YOU JUST CAN'T BEAT THE MACHINE: A LAWYER'S DUTY TO ADAPT IN THE AGE OF ARTIFICIAL INTELLIGENCE

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INTRODUCTION

Lawyers don't like technology—until they do.

In the past few years, artificial intelligence ("AI") has rapidly transformed some aspects of the legal profession. New legal research and drafting tools that utilize AI have advanced at a blistering pace. This technology has the potential to make you more efficient and effective—or land you in the headlines.

But none of this is new. Over the course of several decades, the legal profession has moved from manual processes—like consulting physical case reporters and documents—to data-analyzing and digital-research platforms like Westlaw and LexisNexis. Indeed, "the stacks of papers and books that once covered a lawyer's desk have been replaced by a collection of browser tabs on the computer screen."[1]

Now, the next wave of tech advancement is upon us—"generative AI" tools that can analyze vast amounts of data, predict case outcomes, evaluate arguments, and even draft pleadings.[2] Despite undeniable advantages, AI's role in the practice of law has stirred much debate over the ethical implications of using such technology. Reliability concerns, confidentiality risks, and lack of proper human oversight have dominated the conversation.[3] Many argue AI's inherent risks could lead to ethical breaches under the American Bar Association's ("ABA") Model Rules of Professional Conduct, as well as violations of Rule 11 of the Federal Rules

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1. *From Dusty Tomes to Artificial Intelligence: The History and Future of Legal Research*, BLUE J BLOG, https://web.archive.org/web/20240823203121/https://www.bluej.com/blog/from-dust y-tomes-to-artificial-intelligence-the-history-and-future-of-legal-research (last visited Nov. 1, 2024).

2. Ronald J. Hedges, *Artificial Intelligence: A Judge's View of Generative AI*, LEXISNEXIS 1 (Nov. 9, 2023), https://www.lexisnexis.com/pdf/practical-guidance/ai/ai-a-judges-view-of-generativ e-ai.pdf?srsltid=AfmBOopSMqMzBCJ5ts0oIEEmETI9gSC9NWe58uekoep96uLmfSh7OgO0.

3. *See* Matthew Christoff & Danny Riley, *Federal Judges Revise Court Rules to Require Certification Regarding the Use of A.I.*, CARPE DATUM L. (June 5, 2023), https://www.carpedatumlaw.co m/2023/06/federal-judges-revise-court-rules-to-require-certification-regarding-the-use-of-a-i/.

of Civil Procedure.[4] But lawyers can't hide from new technology—no matter how scary it may seem.

This summer, the ABA Standing Committee on Ethics and Professional Responsibility weighed in on attorneys' ethical duties with respect to generative AI.[5] "The Opinion discusses the use of [generative] AI in the context of six ethical obligations covered by the ABA Model Rules of Professional Conduct: competence, confidentiality, communication, candor toward the tribunal, supervisory responsibilities, and fees."[6] It notes that:

> To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.[7]

These technology platforms are a "*rapidly* moving target."[8] Even so, attorneys must understand evolving technology to meet their duties to their clients and the court.

This Article makes the case that lawyers need to embrace AI to meet their ethical duties as modern practitioners.[9] Lawyers can embrace this new technology responsibly, mitigating justified accuracy and confidentiality concerns, while also fulfilling their evolving ethical duties.[10] As generative AI becomes a fundamental tool in legal practice, the duty to use it effectively will outweigh the perceived risks.

II. THE EVOLUTION OF TECHNOLOGY IN THE LEGAL PROFESSION

A.   *Technology and "the Law"*

In 1876, law book salesman John B. West, launched his first publication, the *Syllabi*, "which offered the first and most complete current reporting of Minnesota

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4. *Id.*

5. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (expressing the American Bar Association's concern with generative AI and attorney ethical duties).

6. Michelle Barineau, *ABA Publishes First Opinion on the Use of Generative AI in the Legal Profession*, COVINGTON (Aug. 6, 2024), https://www.insideglobaltech.com/2024/08/06/aba-publishe s-first-opinion-on-the-use-of-generative-ai-in-the-legal-profession/.

7. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

8. *Id.* at 2.

9. I used a custom GPT in producing this article. The GPT was specifically "trained" to come up with ideas, find sources, organize outlines, and draft an initial working version.

10. *See* David Lat, *AI Use in Law Practice Needs Common Sense, Not More Court Rules*, BLOOMBERG L. (Feb. 28, 2024, 4:30 AM), https://news.bloomberglaw.com/us-law-week/ai-use-in-law-practice-needs-common-sense-not-more-court-rules (discussing the advantages of generative AI and noting Rule 11 already mitigates ethical concerns—"no fancy new AI rule needed").

Supreme Court Rulings."[11] His initial advertisement promised "prompt and reliable intelligence as to the various questions adjudicated by the Minnesota Courts at a date long prior to the publication of the State Reports."[12] West delivered on this promise.

As demand rapidly increased, the company expanded its coverage to surrounding states and then to the U.S. federal courts.[13] "In 1879, West launched two of its most influential innovations which continue to underpin the contemporary research system: the National Reporter System (NRS), which introduced the first nation-wide U.S. judicial decision reporting, and the Key Number System, the first indexing scheme that systematically organizes cases by topics and subdivisions."[14] These dramatically improved "the slow and error-prone State Reports commissioned by state governments… provid[ing] U.S. lawyers with an unprecedented and timely access to a cohesive body of case law from all U.S. state and federal jurisdictions, thus facilitating a comprehensive, cross-jurisdictional study."[15] This new system "also gave birth to the concept of a permanent case reference publication and thus secured the primacy of current case studies in the legal research process."[16]

As with all great innovations, the legal profession was skeptical. "Despite their evident merits, both revolutionary systems met with initial resistance."[17] "While many attorneys began to accept West's publications as fundamental case studies, many of the courts were reluctant to admit the West citations in lieu of actual State Report citations."[18] The courts continued to be reluctant to accept West citations "until it was clear that West's reports were the de facto sources used by practitioners."[19] Likewise, there was resistance to the Key Number System "because its (superior) comprehensive indexing was very different from the State Reports organization."[20] It took several decades before "the need for an accurate judicial reporting system for managing the leap of published cases became so great that courts and lawyers came to fully embrace" West's systems."[21]

As the NRS expanded, it became clear that a system to organize the growing volume of case law was needed. West released the Century Digest in 1897, designed "to organize all state and federal cases from 1685 to 1896 into over 400

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11. *From Dusty Tomes to Artificial Intelligence: The History and Future of Legal Research*, *supra* note 1.

12. *West Group History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histor ies/west-group-history/ (last visited Nov. 1, 2024).

13. *Id.*

14. *From Dusty Tomes to Artificial Intelligence: The History and Future of Legal Research*, *supra* note 1.

15. *Id.*

16. *Id.*

17. *Id.*

18. *West Group History*, *supra* note 12.

19. *From Dusty Tomes to Artificial Intelligence: The History and Future of Legal Research*, *supra* note 1.

20. *Id.*

21. *Id.*

topics and 100,000 subdivisions."[22] To assist in finding cases, lawyers began using new research tools like Shepard's citators, "[i]nitially launched as stickers printed on gummed, perforated sheets to be pasted onto pages of case law."[23] However, as the volume of caselaw continued to expand, finding cases and identifying good law became increasingly difficult.

Lawyers looked to technology for the solution. "The severity of the research problem eventually led the legal community to actively look towards computers, the emerging disruptive technology of the century, for a more permanent solution."[24] In 1964, an Ohio Bar Association working group tested a new system to "incorporate computers into legal research."[25] That system "was subsequently developed by Mead Data Central and launched into market in 1973 as Lexis (now LexisNexis)."[26] Up to this point, West's printed NRS had been "the only comprehensive system that enabled a legal researcher to locate opinions relating to specific points of law."[27] But Lexis completely changed the legal-research market "by offering online access to the full text of judicial decisions as well as making them searchable by keywords."[28] Two years later, West launched the online platform WestLaw—the era of digital research had begun.

The revolution was not a quick one.

> Partially, the slow adoption was due to their logistical and technical constraints: limited case coverage, premature computer network infrastructure (the initial access relied on gigantic terminals established over telephone lines), and high acquisition costs—a simple search for the phrase "trial by jury," for instance, would have cost $5,000 in the 1970s.[29]

But much of the continued resistance stemmed from the simple fact that this technology was "new." In 1998, West launched Westlaw.com, allowing users to access and search its online database.[30] Lawyers were still skeptical: "[S]enior attorneys viewed online research as expensive, inherently untrustworthy, and not as intuitive (to them) as picking up a book and flipping through headnotes."[31]

As the digital legal-research evolution slowly churned, similar changes were taking place involving non-case-law documents. "Once upon a time, in a land not so far away, legal professionals were forced to sift through mountains of paper

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22. *See id.* (stating that in 1897, West launched the first volume of the Century Digest, with full utilization of the Key Number System, to organize all state and federal cases from 1685 to 1896 into over 400 topics and 100,000 subdivisions).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Jennifer Marsh, *Lawyers Don't Like New Technology, Except When They Do!*, MEDIUM (Sept. 24, 2023), https://medium.com/@legalytical/lawyers-dont-like-new-technology-except-when -they-do-7cd846d0b597.

31. *Id.* "Headnotes" are short summaries of legal principles.

documents to build their cases. It was a grueling process that required highlighters, paperclips, and the patience of a saint."[32] Before technological advancements, "[l]awyers shuffled reams of pages and hefted boxes of paper and went nearly blind scanning those individual sheets during document review. It was slow, it was labor-intensive."[33] This process "was not very environmentally sound, but it was straightforward and easy—if not to manage, then at least to conceptualize."[34] But all this changed when discovery became "e-discovery."[35]

As email first replaced traditional or "snail" mail, attorneys agreed to preclude electronic data in discovery.[36] However, as people increasingly communicated through digital channels like email, text messaging, and other collaborative work platforms, lawyers "quickly realized that they needed a new set of tools and techniques to deal with this digital evidence."[37] The courts realized this as well and, in 2006, the Supreme Court added "Electronically Stored Information (ESI)" discovery obligations were added to the Federal Rules of Civil Procedure.[38]

Once again, this digital revolution did not take place overnight. "In the early days of eDiscovery, legal professionals were forced to use basic search and retrieval tools to find electronic evidence. But as the volume of electronic data exploded, eDiscovery tools and software evolved to keep pace."[39] These platforms enabled attorneys to comb through terabytes of electronic data—emails, documents, metadata—quickly identifying relevant information without combing through boxes full of hard-copy documents.

Fast forward—"[t]oday, we have innovative tools and techniques like predictive coding, machine learning, and [AI] to help us sort through massive amounts of data and find the evidence we need."[40] With AI-assisted document review, software can flag important information or filter irrelevant content and save significant time and cost during litigation, leading to quicker resolution of cases and reduced legal fees.[41]

B.   *Generative AI and Machine Learning*

Few today would argue online research databases and e-discovery platforms create insurmountable ethical dilemmas; they are seen as extensions of existing technology that allow for more efficient lawyering. The most recent tech evolution,

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32.   Catherine Casey, *Technocat Tidbits: How Did Discovery Become Electronic Discovery?*, ACEDS BLOG (Oct. 3, 2023), https://aceds.org/technocat-tidbits-how-did-discovery-become-electronic-discovery-aceds-blog/.

33.   *A Brief History of Ediscovery—and a Glimpse of What's to Come With Collaborative Data*, JD SUPRA (Jan. 28, 2020), https://www.jdsupra.com/legalnews/a-brief-history-of-ediscovery-and-a-74681/.

34*. Id.*

35*. Id.*

36*. Id.*

37.   Casey, *supra* note 32.

38*. Id.*

39*. Id.*

40*. Id.*

41*. Id.*

however, is fundamentally different from those that have taken place in prior decades. If you've opened a major newspaper in the last two years, you already know I'm referring to AI.

No comprehensive definition of AI exists.[42] "At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence."[43] "The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, general-ize, or learn from past experience."[44]

"Before the generative AI boom of the past few years, when people talked about AI, typically they were talking about machine-learning models that can learn to make a prediction based on data."[45] Generative AI takes an additional step—creating original content. Generative AI "can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions."[46] "[T]hese tools analyze large amounts of digital text culled from the internet or proprietary data sources"[47] to "produce new text [as] prediction tools that generate a statistically probable output when prompted."[48] These machine-learning models learn from themselves as they access data to "create new data, rather than making a prediction about a specific dataset… [and] generate more objects that look like the data it was trained on."[49]

The newest iteration of these algorithms, relevant to this Article, "are commonly referred to as Large Language Models (LLMs)."[50] These machines "learn from vast amounts of data collected from many places" which "is used to train the model."[51] Their data sets and training then allow the models "to generat[e] written text that mimics human speech."[52] Generative AI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.[53]

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

43*. Id.*

44*. Id.*

45. Adam Zewe, *Explained: Generative AI*, MIT NEWS (Nov. 9, 2023), https://news.mit.edu/2023/explained-generative-ai-1109.

46. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

47*. Id.*

48*. Id.*

49. Zewe, *supra* note 45.

50. S. Sean Tu et al., *Artificial Intelligence: Legal Reasoning, Legal Research and Legal Writing*, MINN. J.L. SCI. & TECH., 2024, at 105, 107.

51. Michael Murray, *The Rise of AI in Court Reporting Technology*, LEGAL TECH NEWS (Jan. 12, 2024, 9:24 AM), https://www.law.com/legaltechnews/2024/01/12/the-rise-of-ai-in-court-reporting-technology/?slreturn=20241101104826.

52. Tu et al., *supra* note 50.

53. Kevin T. McCarthy et al., *Artificial Intelligence in Legal Practice: Benefits, Considerations, and Best Practices*, CTR. FOR L. & PUB. POL. 7-10 (2024), https://www.dri.org/docs/default-source/dri-white-papers-and-reports/ai-legal-practice.pdf.

In 2022, OpenAI released the first generation of ChatGPT.[54] "OpenAI collected or scraped large amounts of text from the internet and used deep learning techniques to train a new language model that could predict the next word in a sentence."[55] This initial version, GPT-1, amazed users, and its instantaneous responses to queries quickly went viral on social media. However, the initial version came with several limitations, including accuracy concerns which will be discussed below.

OpenAI, and other AI companies, began to improve their models, giving users "the ability… to direct the LLM to generate the text that was more specific to their needs."[56] Likewise, AI companies "added the ability for users to provide instructions directly to the language model to improve user satisfaction with its output using a process that OpenAI calls post-training alignment."[57]

In recent months, "OpenAI and other AI firms (including Meta, Anthropic, and Google) have launched even more improved models."[58] For example, OpenAI currently makes GPT-4 available to individual users who pay a monthly subscription fee.[59] This model "was trained using even more parameters than GPT-3."[60] OpenAI also expanded the ways in which users can upload information and instructions to the model. Users can now "submit different types of file inputs including images, sounds, music, and more."[61]

These new generative AI tools use machine-learning algorithms to create new, original content based on the data on which they have been trained. With respect to the legal profession, these platforms can be used to generate draft pleadings, contracts, and legal opinions—all in mere minutes.[62] Likewise, AI platforms can be used for predictive analytics further enhances AI's capabilities, enabling lawyers to foresee case outcomes, potential settlement ranges, and the likelihood of success on a given motion based on historical data.[63] Large law firms have turned to AI companies to automate drafting and research.[64] For instance, thousands of lawyers worldwide are now using Harvey, a GPT-4 platform backed

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54. Bernard Marr, *A Short History of ChatGPT: How We Got to Where We Are Today*, FORBES (May 19, 2023, 1:14 AM), https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/.

55. Tu et al., *supra* note 50.

56. *Id.*

57. *Id.*

58. *Id.* at 108.

59. *Id.*

60. *Id.*

61. *Id.*

62. Akash Takyar, *AI in Legal Businesses: Use Cases, Solution, Benefits and Implementation*, LEEWAYHERTZ, https://www.leewayhertz.com/ai-use-cases-in-legal-businesses/#An-overview-of-AI-in-legal-businesses (last visited Oct. 11, 2024).

63. *Id.*

64. Sara Merken, *OpenAI-Backed Startup Brings Chatbot Technology to Major Law Firm*, REUTERS (Feb. 16, 2023, 10:22 AM), https://www.reuters.com/legal/transactional/openai-backed-startup-brings-chatbot-technology-first-major-law-firm-2023-02-15/.

by OpenAI, to save time and money.[65] Not to be left behind, Lexis and Westlaw joined the AI race, creating their own generative AI platforms.[66]

However, this new leap from simple data storing and sorting to generating content has raised ethical concerns. At the outset, AI tools were prone to "hallucinations"—generating content that may appear plausible but is factually incorrect or misleading. Anyone paying attention is likely sick of hearing about *Mata v. Avianca, Inc.*, the New York case in which an attorney filed AI-generated briefs without cite-checking them.[67] The AI-generated legal research included made-up cases, leading to Rule 11 sanctions against the attorney.[68]

As the technology has improved, these risks have been reduced. And despite the accuracy concerns, generative AI is the future—offering previously unimaginable levels of streamlining and efficiency.[69] Even so, as outlined above, while few lawyers can now envision legal research without online databases, the change didn't take place overnight.

III. TECH COMPETENCY: AN ETHICAL OBLIGATION

#### A.	Competence

Adopted by the ABA House of Delegates in 1983, The ABA Model Rules of Professional Conduct "serve as models for the ethics rules of most jurisdictions."[70] ABA Model Rule 1.1 sets the standard for attorney competence, requiring lawyers to provide competent representation, including "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[71] Historically, this rule focused on a lawyer's understanding of legal principles and procedural rules. However, in the digital era, the duty of competence has changed.

Model Rule 1.1 has always required a lawyer to "keep abreast of changes in the law and its practice."[72] Ten years ago, the ABA added language to Comment 8 of Rule 1.1 to emphasize that "a lawyer's general ethical duty to remain competent in a digital age" includes "understanding relevant technology's benefits and risks."[73] Further, "a lawyer should remain aware of technology… as part of a

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65. *Id.*; Isha Marathe, *The Hype Behind Harvey: How the Stealthy Startup Is Raising Industry Eyebrows*, LEGAL TECH NEWS (June 13, 2024, 4:14 PM), https://www.law.com/legaltechnews/2024 /06/13/the-hype-behind-harvey-how-the-stealthy-startup-is-raising-industry-eyebrows/.

66. Patrick Austin, *LexisNexis and Westlaw Will Launch AI Legal Research Tools*, NBI BLOG, https://nbi-sems.com/blogs/news/lexisnexis-and-westlaw-will-launch-ai-legal-research-tools   (last visited Nov. 1, 2024).

67. Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 448 (S.D.N.Y. 2023).

68. *Id.*

69. Christoff & Riley, *supra* note 3.

70. *Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/grou ps/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Nov. 1, 2024).

71. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

72. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2023).

73. Brett Burney, *Technology Competence for Lawyers: Ignorance Is No Excuse*, JD SUPRA (July 6, 2022), https://www.jdsupra.com/legalnews/technology-competence-for-lawyers-4784027/.

lawyer's general ethical duty to remain competent in a digital age."[74] This is because "technology is such an integral—and yet at times invisible—aspect of contemporary law practice."[75] Thus, for over a decade, the profession has recognized the growing role of technology. The duty of competence is no longer limited to substantive and procedural law; it now includes navigating technological tools that facilitate modern lawyering.

While Rule 1.1 is a "model" rule, forty states have adopted the duty of technology competency.[76] This ethical obligation poses a distinct problem today. With rapid changes over the past two years, many lawyers have failed to "keep abreast" of technological advances. A recent general counsel survey revealed the following statistics about attorneys in General Counsel ("GC") positions:

> GCs believe 67% of lawyers lack adequate competence.[77] That's almost 7 out of every ten. Not only that, but the percentage of inadequate technologically competent lawyers went up significantly in 2021. Last year, the percentage was 45%. The percentage was 51% in 2019.[78]

As noted above, the ABA Standing Committee on Ethics and Professional Responsibility recently released Formal Opinion 512.[79] It states that while lawyers need not become "AI experts," they "must have a reasonable understanding of the capabilities and limitations of the specific [generative] AI technology that the lawyer might use."[80] This means they "should either acquire a reasonable understanding of the benefits and risks of the [generative] AI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant [] tool's capabilities and limitations."[81] As these tools evolve, Rule 1.1 "presupposes that lawyers remain vigilant about the tools' benefits and risks."[82] "[L]awyers should consider reading about [generative] AI tools targeted at the legal profession, attending relevant continuing legal education programs, and… consulting others who are proficient in [generative] AI technology."[83]

And courts have already recognized that ignorance to technology is no excuse. Take *James v. National Financial, LLC*,[84] in which counsel blamed his discovery missteps on his lacking tech knowledge: "I have to confess to this Court, I am not computer literate. I have not found presence in the cybernetic revolution.

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74. MODEL RULE OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2023).

75. Burney, *supra* note 73.

76. Robert J. Ambrogi, *Tech Competence: 40 States Have Adopted the Duty of Technology Competence*, LAWSITES, https://www.lawnext.com/tech-competence (last visited Nov. 1, 2024).

77. Stephen Embry, *Lawyers' Technological Incompetence: Ethics and Clients Be Damned*, TECHLAW CROSSROADS (Oct. 8, 2021), https://www.techlawcrossroads.com/2021/10/lawyers-technological-incompetence-ethics-and-clients-be-damned/.

78. *Id.*

79. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. James v. Natl. Fin. LLC, 2014 WL 6845560, at *1 (Del. Ch. 2014).

I need a secretary to help me turn on the computer."[85] The court, referring to Comment 8 of Rule 1.1 responded that "professed technological incompetence is not an excuse for discovery misconduct."[86] Further:

> "[D]eliberate ignorance of technology is inexcusable…. [I]f a lawyer cannot master the technology suitable for that lawyer's practice, the lawyer should either hire tech-savvy lawyers tasked with responsibility to keep current, or hire an outside technology consultant who understands the practice of law and associated ethical concerns."[87]

With AI rapidly becoming part of the legal toolkit, attorneys must now acquire sufficient knowledge of AI tools, including generative AI, to competently serve their clients. Currently, relying on AI "without an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation…."[88] And at some point soon, failure to utilize AI technology to your client's advantage may constitute a similar breach. Just as legal professionals transitioned from paper research to digital databases decades ago, they must now transition to AI-enhanced practices to meet their ethical obligations. Would you pay your attorney to pore over boxes of hard-copy emails when an e-discovery tool could pull out the relevant keywords in a matter of seconds? Of course not.

B.   Fees

In addition to the duty to understand and competently employ technology, lawyers have duties to charge "reasonable" fees. Under ABA Model Rule 1.5, lawyers must manage fees reasonably: "[L]awyer[s] shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[89]

AI tools can assist attorneys in streamlining work processes, allowing them to handle routine tasks more efficiently and cost-effectively. But lawyers must bill accordingly. Lawyers who bill hourly have an ethical duty to only bill for time expended. AI "may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time."[90] And the same principle applies to reasonableness of fees. "For example, if using a [generative] AI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be

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85. Elizabeth Guthrie, *Technology Competence for Lawyers: Ignorance Is No Excuse*, NEXTPOINT, https://www.nextpoint.com/ediscovery-blog/technology-competence-for-lawyers-ignorance-is-no-excuse/ (last visited Nov. 1, 2024).

86. *Id.*; *see also* Burney, *supra* note 73.

87. Guthrie, *supra* note 85 (quoting *James*, 2014 WL 6845560, at *12).

88. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

89. MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2023).

90. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the [generative] AI tool as when not using it."[91]

In the future, there may be ethical implications when lawyers choose not to use AI tools that could benefit their clients by making legal services more affordable. Just as billing for hours "saved" by AI violates Rule 1.5, failing to use technology that could lower costs may breach a lawyer's duty to avoid charging unreasonable fees.[92] This is particularly true in cases where AI can automate routine or administrative tasks that could otherwise be billed at high hourly rates. For instance, ESI procedures using predictive coding in e-discovery, in which AI can efficiently sift through vast amounts of data.[93] Using AI to perform document review, or draft simple documents and pleadings, can dramatically reduce the time required for such tasks, leading to lower billable hours and reduced client costs.[94]

C.   Communication

Lawyers have a separate duty that overlaps with the two outlined above—the duty to communicate with clients. ABA Model Rule 1.4 mandates that a lawyer shall "promptly inform the client of any decision or circumstance with respect to which the client's informed consent," "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and "keep the client reasonably informed about the status of the matter."[95] This duty requires lawyers to consider when to disclose their AI use to clients.

"The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their [generative] AI practices to clients or obtain their informed consent to use a particular [generative] AI tool."[96] Lawyers must obviously disclose if asked by a client, or if the client agreement expressly calls for disclosure.[97] Likewise, lawyers must disclose, unprompted by the client, when they intend to input confidential client data into a generative AI platform.[98] And lawyers must also disclose in situations where AI "output will influence a significant decision in the representation,"[99] including using AI to predict outcomes.

A final situation requiring communication and consent of the client—fees. It is important to remember that ABA Model Rule 1.5(b) requires attorneys to communicate with their clients on the basis for fees. "[B]efore charging the client for the use of the [generative] AI tools or services, the lawyer must explain the basis for the charge, preferably in writing."[100] Therefore, it is advisable to consider

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91. *Id.*
92. *Id.*
93. Christoff & Riley, *supra* note 3.
94. Devin R. Bates, *Taming the AI Beast: Judges Set Rules to Control Use of Generative AI in Their Courts*, MITCHELL WILLIAMS L. FIRM (June 8, 2023), https://www.mitchellwilliamslaw.com/taming-the-ai-beast-judges-set-rules-to-control-use-of-generative-ai-in-their-courts.
95. MODEL RULE OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2023).
96. ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

technology prior to engaging with the client, and disclose its use in the engagement agreement.

V. ACCURACY, RELIABILITY, AND SUPERVISION

A.   *Candor to the Court & Rule 11*

Lawyers have responsibilities to the court as well. Under ABA Model Rule 3.1, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous…."[101] And under ABA Model Rule 3.3, lawyers cannot make—or fail to correct—any material statements of law or fact before the court.[102]

Rule 11 of the Federal Rules of Civil Procedure applies in similar fashion. Under Rule 11(b), an attorney's signature on a court filing certifies that the filing is based on a reasonable inquiry and is not frivolous.[103] This rule applies regardless of whether the content was generated by an attorney, paralegal, or AI tool. Thus, when lawyers use AI to draft pleadings or conduct legal research, they must still ensure the information meets the standards set by Rule 11.[104]

One of the major criticisms on generative AI has been the lack of reliable output, including the potential for errors, inaccuracies, or "hallucinations," where the AI fabricates legal authority or misstates facts. In cases like the one referenced above, which I politely decline to name once again, early versions of generative-AI platforms created non-exist facts and law.[105] As with any technology, "[i]f the quality, breadth, and sources of the underlying data on which a [generative] AI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results."[106] But what if hallucinations were no longer a concern?

Attorneys never question output from trusted research platforms like Lexis and Westlaw, and these platforms are now integrating AI in their services. For instance, Westlaw Precision's "AI-Assisted Research uses [an LLM] that analyzes trusted content on Westlaw to generate answers. The content analyzed includes cases, statutes, and regulations."[107] "The LLM also relies heavily on the editorial enhancements the Westlaw attorney-editors add to these primary law sources, which include the West Key Number System, headnotes, and KeyCite."[108]

Westlaw has "used AI to serve up editor-created answers for over a decade."[109] "What's different now is that [it's] generating a new response just for

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101.   MODEL RULE OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023).

102.   MODEL RULE OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2023).

103.   FED. R. CIV. P. 11(b).

104*.   Id.*

105.   Mata v. Avianca, 678 F. Supp. 3d 443 (S.D.N.Y. 2023). This 2023 case involved a now-dated version of ChatGPT.

106.   ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

107*.   Introducing AI-Assisted Research: Legal Research Meets Generative AI*, THOMSON REUTERS (Nov. 15, 2023), https://legal.thomsonreuters.com/blog/legal-research-meets-generative-ai/.

108*.   Id.*

109*.   Id.*

your question, rather than retrieving prewritten responses."[110] It "can generate answers in real-time, reflecting current law across jurisdictions,"[111] allowing the machine to answer "a far broader array of questions than what we could anticipate with human power alone."[112] The platform also links the documents on which it relied, allowing researchers to verify the AI output.[113] Similarly, Lexis+ AI utilizes multiple LLMs, including GPT.[114] "The AI is designed to respond in seconds to prompts and can draft summaries, legal documents and communications."[115] The technology "is also able to provide citations, including cites to relevant case law, authorities and guidance."[116]

Courts have made it clear that the use of AI does not absolve lawyers of their duty under Rule 11 to ensure that their filings are accurate and based on sound legal research. As discussed below, judges have become increasingly vigilant about holding attorneys accountable for AI-related errors, particularly when those errors could have been avoided with proper supervision and cross-checking.[117] But lawyers can take several steps to mitigate accuracy concerns, including understanding the data that the LLM was trained on, defining boundaries (i.e., restricting the LLM's knowledge base), and supervising both the training process and output data.[118]

B.   Supervision

How do lawyers ensure accuracy and reliability? Through supervision. Much like the duties under Rule 11, the duty to supervise non-lawyers is not a new obligation in the legal profession. Lawyers have long been required to supervise junior associates, paralegals, and non-lawyer assistants under ABA Model Rule 5.3, which mandates that lawyers "shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[119] As AI technology integrates into the practice of law, lawyers must extend this duty of supervision to generative AI tools.

Under Rule 5.3, a lawyer is responsible for overseeing both human staff and technological tools that assist in delivering legal services.[120] The rule is clear that lawyers must make reasonable efforts to ensure any assistance adheres to the lawyer's professional obligations. Generative AI tools capable of producing drafts of legal documents or research memoranda, now fall into the broader category of "assistants" that lawyers must supervise.

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114.   Austin, *supra* note 66.

115. *Id.*

116. *Id.*

117.   Christoff & Riley, *supra* note 3.

118.   Jessica R. Gunder, *Rule 11 Is No Match for Generative AI*, 27 STAN. TECH. L. REV. 308, 314 (2024).

119.   MODEL RULES OF PRO. CONDUCT r. 5.3(a) (AM. BAR ASS'N 1983).

120. *Id.*

This duty applies twofold. First, "lawyers must establish clear policies regarding the law firm's permissible use of [generative] AI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations."[121] Second, lawyers must supervise the third-party AI platforms. To do so, lawyers should:

 ● [E]nsure that the [AI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;
 ● [I]nvestigate the [AI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;
 ● [D]etermine whether the [AI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information; and
 ● [U]nderstand the risk that [AI tool's servers] are subject to their own failures and may be an attractive target of cyber-attacks.[122]

Just as lawyers must review and verify the work of a paralegal before filing a brief, they must also review and verify AI-generated work to ensure accuracy, completeness, and compliance with legal and ethical standards. Failure to monitor the outputs of these tools is akin to failing to supervise non-lawyer.[123]

C.   *Judicial Standing Orders on AI Use*

As AI use has expanded, courts have begun implementing standing orders to remind counsel of their ethical obligations. So far, over twenty federal judges have issued standing orders related to AI use.[124] These standing orders generally reflect judicial caution about the accuracy and reliability of AI-generated filings, particularly in light of highly publicized cases where AI outputs have caused problems.

Several federal judges have issued orders requiring lawyers to disclose whether they used AI in drafting documents and, if so, to certify the accuracy of any AI-generated content.[125] For example, U.S. District Judge Brantley Starr in the Northern District of Texas was one of the first to introduce a standing order that mandated attorneys to certify whether they used generative AI to prepare any part of a legal filing.[126] The order required lawyers to verify the AI's output for accuracy and certify that they have conducted a reasonable inquiry under Rule 11.[127] The order stated that failing to comply could result in sanctions, as the

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121.   ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

122.   *Id.*

123.   Christoff & Riley, *supra* note 3.

124.   Lat, *supra* note 10.

125.   *Id.*

126.   Jaqueline Thomsen, *US Judge Orders Lawyers to Sign AI Pledge, Warning Chatbots 'Make Stuff up'*, REUTERS (June 2, 2023), https://www.reuters.com/legal/transactional/us-judge-orders-lawyers-sign-ai-pledge-warning-they-make-stuff-up-2023-05-31/.

127.   *Id.*

responsibility for the accuracy of AI-generated work ultimately rests with the attorney.[128] Similarly, Magistrate Judge Gabriel Fuentes of the Northern District of Illinois issued a standing order requiring attorneys to disclose whether they used AI not only for drafting but also for legal research.[129]

Judges are understandably wary—as generative AI has dominated the media conversation over the past year. Some argue "[a]ny such rules are redundant given lawyers' existing responsibilities to ensure the accuracy of their court filings."[130] Why? Because lawyers already have a duty to ensure the accuracy of their filings. "Rule 11 in the federal courts and similar state rules require lawyers to certify the factual and legal accuracy of their pleadings. Professional responsibility rules impose similar requirements. To create a new 'accuracy' rule specifically related to the use of AI is unnecessary."[131]

Yet others consider Rule 11 to be insufficient to deal with AI-generated filings: "Rule 11 is not well-suited for sanctioning this type of attorney misconduct, and its inadequacy is likely spurring the creation of these standing orders."[132] The alleged shortcomings of Rule 11 are twofold. First, there is a safe harbor provision if opposing counsel moves for rule 11 sanctions, which allows twenty-one days to correct or amend a pleading. Second, *sua sponte* sanctions from the courts are limited—ordinarily issued "only in situations that are akin to a contempt of court."[133] For instance, in *United States v. Cohen*, which took place a few months after *Mata*, counsel used ChatGPT and filed a letter brief containing fictitious cases.[134] The district court declined to issue Rule 11 sanctions, noting that the Second Circuit requires "a finding of subjective bad faith."[135] Although citing "non-existent cases is embarrassing and certainly negligent, perhaps even grossly negligent," it was not enough to show bad faith.[136]

Judges will undoubtedly play a role in shaping how the generative-AI revolution proceeds. Many seem to agree that in addressing AI, whether through standing orders or local rules, courts should proceed with "caution and humility" and avoid overburdensome rules.[137] Commenters argue courts should avoid "an anti-technology tone and the appearance of bias… by not imposing a ban or disclosure requirement, but instead by informing litigants that the use of generative AI is permissible, but its use must be consistent with the litigant's obligations

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128. Bates, *supra* note 94. As of September 2024, disclosure of generative-AI use is now required in the Northern District of Texas under Civil Rule 7.2(f) and Criminal Rule 47.2(e).

129. Judge Fuentes later "moved [the disclosure requirement] to an appendix of background information and court preferences attached to the standing order." Sarah Martinson, *Ill. Magistrate Judge Fuentes Talks Pulling Back AI Order*, Law360 (August 2, 2024), https://www.law360.com/pulse/articles/1866059/ill-magistrate-judge-fuentes-talks-pulling-back-ai-order.

130. Lat, *supra* note 10.

131. *Id.*

132. Gunder, *supra* note 118, at 311.

133. Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment.

134. United States v. Cohen, 2023 WL 8635521, at *1 (S.D.N.Y. 2023).

135. *Id.* at *5.

136. *Id.* at *6.

137. Lat, *supra* note 10.

under Rule 11."[138] Either way, until the courts reach a level of uniformity, lawyers must remain vigilant as they navigate the patchwork of judicially created rules.

IV. CONFIDENTIALITY CONCERNS: A MANAGEABLE RISK

A.   *Confidentiality*

ABA Model Rule 1.6 establishes a lawyer's duty to maintain the confidentiality of information related to the representation of a client. It mandates lawyers "shall not reveal information relating to the representation of a client"[139] and must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[140] And "Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information."[141]

In 2017, the ABA issued Formal Opinion 477R, which "extended and commented on the scope of technological competency."[142] Through this opinion, the ABA "modernized the ethical duties for lawyers and included basic attorney competencies for protection of data with multiple storage devices, including cloud computing and alternate storage locations, and acknowledged the technological competence and duties for cybersecurity."[143] With respect to securing electronic client information, "lawyers should understand the threats and risks associated with cyber intrusion, investigate how client confidential information is transmitted and understand where it is stored, use reasonable electronic security measures, determine how electronic communications about client matters should be protected during representation, and provide appropriate labeling for confidential client information."[144] Thus, lawyers have long had a duty to take reasonable steps to ensure the AI tools they use protect client confidentiality, especially when sensitive information is uploaded to third-party platform. Just like any technology, it is critical for lawyers to understand the algorithm behind the AI platform they are using. There are significant differences between "closed" AI platforms and public ones. "Many companies offer safe, secure, and encrypted platforms that incorporate generative AI technology to protect client data."[145] However, "many publicly available generative AI programs aren't encrypted and data input to them could become publicly available."[146] In such cases, lawyers should obviously avoid inputting *any* confidential client information.

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138.   Gunder, *supra* note 118, at 311.

139.   MODEL RULE OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2001).

140.   MODEL RULE OF PRO. CONDUCT r. 1.6(c) (AM. BAR ASS'N 2001).

141.   ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

142.   Heidi Frostestad Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, J.L. TECH & INTERNET, 2019, at 1, 7.

143*.   Id.*

144*.   Id.*

145.   Owen Wolfe & Eddy Salcedo, *With AI Use, Lawyers Need to Ponder Confidentiality Stipulations*, BLOOMBERG L. (July 1, 2024, 4:30 AM), https://news.bloomberglaw.com/us-law-week/with-ai-use-lawyers-need-to-ponder-confidentiality-stipulations.

146*.   Id.*

In Formal Opinion 512, the ABA highlighted the significance of confidentiality concerns when using generative-AI platforms. Before lawyers input client information into the machine, "they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm."[147] But outsiders are not the only considerations. "Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others inside the firm who will not adequately protect the information from improper disclosure or use."[148] The algorithms learn from previously inputted data—meaning, without the right parameters in place, they could potentially disclose confidential information. For instance, client information could be "input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it."[149] For these reasons, lawyers may need to give clients their best judgment on why the AI tool should be used, in order to receive informed consent.[150]

Despite the legitimate concerns, confidentiality risks associated with AI are not insurmountable. Much of the discourse around AI focuses on its potential to expose sensitive information to data breaches or unauthorized access. However, these risks are manageable with proper due diligence. Lawyers must vet AI providers to ensure they comply with stringent data-security standards, and they must understand how the AI processes and stores client data. Encryption, data anonymization, and contractual agreements with AI vendors regarding data handling are all ways to mitigate confidentiality risks.[151] With respect to contracts, lawyers must familiarize themselves with the AI platform's terms of service and privacy policies or seek out an expert or colleague who has done so. This may include "consult[ing] with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which [generative] AI tools utilize information."[152]

B.   *Balancing Competency, Efficiency, and Confidentiality*

While confidentiality concerns are valid, they should not overshadow the broader ethical obligation lawyers have to provide competent and efficient representation. As AI tools become more reliable and integrated into daily practice, the risks associated with confidentiality will be outweighed by the duties of competence and cost-efficiency. Legal professionals who avoid AI due to concerns about confidentiality may, in fact, be breaching their duties.[153]

The legal industry has long dealt with confidentiality concerns in the context of new technologies. When cloud computing was introduced, there existed similar fears about data breaches and the loss of client confidentiality. However, with

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147.   ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

148*.   Id.*

149*.   Id.*

150*.   Id.*

151.   Lat, *supra* note 10.

152.   ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

153.   Hedges, *supra* note 2, at 2.

appropriate safeguards, cloud technology has become a standard in the legal industry. Multiple state bar associations have issued statements concluding "lawyers may ethically use cloud computing, so long as they exercise reasonable care to keep client information and files confidential."[154] And firms now use cloud-based solutions to manage documents, case files, and communications without significant confidentiality issues.[155] AI will likely follow a similar path, with confidentiality concerns diminishing as lawyers gain more familiarity with the technology and develop strategies to protect sensitive information.[156]

V. BEST PRACTICES FOR SUPERVISING AI-GENERATED WORK

Supervising AI tools presents new challenges that require careful attention to detail and a robust understanding of the technology. Lawyers cannot blindly rely on AI outputs without verifying their accuracy and relevance. Here are some best practices to ensure AI tools are properly supervised:

1. Verify All AI Output: Lawyers should cross-check AI-generated content with traditional legal research databases, such as Westlaw or LexisNexis, to verify that citations are accurate and up to date. AI tools, especially generative models, can produce content that seems credible but is not grounded in actual case law.

2. Use AI for Routine Tasks, Not Complex Legal Reasoning: While AI can automate routine tasks like document review or legal research, lawyers should exercise caution when using AI for more complex legal reasoning or drafting substantive legal arguments. Human oversight is critical to ensure that AI-generated conclusions are sound and well-supported.

3. Document the Supervision Process: Lawyers should document the steps they take to verify AI-generated work, especially when using AI in drafting pleadings or legal briefs. This documentation can serve as a safeguard against potential ethical violations under Rule 11 or other professional conduct rules.

4. Understand the Limitations: Lawyers must familiarize themselves with the capabilities and limitations of the AI tools they use. For instance, they should know whether the AI is prone to "hallucinations," what the data-security measures consist of, and the underlying data used to train the machine. When necessary, lawyers should restrict the platform's knowledge base to ensure reliable output. Understanding these limitations is key to effectively supervising AI tools.

At bottom, lawyers must balance the efficiency AI offers with the need for human oversight and confirmation. AI can significantly reduce the time spent on certain tasks, such as retrieving data from a database of documents or comparing two versions of a draft. It can even draft pleadings and help attorneys understand legal issues. However, it cannot replace the legal judgment and ethical responsibility that come with human decision-making. Attorneys must understand how the

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154. *Is It Ethical for Lawyers to Store and Send Information Through the Cloud?*, AFINETY (Feb. 14, 2020), https://afinety.com/is-it-ethical-for-lawyers-to-store-and-send-information-through-the-cloud/.

155. *Is the Cloud a Secure Place for Legal Data?*, THOMSON REUTERS (Apr. 11, 2023), https://legal.thomsonreuters.com/blog/is-the-cloud-a-secure-place-for-legal-data/.

156. Lat, *supra* note 10.

platform works, and the underlying training data. For example, if an AI system was trained on biased data, it could produce biased legal conclusions. Attorneys must ensure that they, not the machine, are ultimately responsible for the legal arguments and conclusions presented to the court.

By following these best practices, lawyers can mitigate the risks associated with AI use while fulfilling their ethical obligations to verify accuracy and supervise.

CONCLUSION: EMBRACE THE MACHINE RESPONSIBLY

Lawyers have an ethical duty to stay current with technology and to leverage tools in the best interest of their clients. Through AI, lawyers can streamline their work, reduce errors, and improve the overall quality of their services. However, with this increased reliance on technology comes heightened duties of competency, candor, and supervision, ensuring that AI-generated content meets the same ethical standards as work produced by human assistants.[157]

As AI continues to transform legal practice, the surrounding ethical obligations will continue to evolve as well. While accuracy and confidentiality concerns are valid, the duty to use AI responsibly, efficiently, and competently, will soon outweigh the perceived risks. Lawyers who fail to understand and implement technology in the coming years may find themselves at a disadvantage, both in terms of providing competent representation and meeting the growing demands of cost-conscious clients.[158]

History repeats itself. And, as we've seen in the past, the future of the profession will be defined by how well it adapts to technology. The time for hesitation and objection has passed—lawyers have an ethical responsibility to educate themselves and implement technology responsibly.[159] As our past has shown, technology won't replace lawyers, but lawyers who master it will eventually replace those who don't.

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157. MODEL RULE OF PRO. CONDUCT r. 1.1, 5.3. (AM. BAR. ASS'N 2012).
158. Bates, *supra* note 94.
159. Christoff & Riley, *supra* note 3.