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CELEBRATING JUSTICE

Ethical Considerations for the Use of Artificial Intelligence in Law Practice

5/16/2024

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Try Available Generative AI Tools, Without Introducing Sensitive or Confidential Data

Other Types of AI

- Traditional/Narrow AI
  - performs a specific task intelligently, based on a particular set of inputs
- Types of AI
  - Reactive Machine AI (Narrow)
    - AI systems with no memory, designed to perform a specific task
    - eg – Deep Blue, Netflix recommendations
  - Limited Memory AI (Narrow)
    - AI systems that use past & present data, to determine a course of action
    - eg – ChatGPT, Siri, Tesla
  - Theory of Mind AI
    - understands & interacts with thoughts & emotions of others (theoretical)
    - eg – Bicentennial Man, Baymax
  - Self Aware AI
    - 'super AI' = has its own sets of emotions, needs & beliefs, as well as understanding humans' emotions, needs & beliefs (theoretical)
    - eg – Ultron (evil), Bicentennial Man & Baymax (eventually, good)

AI Is All Around + It's Not Going Anywhere
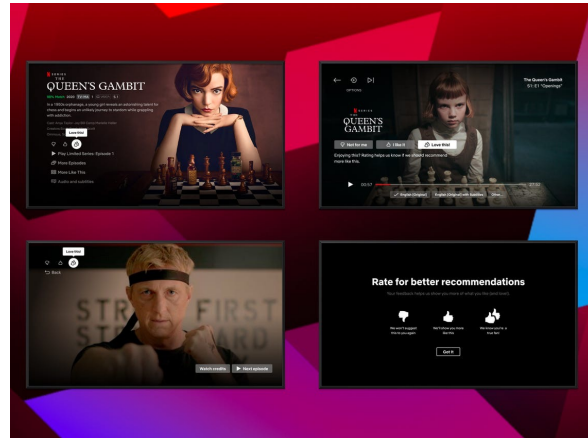
AI is the Most Important Technology Development for Law Firms, Since the Release of Cloud Softwares

Ethics Rules

- **Rule 1.1 | Competence + 'Maintaining Competence' Comment**
- **Rule 1.3 | Diligence**
- **Rule 1.5 | Fees**
- **Rule 1.6 | Confidentiality of Information**
- **Rule 3.1 | Meritorious Claims & Contentions**
- **Rule 3.3 | Candor Toward the Tribunal**
- **Rule 5.1 | Responsibility of Partners, Managers & Supervisors**
- **Rule 5.3 | Responsibilities Regarding Non-Lawyer Assistants**

Caselaw & Sanctions

Mata v. Aviancia, Inc., 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023)
Sua sponte sanctions rested upon "bad faith" determination under Rule 11(c)(2).
Letter to client with notice of sanctions, letter to incorrectly cited federal judges, $5000.00 fine. (HALLUCINATED CASES)

People v. Crabill, Colo. O.P.D.J., No. 23PDJ067 (Nov. 23, 2023).
Disciplinary suspension, 1 year and a day. (HALLUCINATED CASES)

Smith v. Farwell, *et al.* (Davis, J.) (Suffolk Superior Court) (Civil Action No. 2282CV01197) (Feb. 12, 2024).
$2000.00 fine (HALLUCINATED CASES, INTERNS DRAFTED DOCS)

In Re: Thomas Grant Neusom, Case No: 2:24-mc-2-JES (US District Court Mid Dis. FL), Court Sanction 1 year suspension with conditions. (HALLUCINATED CASES, FLORIDA)

Caselaw & Sanctions

Park v. Kim, 2024 WL 332478, 4 (2d. Cir. Jan. 30, 3024) Cited to Rule 11 and N.Y.R. Pro. Conduct 3.3(a).

Referred to Grievance panel for further investigation and possible referral to the Committee on Admission and Grievances. Also ordered to provide a copy of the Court's ruling, translated if necessary, to her client and certify compliance with the court. (LOCAL RULE NOT NECESSARY TO IMPOSE SANCTIONS)

Kruse v. Karlen, 2024 WL 559497, at *3 (Mo. Ct. App. Feb. 13, 2024) Dismissal of *pro se* litigant's appeal and Respondent awarded $10,000.00 in damages. (HALLUCINATED CASES)

Matter of Samuel, 2024 WL 238160 at 2 (N.Y. Sur. Jan. 11, 2024). Pleading stricken, Sanctions TBD but may include economic sanctions. (HALLUCINATED CASES)

Caselaw & Sanctions

- **J.G. v. New York City Dept. of Education, 2024 WL 728626**

  - In a recent federal case in New York under the Individuals with Disabilities Act, plaintiff prevailed on her claims and sought an award of attorney's fees under the statute. Though the court ended up awarding plaintiff's attorneys some of their requested fees, the court lambasted counsel in the process for using information obtained from ChatGPT to support the claim of the attorneys' hourly rates.

  - Plaintiff's firm used ChatGPT-4 as a "cross-check" against other sources in confirming what should be a reasonably hourly rate for the attorneys on the case. The court found this reliance on ChatGPT-4 to be "utterly and unusually unpersuasive" for determining reasonable billing rates for legal services. The court criticized the firm's use of ChatGPT-4 for not adequately considering the complexity and specificity required in legal billing, especially given the tool's inability to discern between real and fictitious legal citations, as demonstrated in recent past cases within the Second Circuit.

  https://evan.law/2024/02/23/chatgpt-was-utterly-and-unusually-unpersuasive-in-case-involving-recovery-of-attorneys-fees/

Jurisdictional Guidance

Florida Bar Ethics Advisory Opinion 24-1

- **Confidentiality** – recommend lawyer obtain informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information. *(reasonable efforts)*
- **Supervision** – Create office policies related to the use of A.I.
- **Competence/Diligence** – Review work product created utilizing A.I. *(review AI software tools – as with cloud software, 'self-learning' AI)*
- **Unauthorized Practice** – Determine what can be ethically delegated to generative A.I. to avoid facilitating the unauthorized practice of law.
- **Advertising** – Monitor advertising (particularly chatbots) to prevent an inadvertent lawyer-client relationship. *(can't claim your AI is better than a competing firm's AI unless objectively verifiable)*
- **Fees** – a lawyer may need to advise in writing if the Lawyer intends to charge the client for the cost of using generative A.I.

Jurisdictional Guidance

State Bar of California's Standing Committee on Professional Responsibility and Conduct: Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law

- **Confidentiality**
  - Do not input confidential information and "anonymize" client information.
  - Speak to IT professionals to ensure that the system used "adheres to stringent security, confidentiality, and data retention" and read the terms and services.
- **Competence & Diligence**
  - Understand how the technology works.
  - Check and validate product.
  - *Do not over rely on A.I such that "it hinders critical attorney analysis fostered by traditional research and writing."*
- **Fees**
  - A lawyer may charge for the actual time spent using "generative AI to more efficiently create work product … (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs)." However, a lawyer cannot charge for the "time saved by using generative AI."
- **Candor & Meritorious Claims**
  - Review all output.
  - Know your local rules on A.I. usage.
- **Bias -** *Be aware of implicit bias.*

Jurisdictional Guidance

New York State Bar Association's Task Force on Artificial Intelligence: Report & Recommendations

- **Existing Ethics Rules**
  - The existing Rules of Professional Conduct, along with guidance and commentary "is sufficient to guide most practitioners."

- **Education**
  - The key to understanding how the technology works in law practice.
  - So, good on you for being here!

- **Competency**
  - The bedrock of appropriate AI use for law firms is the observance of the duty of competency.

- **Transparency**
  - Transparency when using AI notice and authorization does not eliminate Rule 1.6 duties.

- **Fee**
  - "If the Tools would make your work on behalf of a client substantially more efficient, then your use of (or failure to use) such Tools may be considered as a factor in determining whether the fees you charged for a given task or matter were reasonable. If you will add a 'surcharge' (i.e. an amount above actual cost) when using specific Tools, then you should clearly state such charges in your engagement letter, provided that the total charge remains reasonable."
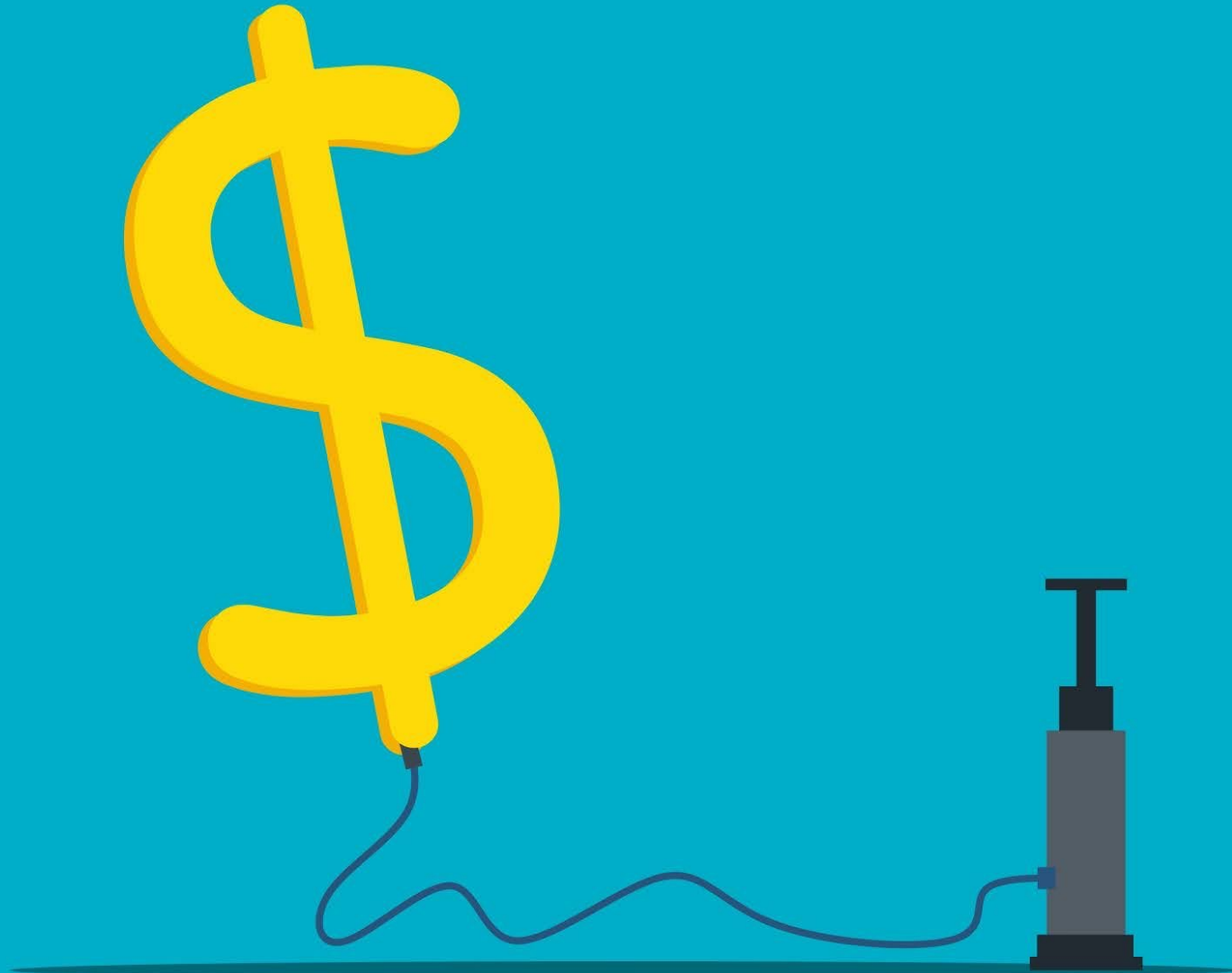
Hypotheticals –
for Ethics & Logistics

Charging for the costs of using/building AI solutions.

(see Florida Bar Ethics Opinion 24-1 = 'must not duplicate charges that are already accounted for in the lawyer's overhead')

Pricing for services when AI is employed.

(see Florida Bar Ethics Opinion 24-1 = 'Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.')

Vetting & managing software versus supervising staff.

(see Florida Bar Ethics Opinion 24-1 = 'While Rule 5.3 defines a nonlawyer assistant as 'a person', many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.')

Inputting confidential data into AI tools.

(see Florida Bar Ethics Opinion 24-1 = 'It is recommended that a lawyer obtain the affected client's informed consent prior to using a third-party generative AI program, if the utilization would involve the disclosure of any confidential information.')

Disclosing the use of AI to courts, clients.