Comm. on Ethics & Pro. Resp., *supra* note 48, at 8.

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.<sup>51</sup>

Using similar reasoning, lawyers should be permitted to recoup expenses reasonably incurred for generative AI tools, "so long as the charge reasonably reflects the lawyer's actual cost for the services rendered."<sup>52</sup> The particular application of this principle will vary depending on whether a lawyer is paying for a third-party provider or building a generative AI tool in-house and seeking to recover those costs,<sup>53</sup> but the basic point is that there are some well-established principles to guide lawyers on how to charge for the use of generative AI.

A broader question is whether generative AI will change how lawyers bill for their work in the first place. Commentators have been incorrectly predicting the end of the billable hour for decades, but if generative AI dramatically reduces the time it takes for lawyers to provide some kinds of services, we are likely to see a greater shift towards alternative fee arrangements and an increased focus on the value of a lawyer's services rather than the time spent on a matter. For example, a firm's pricing may increasingly turn on the quality of the proprietary data that the firm uses to train its generative AI tools.

#### *E. The Duty of Competence Under Rule 1.1*

The preceding ethical obligations arguably fall under the more general obligation to act competently with regard to technology. Prior to the work of the Ethics 20/20 Commission, the word "technology" did not even appear in the Model Rules, so the Commission decided that the Model Rules should address the issue and that a comment related to the duty of competence was the appropriate place to do so.<sup>54</sup>

The new language (in italics) says that "[t]o 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 . . .*"<sup>55</sup> The idea here is that, to maintain competence, lawyers necessarily need to remain aware of both the benefits and the risks associated with existing and emerging technologies.

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51. *Id.* at 1.

52. *Id.*

53. *Id.* at 7-8.

54. See ABA Commission on Ethics 20/20, *supra* note 16 (proposing changes to the Comments to Model Rule 1.1); *infra* note 55.

55. See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. [8].

In the context of generative AI, this obligation means that lawyers should understand the potential advantages and risks from the tools.<sup>56</sup> Lawyers can quite reasonably conclude that, under some circumstances, generative AI does not present a sufficient benefit to outweigh the risks and vice versa. This assessment is a necessary part of a lawyer's ongoing duty of competence.<sup>57</sup>

In sum, lawyers have to navigate a number of ethical issues when using generative AI, including some not even referenced here. For example, lawyers may have to deal with issues involving the unauthorized practice of law and duties to prospective clients under Rule 1.18 (e.g., when generative AI is used to interact with potential clients).<sup>58</sup> Moreover, the legal profession is likely to face other ethics-related issues going forward, such as whether to have mandatory training on generative AI for both law students and practicing lawyers, as the California Committee on Professional Responsibility and Conduct recently suggested.<sup>59</sup> The key point is that the ethics rules will not impede the steady advance of generative AI in the delivery of legal services.

### III. OBLIGATIONS IMPOSED BY COURT ORDER

Some courts have responded to the emergence of generative AI by issuing standing orders that impose near-outright bans on lawyers' use of AI or require lawyers to disclose when they have used the technology for court filings.<sup>60</sup> Both types of orders are overly broad and unnecessary.

#### A. *The Problems with Banning AI*

One example of a ban comes from Judge Michael J. Newman of the United States District Court for the Southern District of Ohio.<sup>61</sup> Judge Newman has a standing order that not only prohibits the use of generative AI tools to prepare a

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56. See Jessica R. Blaemire, *Analysis: Lawyers Recognize Ethical Duty to Understand Gen AI*, BL (Oct. 19, 2023) <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-lawyers-recognize-ethical-duty-to-understand-gen-ai> [https://perma.cc/542A-T2LR] (explaining results of study). In fact, many attorneys have already concluded that they can use generative AI in their practice without violating an ethical duty. See *id.* For example, Bloomberg Law asked 452 attorneys for their opinion on legal ethics and the use of generative AI and "almost 70% said that it's possible to use generative AI in legal practice without violating an ethical duty, and almost as many (66%) said it can be used without violating the ABA Model Rules or state equivalents." See *id.* These results suggest that, while the Model Rules may not currently have provisions that directly address generative AI, the legal profession recognizes that the rules of professional conduct are unlikely to impede the legal profession's adoption of generative AI. See generally *id.*

57. See generally *id.* (finding 66% of surveyed attorneys believe using AI does not violate ABA Model Rules).

58. See MODEL RULES OF PRO. CONDUCT r. 1.18 (AM. BAR ASS'N 2020) (describing duties to prospective clients).

59. See *infra* note 86 (recommending such training).

60. See, e.g., J. Michael J. Newman, Artificial Intelligence ("AI") Provision in Both Civil and Criminal Cases (S.D. Ohio July 14, 2023); J. Roy Ferguson, Standing Order Regarding Use of Artificial Intelligence (394th Jud. Dist. Tex., June 9, 2023); J. Stephen Alexander Vaden, Order on Artificial Intelligence, (U.S. Ct. Int'l. Trade, June 6, 2023).

61. J. Newman, *supra* note 60.

court filing but extends that prohibition to the use of nearly all forms of artificial intelligence.<sup>62</sup> The standing order provides as follows:

No attorney for a party, or a *pro se* party, may use Artificial Intelligence (“AI”) in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, *inter alia*, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.<sup>63</sup>

This ban is problematic for two reasons. First, by prohibiting the use of nearly all forms of AI—and not just generative AI—the order is dramatically overbroad. The definition of “artificial intelligence” varies, but it commonly “refers to the ability of machines and computers to perform tasks that would normally require human intelligence.”<sup>64</sup> Using this definition, the order would prohibit lawyers from using most types of professional productivity software, such as Microsoft Word, Outlook, and Gmail, given that most of these tools perform tasks (like spellchecking and grammar checking) that used to require human-level intelligence.<sup>65</sup> The order also would seem to extend to e-discovery services, which almost always rely on some form of AI.<sup>66</sup> Since those e-discovery services do not fall within the safe harbor of “legal search engines,” lawyers would presumably be prohibited from using them to find relevant information when preparing a court filing.

The court order is not only overbroad; it is also unnecessary. Lawyers are already subject to sanctions or discipline for filing inaccurate or false documents

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62. *Id.*

63. *Id.*

64. Jennifer Monahan, *Artificial Intelligence, Explained*, CARNEGIE MELLON UNIV. HEINZ COLL. (July 2023), <https://www.heinz.cmu.edu/media/2023/July/artificial-intelligence-explained> [https://perma.cc/R7Q3-MQEY]; see also Clara Pilato, *Artificial Intelligence vs Machine Learning: What’s the Difference?*, MIT PRO. EDUC., <https://professionalprograms.mit.edu/blog/technology/machine-learning-vs-artificial-intelligence/> [https://perma.cc/FNX4-BJSB] (describing AI as the ability of “computers to imitate cognitive human functions” and noting its ubiquity).

65. John Roach, *How AI Is Making People’s Workday More Productive*, MICROSOFT (May 6, 2019), <https://news.microsoft.com/source/features/ai/microsoft-365-intelligent-workday-productivity/> [https://perma.cc/W-36M-XJLP] (explaining how AI was infused in Microsoft products in 2019 through spellchecking and grammar checking).

66. See *AI for Lawyers: How Law Firms are Leveraging AI for Document Review*, CASEPOINT, <https://www.casepoint.com/resources/spotlight/leveraging-ai-document-review-law-firms/> [https://perma.cc/V3PP-WRPF] (offering ways to use AI throughout the e-discovery process); *Casetext Launches AllSearch, Powerful Document Search Technology for Litigators*, CASETEXT (June 6, 2022), <https://casetext.com/blog/allsearch-launch> [https://perma.cc/XG2N-RWWH] (promoting AllSearch’s ability to streamline e-discovery workflows).

using AI.<sup>67</sup> For example Rule 11(b) of the Federal Rules of Civil Procedure (FRCP) requires lawyers to thoroughly research their pleadings, filings, or motions to a court using “an inquiry reasonable under the circumstances.”<sup>68</sup> In other words, lawyers must certify that their filings do not contain fictitious legal contentions, citations, or claims.<sup>69</sup> Model Rule 3.1, which has been adopted in nearly every U.S. jurisdiction, imposes almost identical obligations.<sup>70</sup>

These provisions were more than adequate to discipline and sanction the infamous New York lawyer who cut and pasted bogus citations from ChatGPT into a court document.<sup>71</sup> In fact, the judge in that case (Judge P. Kevin Castel) acknowledged “there is nothing inherently improper about using a reliable artificial intelligence tool for assistance.”<sup>72</sup> Judge Castel correctly recognized that an across-the-board ban is unnecessary because both the Model Rules and the Federal Rules of Civil Procedure provide sufficient protections against a lawyer’s careless use of AI.

### B. The Overbreadth of Orders Requiring Disclosure

Some courts have adopted a more targeted approach by simply requiring lawyers to disclose when they have used generative AI to prepare a court filing.<sup>73</sup> For example, U.S. Magistrate Judge Gabriel Fuentes of the United States District Court for the Northern District of Illinois has a standing order with the following directive: “[a]ny party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI

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67. See *Mata v. Avianca*, No. 22-cv-1461, 2023 U.S. Dist. LEXIS 108263, at \*3 (S.D.N.Y. June 22, 2023) (sanctioning attorney under Federal Rules of Civil Procedure 11 for submitting document with fictitious citations generated by ChatGPT).

68. See Fed. R. Civ. P. 11(b) (imposing obligations on lawyers when filing documents with the court). The Rule provides as follows:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery ...

See *id.*

69. *Id.*

70. Compare MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020) (describing a lawyer’s obligations with regard to meritorious claims & contentions), with Fed. R. Civ. P. 11(b) (outlining similar standards).

71. See *Mata*, 2023 U.S. Dist. LEXIS 108263, at \*45-46 (sanctioning attorney for false citations).

72. *Id.* at \*1 (noting the effective and ethical applications of AI in legal work).

73. See J. Magis. J. Gabriel A. Fuentes, Standing Order for Civil Cases Before Magistrate Judge Fuentes, (N.D. Ill. May 5, 2023) (requiring any party to disclose the use of generative AI in court-filed documents to court); J. Brantley Starr, Mandatory Certification Regarding Generative Artificial Intelligence, (N.D. Tex. May 30, 2023) (requiring attorneys or *pro se* litigants to certify that generative AI did not draft any portion of filing).

was used, with the disclosure including the specific AI tool and the manner in which it was used.”<sup>74</sup>

The United States Court of Appeals for the Fifth Circuit similarly specifies that:

Counsel and unrepresented filers must ... certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.<sup>75</sup>

Other courts have adopted conceptually similar approaches.<sup>76</sup>

These directives are an improvement over Judge Newman’s order, but they are still overly broad.<sup>77</sup> One problem is that lawyers are now using generative AI without even realizing it. Take, for example, this very essay, which was drafted using Microsoft Word 365. At various times while drafting the piece, Microsoft suggested ways to autocomplete a sentence (including while writing this sentence). These autocomplete features are a form of “generative AI,” and they are now incorporated into a wide range of professional software. Does a lawyer have to disclose to a court each time a filed document may have had some words generated by commonly used tools? If courts only intend to require lawyers to disclose when they use AI to generate more substantive content, how much more substantive does it need to be? The lines are difficult to draw already, but they will become increasingly so as generative AI is incorporated more deeply and widely into professional software.

Another problem with these orders is that they would require lawyers to disclose when they have used generative AI just to brainstorm ideas. The tools are often quite useful in helping to think through possible arguments or to suggest weaknesses in wording. There is no clear public policy rationale for why a lawyer should have to disclose such uses, but most of the standing orders effectively impose such a disclosure requirement.<sup>78</sup>

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74. J. Fuentes, *supra* note 73.

75. Notice of Proposed Amendment to 5th Cir. Rule 32.3 (Dec. 1, 2023).

76. See, e.g., J. Fuentes, *supra* note 73; J. Starr, *supra* note 73; J. Vaden, *supra* note 60; J. Ferguson, *supra* note 60; J. Michael M. Baylson, Standing Order RE: Artificial Intelligence (“AI”) in Cases Assigned to Judge Baylson (E.D. Penn., June 6, 2023).

77. Compare J. Newman, *supra* note 60 (creating generative AI standing order), with Notice of Proposed Amendment to 5th Cir. Rule 32.3 (Dec. 1 2023) (allowing for use of generative AI with human oversight for accuracy), and J. Fuentes, *supra* note 73 (requiring attorneys or *pro se* litigants to disclose the use of generative AI, but not banning it).

78. See J. Fuentes, *supra* note 73 (requiring any party that uses generative AI in research or drafting documents to disclose its use); J. Vaden, *supra* note 60 (mandating disclosure of use of generative AI in any submission to Judge Vaden); J. Baylson, *supra* note 76 (requiring any attorney or *pro se* litigant to disclose generative AI use in any submitted filing); see also Maura R. Grossman et al., *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 69, 76 (2023) (arguing that current standing orders with disclosure requirements unnecessarily burden litigants).

The standing orders are not only worded too broadly, but like Judge Newman's order, they are unnecessary. As noted earlier, the rules of professional conduct and civil procedure impose sufficient duties on lawyers with regard to their filings. A notification requirement will not only cause increasing confusion as generative AI tools become more widely used, but courts have ample tools to ensure that lawyers fulfill their ethical and legal duties to the court.<sup>79</sup>

Judges have expressed their concerns about generative AI in a variety of ways, with Judge Brantley Starr of the United States District Court for the Northern District of Texas offering among the most elaborate explanations:

These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing. A template Certificate Regarding Judge-Specific Requirements is provided here.<sup>80</sup>

The problem with this reasoning is that it proves too much. Lawyers have long used a variety of methods to prepare court filings that trigger conceptually similar concerns, yet courts do not impose any new certification obligations. Consider, for example, lawyers who use summer associates to help prepare the first draft of a court filing, including a brief. The summer associate is much more likely to make mistakes than a lawyer (i.e., summer associates do not have "requisite accuracy and reliability for legal briefing"), but despite this risk of error, courts do not require lawyers to separately certify that have adequately supervised summer associates who worked on the filing. Lawyers understand their

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79. See, e.g., *Mata v. Avianca*, No. 22-cv-1461, 2023 U.S. Dist. LEXIS 108263, at \*45-46 (S.D.N.Y. June 22, 2023) (using existing provisions to impose sanctions).

80. J. Starr, *supra* note 73.

obligations to provide appropriate oversight and review before filing a document with a court. That obligation is sufficient in the context of summer associates, and it is sufficient with regard to generative AI.

Having said that, there is arguably no downside to courts reminding lawyers to comply with their existing ethical and legal obligations when using generative AI, especially given the nascent nature of the technology. Most of the existing orders, however, go beyond such a reminder. They institute notification requirements or outright bans, which cause increasing confusion and impose unnecessary new obligations. For now, the best approach is for courts to rely on their existing ability to sanction lawyers or to simply remind lawyers that they should be careful when using generative AI.

#### IV. THE FUTURE OF THE DUTY OF COMPETENCE

The contention of this essay so far has been fairly modest and can be summarized by two basic points. First, lawyers can typically use generative AI in ethically compliant ways by adopting appropriate procedures and protocols. Second, judicial efforts to prohibit these tools or impose notification requirements are either problematic or unnecessary.

The final section of this essay makes an even more provocative claim: generative AI is advancing so rapidly that we may eventually move away from saying that lawyers are ethically permitted to use it, to saying that lawyers are ethically *required* to do so. The idea here is that, just as we would question the competence of a lawyer who pulls out a typewriter to prepare a client document, we will at some point question the competence of a lawyer who begins drafting legal documents by opening a word processing program to a blank screen and typing from scratch. Lawyers will be expected to use generative AI tools—or whatever they will be called in the future—as part of the modern, competent practice of law.

Lawyers already have begun to use these tools to improve the quality of their work or make it more efficient. For example, generative AI tools are helping lawyers draft clauses and phrases in transactional documents; summarize large collections of documents in litigation and transactional work; draft and respond to emails; brainstorm possible arguments to raise in litigation or identify weaknesses in existing arguments; draft interrogatories and document requests; draft simple transactional documents; prepare first drafts of simple motions and briefs; identify inconsistencies in deposition and trial testimony in real time; prepare first drafts of legal memos; and identify possible deposition topics and questions.<sup>81</sup> These use cases have emerged within only one year of ChatGPT's

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81. See, e.g., Patrick Smith, *Sullivan & Cromwell's Investments in AI Lead to Discovery, Deposition 'Assistants'*, ALM LAW.COM (Aug. 21, 2023), <https://www.law.com/americanlawyer/2023/08/21/sullivan-cromwell-investments-in-ai-lead-to-discovery-deposition-assistants/> [<https://perma.cc/TUX4-UK2L>] (describing current and future uses of generative AI at Sullivan & Cromwell); *How To . . . Use AI to Ace Your Next Deposition*,



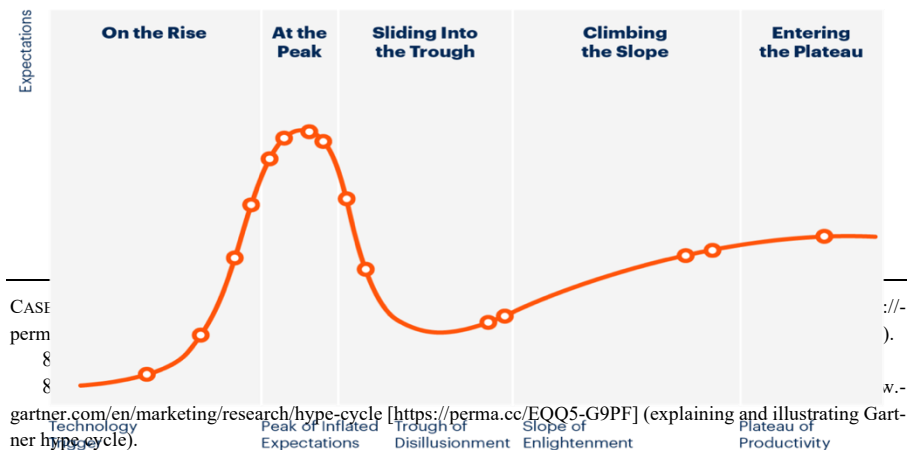
release, when these tools are in their relative infancy. The level of sophistication is likely to grow significantly in the future, making these tools indispensable to modern law practice.

Is this transition likely to happen soon? The answer is almost certainly, “no.” As Bill Gates once said, “[p]eople often overestimate what will happen in the next two years and underestimate what will happen in ten.”<sup>82</sup> Generative AI’s potential to transform the legal profession is enormous, but it will not lead to seismic changes in the immediate future. The tools are evolving; their reliability is still improving; and the use cases are still emerging. Law firms, legal departments, and legal services providers are understandably cautious about deploying these tools, and they are waiting to see how the market evolves in the coming years.

Put another way, generative AI is going through some version of the so-called Gartner hype cycle, where we expect a new technology to be more transformative than we can reasonably expect it to be in the short term. We may soon enter the “trough of disillusionment” if we are not there already.<sup>83</sup>

That said, generative AI will very likely become ubiquitous in much the same way as email and online legal research. Competent lawyers are now expected to know how to use those tools, and the same will eventually be true for generative AI (i.e., the technology will reach the right side of the curve, but perhaps with a steeper upward slope).<sup>84</sup>

The email analogy may be especially apt. When the technology first became available, ethics opinions urged considerable caution and even suggested that lawyers might violate their duty of confidentiality by using it.<sup>85</sup> We have now



84. Jan L. Jacobowitz & Justin Ortiz, *Happy Birthday Siri! Dialing in Legal Ethics for Artificial Intelligence, Smartphones, and Real Time Lawyers*, 4 TEX. A&M J. PROP. L. 407, 418-19 (2018) (making a similar observation about artificial intelligence).

85. See Laurel S. Terry, *30th Anniversary Commemorative Issue: Commemorative Contributions: The Impact of Global Developments on U.S. Legal Ethics During the Past Thirty Years*, 30 GEO. J. LEGAL ETHICS 365, 372 (2017) (explaining the history behind the legal profession’s treatment of email); ABA Comm. on Ethics & Pro. Resp., Formal Op. 99-413 (1999) (concluding that lawyers can use email and fulfill their ethical obligations under Rule 1.6); ABA Comm. on Ethics & Pro. Resp., Formal Op. 477 (2017) (concluding that lawyers may transmit information about their client over the internet without violating the Model Rules).

reached the point where lawyers *must* have an email address to remain licensed to practice law.<sup>86</sup> We are likely to see a similar transition for generative AI, as we move from urging caution to expecting usage.

## V. CONCLUSION

The Model Rules offer an adaptable framework for guiding lawyers on their use of generative AI. This adaptability is by design. When the Ethics 20/20 Commission proposed amendments to the Model Rules more than a decade ago, it understood that the amendments needed to offer sufficiently flexibility to accommodate future technological developments.<sup>87</sup>

This flexible approach implies that we can expect the assessment of generative AI to evolve in the future as the tools become more reliable and useful. At some point, generative AI is likely to become so critical to the effective and efficient delivery of legal services that lawyers will have an ethical obligation to use it. We may even come to see generative AI as an important way to serve the public's unmet legal needs and as a powerful tool for addressing the access-to-justice crisis.<sup>88</sup>

The first sentence of the preamble to the Model Rules says that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>89</sup> If we take this obligation seriously, we necessarily need to consider how new technologies can help us to better serve our clients and the public. Generative AI is such a technology and may have more potential in this regard than any technology ever invented.

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86. See *Attorneys Must Provide E-mail Address to the Bar by Feb. 1*, CAL. BAR J., <https://www.calbarjournal.com/January2010/TopHeadlines/TH3.aspx> [<https://perma.cc/TUA6-2NPQ>] (announcing change to Rule 9.7 and requiring attorneys to provide e-mail addresses); *Email Service: It's the Law*, ILL. STATE BAR ASS'N (Sept. 17, 2017), <https://www.isba.org/barnews/2017/09/27/email-service-it-s-law> [<https://perma.cc/7WG7-2Y5R>] (explaining recent update to Illinois Supreme Court Rule 11); *Annual Regulatory Compliance*, VA. STATE BAR, <https://vsb.org/Site/Site/lawyers/compliance.aspx> [<https://perma.cc/6S8F-AXKZ>] (mandating all attorneys to keep an "email of record" to maintain their license).

87. See Letter from Am. Bar Ass'n Comm'n on Ethics 20/20 Working Group, to Am. Bar Ass'n Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Individuals, and Entities (Sept. 20, 2010) (on file with author) (discussing the Commission's goal of offering recommendations and proposals for ethically integrating technology into practice).

88. See *WJP Rule of Law Index: United States*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2022/United%20States/Civil%20Justice> [<https://perma.cc/B4QS-BQ75>] (ranking United States 115 out of 140 countries in access to civil justice); Ashwin Telang, *The Promise and Peril of AI Legal Services to Equalize Justice*, JOLT DIGEST (Mar. 14, 2023), <https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice> [<https://perma.cc/8XUB-4S5Z>] (describing AI's ability to answer legal questions and offer low-cost legal assistance).

89. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2020).