



The State Bar *of California*

Generative AI in Legal Practice: Opportunities, Risks, and Best Practices

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COURSE OVERVIEW

Understand the Basics of GAI

Explore Possible Use Cases

Examine Risks and Ethical
Considerations

Determine Best Practices for
Implementation



Professional and Ethical Considerations for GAI Use



Introduction to AI Technology



**Machine
Learning**



**Natural
Language
Processing**



**Computer
Vision**



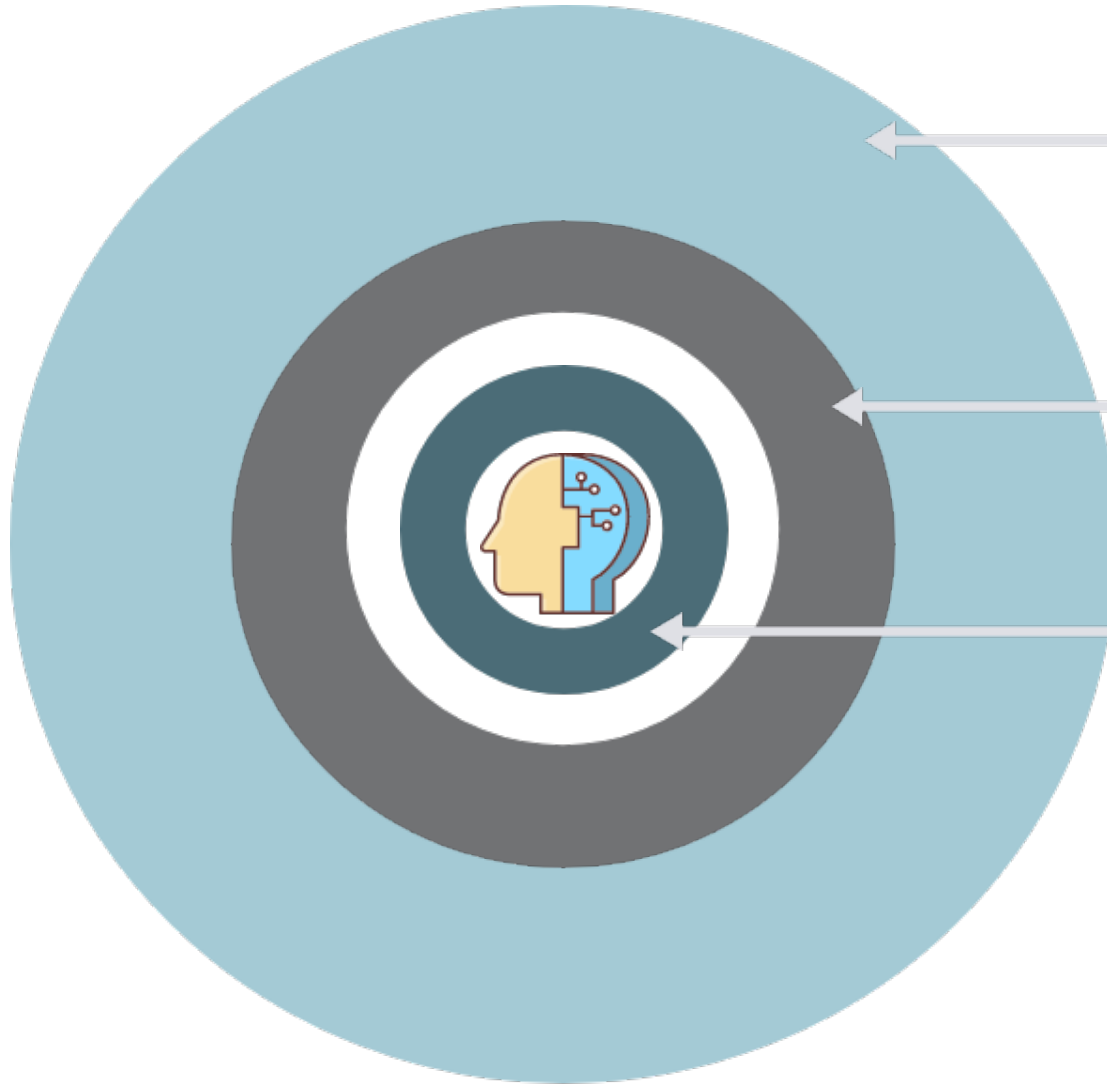
Robotics



**Neural
Networks**



Key Concepts



AI: Computer systems that can do things normally thought to require human intelligence

GAI: AI that can generate new content based on data it's been trained on

LLM: Type of GAI focused on processing and generating human language

Generative AI Terms to Know

- GOF AI (Good Old-Fashioned Artificial Intelligence)
- GAI (Generative Artificial Intelligence)
- LLM (Large Language Model)- ChatGPT
- NLP (Natural Language Processing)
- AGI (Artificial General Intelligence)
- RAG (Retrieval-Augmented Generation)
- ASI (Artificial Superintelligence)
- Fine Tuning
- Prompt/Output





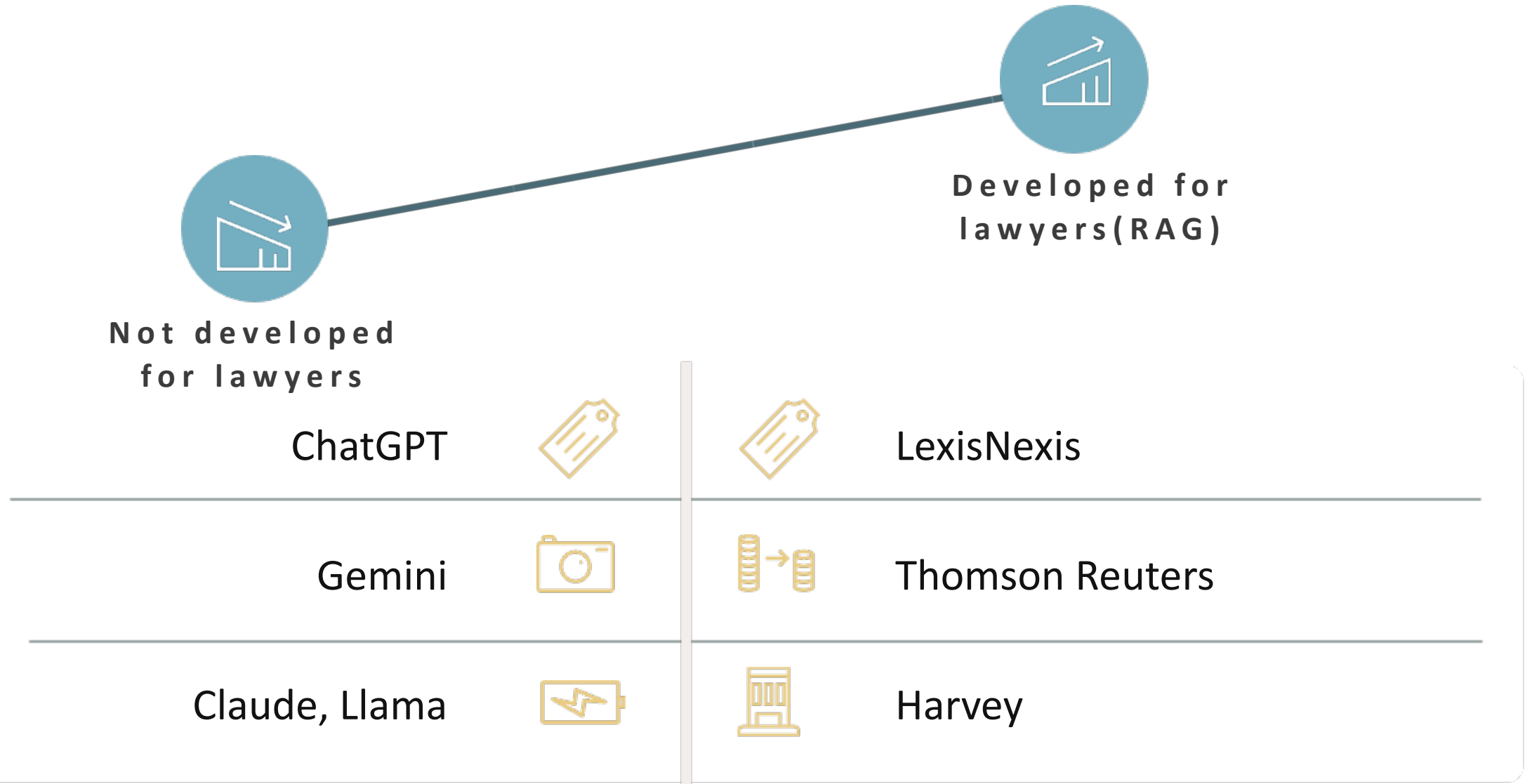
Retrieval-Augmented Generation (RAG)

Retrieval-augmented generation is being promoted as the key technology for making LLMs effective in domain-specific contexts, like the practice of law.

It allows general LLMs to make effective use of company- or domain-specific data and to produce more detailed and accurate answers by drawing directly from retrieved text.



General Products vs. Law-Specific Products



How GAI Can Aid Lawyers

Initial Drafts

- Correspondence and agreements (e.g., fee agreements, client communications, content for law firm marketing)
- Litigation timelines with key dates, locations, parties and necessary persons
- Pleadings
- Identify key contract terms

Legal Research and Motion Practice

- Review and summarize new statutes, regulations, and case law
- Identify relevant case law and authorities
- Draft motions/briefs
- Identify exhibits from the record to support factual assertions
- Suggest defenses, counterclaims, and cross-claims

Discovery and Depositions

- Search for concepts across documents
- Summarize and analyze documents and transcripts
- Identify discrepancies in discovery and testimony

Trial Prep and Evidence

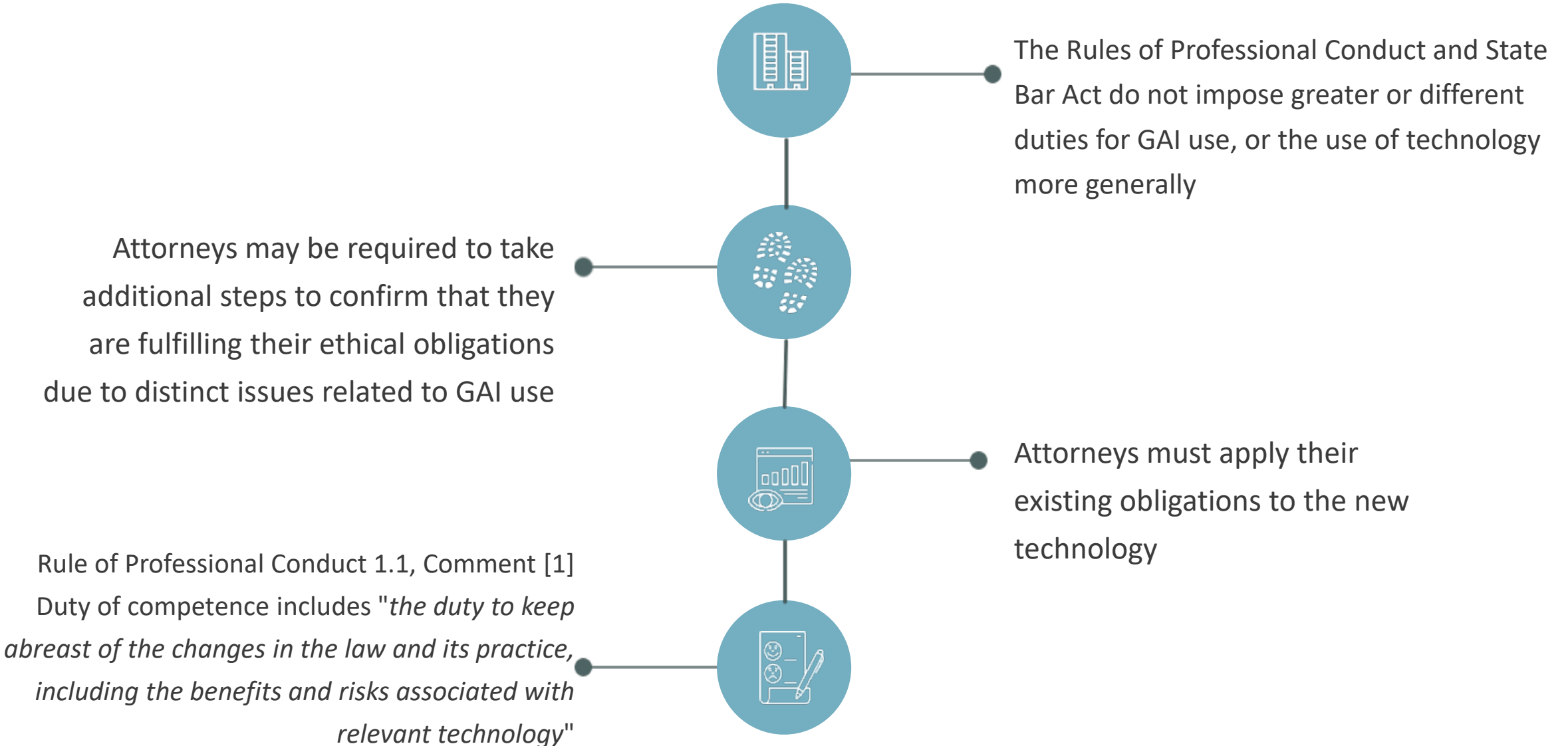
- Draft demonstrative evidence
- Identify relevant exhibits, testimony
- Develop opening statements and closing arguments





The Rules of Professional Conduct

Existing Authorities Apply to New Technology



Rule 1.1

- A lawyer must ensure competent use of GAI by:
 - Understanding technology and policies.
 - Engaging in critical review and validation.
- A lawyer's professional judgment cannot be delegated to GAI.
- The duty of competence requires more than detection and elimination of false AI-generated results.



Rule 1.5 Bus. & Prof. Code, §§ 6147– 6148

- A lawyer may charge for actual time spent using GAI, including creating and refining inputs and prompts, and reviewing and editing outputs.
- A lawyer cannot charge hourly fees for the time saved by using GAI.
- If a GAI tool enables quicker completion, it may be unreasonable to charge the same flat fee





Charging for GAI Itself

A fee agreement should explain the basis for all fees and costs associated with generative AI.

ABA Formal Opinion 512 advises:

If a GAI tool functions like legal practice overhead, the cost should be considered overhead and not charged to the client (e.g., using a tool like Grammarly).

When using a third-party GAI service with per-use charges, it's reasonable to bill the client for the actual expense.

For custom tools built by the law firm:

The client and firm can agree in advance on rates for using this tool.

Absent an agreement, the firm can charge no more than the direct cost plus a reasonable allocation of expenses.

When charging for any tool, the charge cannot be duplicative of charges to other clients.



Hypothetical

Maria, a defense attorney, is representing a client in a high-stakes corporate litigation case. To prepare for negotiations, she decides to use an AI-powered tool that predicts settlement outcomes based on historical data of similar cases. The tool suggests a settlement range significantly lower than what Maria's client initially expected, based on the trends observed in recent cases.

Maria knows the tool's prediction could potentially lower her client's expectations and may lead her to push for a quicker, albeit less favorable, settlement. Maria also realizes that relying solely on the tool's predictions without considering all relevant factors might not fully serve her client's interests.

What is an ethical consideration Maria faces in this scenario?



Debrief of Hypothetical

Correct Answer is (D): All of the above.

Maria faces multiple ethical considerations in this scenario:

Accuracy and Relevance of Data (A): Maria must ensure that the data used by the AI tool is current, relevant, and accurately reflects the dynamics of her specific case. Relying on outdated or irrelevant data could lead to poor advice and potentially harm her client's position.

Transparency (B): Should Maria disclose to her client that she used an AI tool to inform her advice, ensuring transparency in how she arrived at her recommendations? If she does, this disclosure helps maintain the client's trust and allows them to make informed decisions. It may also be required under Rule 1.4.

Client's Best Interests (C): Maria must critically assess whether the AI's predictions align with her client's best interests, considering not just the data but also the specific circumstances and strategic goals of her client.



Risks and Considerations



Confidentiality



Privacy Concerns with the AI
technology



Accountability and Decision-making



Bias and Fairness in AI models



**Bus. & Prof.
Code, § 6068,
subd. (e)**

Rule 1.6

Rule 1.8.2

- Absent client consent, a lawyer cannot input confidential client information, or information that could identify a client, into a GAI product that lacks adequate confidentiality and security protections.
- A lawyer should:
 - Understand the GAI product's use of inputs and security.
 - Assess other relevant rules or laws (e.g., privacy, cybersecurity).



Outsourcing Legal/Nonlegal Services Through GAI

ABA Formal Opinion 512 advises that lawyers should:

- Ensure that the GAI tool is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;
- Investigate the GAI tool's reliability, security measures, and policies, including limitations on the company's liability;
- Determine whether the GAI tool retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information; and
- Understand the risk that GAI tool servers are subject to their own failures and may be an attractive target of cyber-attacks.



Privacy Concerns



What does the model do with data?



Are there privacy implications of using GAI in data analysis and storage?



How could it potentially expose sensitive client information?



Are there safeguards to protect client privacy?



Specific Concerns for Self-Learning GAI Tools


- Lawyers must evaluate the risk of GAI tool information being disclosed to or accessed by others in the firm, which could be inadvertently improperly disclosed outside of the firm by another lawyer (Rules 1.6, 1.8.2).
- The information could also be disclosed to those prohibited from accessing it due to ethical walls (Rules 1.7, 1.9, 1.10).
- ABA Formal Opinion 512 advises that a client's informed consent is required before inputting their information into such a GAI tool; COPRAC guidance says that informed consent may be required.



Rule 1.4 Rule 1.2

- A lawyer should evaluate their communication obligations throughout the representation to determine whether lawyer's use of GAI must be communicated to the client.
- Consider: facts and circumstances of the representation, the novelty of the technology at time of representation, risks associated with GAI use, the scope of the representation, and client instructions or guidelines, as well as the sophistication of the client.





If Informed Written Consent Is Required, What Must It Include?

ABA Formal Opinion 512 says the client must have the lawyer's best judgment about:

- Why the GAI tool is being used;
- The extent of, and specific information about, the risk of GAI use, including particulars about:
 - the kinds of client information that will be disclosed,
 - the ways in which others might use the information against the client's interests,
 - potential risk of later users having access to client's information; and
- The GAI tool's benefits to the representation.

Boilerplate provisions in engagement letter purporting to authorize the lawyer to use GAI are not sufficient.



Hallucinations

- What are hallucinations?
 - False or misleading AI-generated content
 - False statements (e.g., made up case law, stating that it is legal/illegal to do something that it isn't)
 - Easy to spot if looking for it by double-checking citations
 - False assertions (e.g., misstating the holding of a real case, citing a case that does not stand for a correct factual proposition)
 - More difficult to spot as they require reading and understanding the source and assessing its authority
- What are the risks?
 - Inefficiencies and additional workload
 - Poor advocacy/ incompetence
 - False/misleading statements to a judicial officer



Does RAG / Legal Specific Tools Solve Hallucination Concerns?

- Stanford says no. Commercially-available RAG-based legal research tools still hallucinate.
- In a May 2024 Stanford study, over 1 in 6 of queries caused Lexis+ AI and Ask Practical Law AI (Thomson Reuters) to respond with misleading or false information. One-third of Westlaw's AI-Assisted Research (Thomson Reuters) contained a hallucination.
- Many of the hallucinations related to misunderstanding holdings, distinguishing between a party's argument and the court's holding, and the hierarchy of legal authorities.
- These systems are less prone to hallucination than GPT-4, but **users of any GAI product must remain cautious about relying on their outputs.**



Rule 3.1 Rule 3.3

- A lawyer must review all GAI outputs to check for accuracy before submission to a court and correct any errors or misleading statements made to a court.
- Jurisdictional requirements may require disclosure of generative AI use or create other obligations:
 - Local Rules
 - Standing Orders
 - Other requirements in the relevant jurisdiction





Hypothetical

Larry, a practicing attorney, decides to integrate a GAI tool into his practice to assist with drafting legal documents. He uses the tool to generate a first draft of a client's will based on information provided during a consultation. Before finalizing the document, Larry reviews the draft for accuracy and appropriateness but does not verify all legal references or double-check the AI's application of state-specific estate laws, assuming the AI's output is accurate. Later, it is discovered that the will has significant errors related to the distribution of assets, which do not align with the client's explicit wishes and state law, potentially leading to legal challenges after the client's death.

What ethical consideration did Larry fail to adequately address when using the GAI tool?



Debrief of Hypothetical

Correct Answer: B) Verifying the legal accuracy and applicability of the AI-generated document.

Larry's primary failure lies in not adequately verifying the legal accuracy and applicability of the information generated by the AI tool. According to the guidance provided in the document, while generative AI can assist in legal document preparation, it remains the attorney's responsibility to ensure that all outputs, including legal references and applications of law, are accurate and relevant to the client's specific situation. This includes a thorough review and validation of the AI's work against current legal standards and the specific needs of the client, beyond just checking for technical accuracy. Larry's oversight highlights the risk of overreliance on AI without sufficient attorney oversight, potentially leading to errors that could impact the client adversely. This scenario underscores the need for a lawyer's critical analysis and review as outlined under the duties of competence and diligence in the AI guidance document.



Balancing the Risks





Best Practices for Implementation

- Establish protocols and policies that include GAI governance frameworks and ethical guidelines to ensure responsible use.
 - Conduct regular audits and ethical reviews, which are crucial to maintaining trust and compliance.
 - Develop training for your lawyers and other law firm staff.
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Duty to Supervise Lawyers and Non-Lawyers

Rule 5.1

Rule 5.2

Rule 5.3

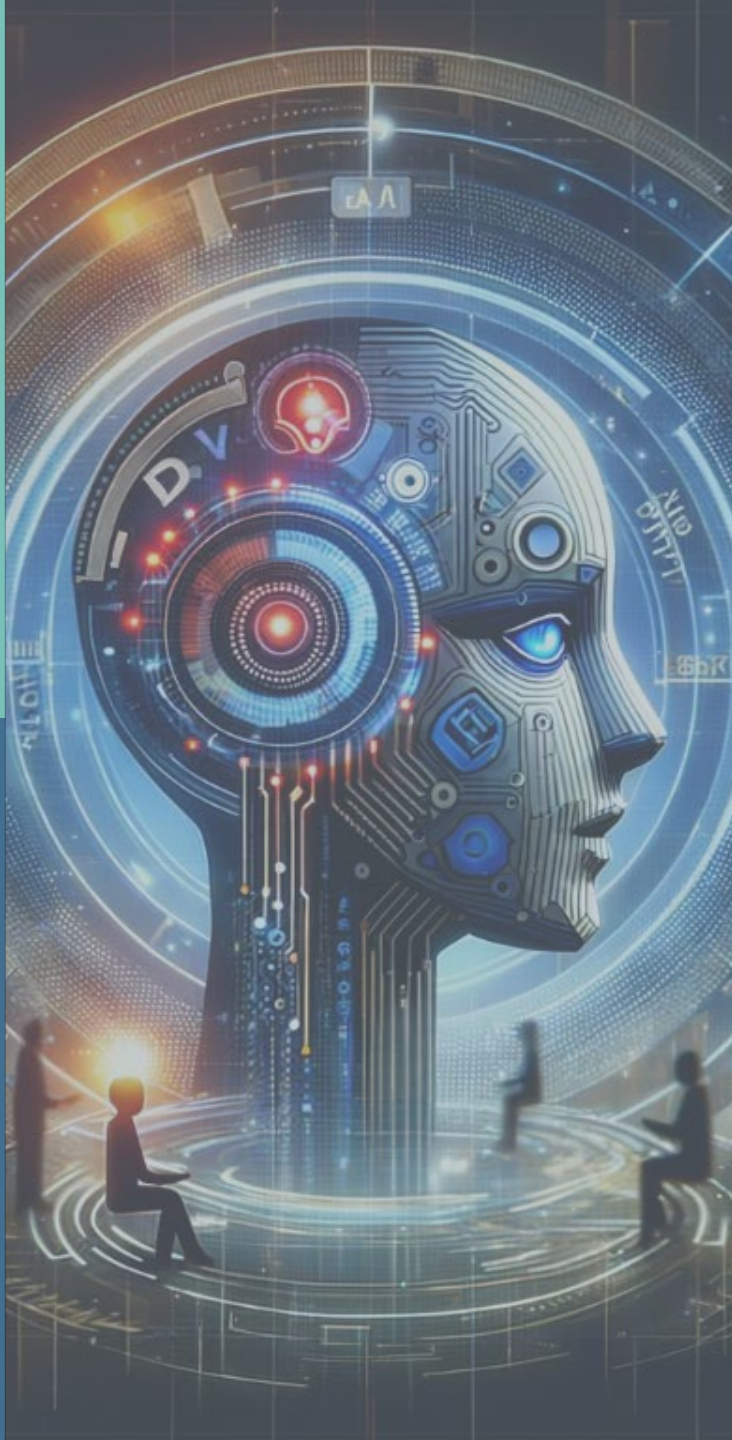
- Managerial and supervisory lawyers should establish clear GAI policies and provide training on the ethical and practical aspects and pitfalls of GAI use.
- A subordinate lawyer cannot use GAI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility obligations.





Bias and Fairness in GAI models

- Risks of inherent biases in GAI algorithms and data sets
 - Impact of biased GAI on legal outcomes and client representation
 - Strategies to mitigate bias and ensure fairness in GAI applications
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Rule 8.4.1

- GAI may be trained on biased information, and a lawyer should be aware of possible biases when using generative AI (e.g., to screen potential clients or employees).
- Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.



Duty to Comply with the Law

**Bus. & Prof. Code, §
6068(a)**

Rule 8.4

Rule 1.2.1

- A lawyer must comply with the law and cannot counsel a client to engage or assist a client in conduct that the lawyer knows is a violation of any law. This extends to the lawyer's use of generative AI and when client representation relates to the client's GAI use.
- There are many relevant and applicable legal issues and regulations relevant to GAI use, including:
 - AI-specific laws;
 - Privacy/cybersecurity laws;
 - Cross-border data transfer laws; and
 - Intellectual property laws.



Rule 8.5

- A lawyer must analyze relevant laws and regulations in other jurisdictions in which they are licensed or authorized to practice.





THANK YOU FOR ATTENDING!

- Questions?
- Resources are available at the State Bar of California's ethics and technology webpage.

