

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: February 21, 2025
From: Legal Ethics Committee
Re: Formal Opinion 2025-XXX

Action Recommended

Adopt Formal Opinion 2025-XXX related to the usage of AI by legal practitioners.

Background

The Legal Ethics Committee (LEC) has been evaluating the need for legal practitioners in Oregon to have guidance on using recent generative AI tools in their legal practices. The Board of Governors discussed the potential effects of generative AI on the legal profession in April 2024. Based on that discussion, and research undertaken by the LEC, the LEC authored and approved the following opinion in December 2024.

Options

1. Approve Formal Opinion 2025-XXX for publication.
2. Decline to Adopt and refer back to the Legal Ethics Committee.

Discussion

The LEC began to examine generative AI after a substantial amount of publicity surrounding attorneys using AI in 2023. In April 2024, the Board of Governors also looked carefully at generative AI at their joint session with the PLF.

The LEC evaluated multiple state opinions, and eventually, ABA Formal Op. 512, in drafting an opinion that would be helpful to practitioners. The LEC noted that multiple rules are implicated with generative AI and broke down each issue to help practitioners to understand their ethical duties if they decide to use generative AI. They evaluated generative AI in relation to a legal practitioner's ethical duties towards competence (RPC 1.1), communication (RPC 1.4 and 1.2), fees (RPC 1.5), confidentiality (RPC 1.6), supervisory responsibilities (RPCs 5.1, 5.2, and 5.3), and candor and truthfulness (RPCs 3.3 and 4.1). Many of the conclusions in the draft opinion reflect guidance that has been provided by prior states and the ABA.

Competence

RPC 1.1 requires lawyers to be proficient not only in the law but also in the technology they employ. This obligation is an ongoing, requiring an attorney to keep abreast of technological improvements in legal practice. In being competent, attorneys must understand the risks in utilizing AI tools. AI tools present unique risks, including potential inaccuracies, data security concerns, and ethical implications related to reliance on AI-generated content. Given AI's rapid development, lawyers seeking to use AI must continuously evaluate its risks and benefits, conduct due diligence on AI tools and vendors, and seek appropriate training to ensure responsible use.

Communication

Lawyers may also have specific communication obligations under Oregon RPC 1.4 and 1.2 if they seek to use AI in their practice. The LEC discussed whether disclosure was mandatory but noted that the substantially different uses of AI required the attorney to evaluate each case individually to determine whether the disclosure of the use of AI was necessary under the RPCs.

Lawyers may need to disclose AI to clients in circumstances where it materially deviates from client expectations regarding representation. Several factors, such as the novelty of the technology, potential risks to client data, and the extent of reliance on AI must be weighed in determining whether disclosure is necessary. Additionally, if AI use affects legal fees or client costs, lawyers must provide clear and transparent explanations to their clients.

Fees

The opinion also discussed billing issues that arise with AI. While lawyers may charge for case-specific research and drafting when using AI, billing practices must reflect the actual work performed. Any savings in time due to AI use should not result in inflated billable hours. Moreover, lawyers may only pass along AI-related costs to clients if those costs are clearly disclosed and properly categorized, avoiding improper duplication as general overhead.

Confidentiality

Confidentiality obligations under RPC 1.6 are another fundamental aspect of AI use. Lawyers must take reasonable steps to ensure that AI tools do not compromise client confidentiality. The opinion discusses the concerns about open AI models and closed AI models, and the need for lawyers to understand the difference between the two. Open AI models, which store and learn from input data, present significant risks and require lawyers to obtain informed client consent before use. Closed AI models, which segregate and limits access to data submitted by the lawyer, still requires lawyers to carefully review vendor agreements to confirm data security measures and ensure that client information is not improperly exposed. If an open AI model is used without obtaining consent, lawyers must anonymize or redact sensitive information to minimize risks of disclosing client information.

Supervision

Additionally, lawyers and firms must recognize and fulfill their ethical obligations in the supervision of subordinate lawyers and nonlawyers while utilizing AI. Supervisory lawyers bear responsibility for ensuring that subordinate lawyers and nonlawyers using AI comply with ethical obligations. Firm leadership should develop policies regulating AI use and provide training to ensure ethical compliance. Supervisory lawyers must ensure that subordinate lawyers and nonlawyers understand the ethical risks associated with AI and that AI-generated work product is thoroughly reviewed for accuracy. The responsibility to oversee AI use extends to external third-party vendors who provide AI-related legal services.

Duty of Candor

Finally, the opinion addresses the duty of candor toward tribunals and truthfulness in statements to others, as required by RPC 3.3 and 4.1. Given the rampant number of cases dealing with lawyers submitting AI briefs with fake case citations, the LEC felt the need to stress the lawyer's duty to verify documents prior to submission to a tribunal.

Lawyers must verify AI-generated content before submitting it to courts or third parties. Given the possibility of AI "hallucinations" or inaccuracies, lawyers must exercise diligence in reviewing citations, factual assertions, and legal conclusions. Courts may impose specific requirements regarding AI disclosures, and lawyers must comply with any applicable rules. If incorrect AI-generated information is inadvertently provided to a tribunal, lawyers have an obligation to correct the error while maintaining client confidences.

Conclusion

The draft opinion clarifies that AI can be a valuable tool for legal practice, but lawyers must understand the ethical obligations that arise with its use. By doing so, lawyers can responsibly integrate AI into their practice while upholding the ethical standards of the RPCs.

Exhibit 1: Formal Ethics Op. 2025-XXX

FORMAL OPINION NO 2025-XXX
ARTIFICIAL INTELLIGENCE TOOLS

Facts:

Artificial intelligence (AI) tools have become widely available for use by lawyers. AI has been incorporated into a multitude of products frequently used by lawyers, such as word processing applications, communication tools, and research databases. AI tools generally use predictive text and other features to prompt or complete complex tasks. Generative AI (GAI) tools are a type of AI that use heuristics to produce complex and specific data, which can include generating full legal documents like briefs, contracts, and demand letters.

Question:

1. May Oregon lawyers utilize AI tools in their legal practice?
2. May Oregon lawyers utilize GAI tools in their legal practice?

Conclusion:

1. Yes, qualified.
2. Yes, qualified.

Discussion:

Competence

Oregon RPC 1.1 requires lawyers to be competent in both the law and in the tools that they use to provide legal services to clients.¹ Lawyers may utilize AI in their legal practice only if they have taken reasonable steps to become competent in the use of such technology. Here, competence requires understanding the benefits and risks associated with the specific use and type of AI being used.

Competence is an ongoing obligation. At this point, AI includes thousands of rapidly evolving tools, and the associated benefits and risks of using AI are constantly changing. Lawyers must consider and continually evaluate the following when determining whether and how to incorporate AI into their practice:²

- Lawyers must understand how any AI that they utilize stores information and responds to prompts. For example, some GAI products may produce hallucinations³ or collect user

¹ See ABA Model RPC 1.1 cmt [8], which requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

² See ABA Formal Ethics Op No 477R (2017) (Securing Communication of Protected Client Information).

³ Some GAI tools may produce plausible responses that have no basis in fact or reality. These responses are known as hallucinations and are a concern for legal practitioners due to the false information provided. ABA Formal Ethics

prompts to train the product for use by other future users. The collection of data raises questions related to client confidentiality and protection of the attorney-client privilege. Thus, adequately understanding AI may require lawyers to conduct research, attend trainings, and hire a professional to assist them.

- Lawyers must conduct due diligence on AI and potential vendors to determine whether the product can be implemented and utilized in a manner consistent with the lawyers' ethical duties.
- Lawyers must provide adequate training on the use and risks of the technology to anyone they owe a supervisory duty to, including any nonlawyer assistants who will be using AI.
- Lawyers must take reasonable measures to protect clients' confidential information. Accordingly, before utilizing AI or otherwise implementing any other new technology, lawyers must either confirm that any information communicated through or stored by the technology is reasonably secure, or develop policies that prohibit client information from being input into a system that could compromise its confidentiality.
- Lawyers should consider consulting with their clients before using AI or other new technology in connection with the client's legal matters. In some cases, as described below, disclosure of an attorney's use of AI may be required.

Communication

Lawyers may be required to disclose the use of AI to their clients under certain circumstances. Oregon RPC 1.4(b) requires a lawyer to provide enough information to enable the client to make "informed decisions regarding the representation." Oregon RPC 1.2(a) requires lawyers to "consult with the client as to the means" used to pursue a client's objectives. However, lawyers are allowed to take actions without consulting the client that are "impliedly authorized" by the representation. The use of word processing applications and research databases are generally considered to be impliedly authorized. However, the use of new technologies that deviate materially from the client's expectations concerning the scope of representation may have an impact and should be communicated to the client.

To determine whether the use of AI may have an impact on the client's expectations about the scope of representation, lawyers should evaluate each case individually.⁴ Lawyers must consider several factors, including the type of case, similarities to and deviations from technology typically used, novelty of the technology, risks to client data, risks that incorrect information will be included in the lawyer's work product, sophistication of the client, deviation from explicit client

Op No 512 at 3 (2024); *see Mata v. Avianca, Inc.*, 678 F Supp 3d 443 (SDNY 2023) (sanctioning lawyers who submitted ChatGPT hallucinations to the court).

⁴ So long as AI and GAI are not commonly used in the legal field, it may be appropriate to include in the engagement letter that AI or GAI will be used, disclose the risks associated with such tools, and/or seek the client's acknowledgment that such tools will be used. *See* New York State Bar Association Task Force on Artificial Intelligence, *Report and Recommendations to NYSBA House of Delegates*, 56 (Apr 6, 2024), <https://nysba.org/app/uploads/2024/02/Task-Force-on-AI-Report-final.pdf> ("Consider including in your client engagement letter a statement that the Tools may be utilized in your representation of the client and seek the client's acknowledgment.").

instructions or reasonable expectations, the scope of representation, the extent of the lawyer's reliance on the technology, the existence of safeguards present in the technology and independently implemented by the lawyer, and whether the use of AI or other new technology would have a significant impact on attorney fees or is a cost passed on to the client.

Fees

Lawyers are required to adequately explain their fee arrangements to their clients.⁵ Oregon RPC 1.5(a) prohibits lawyers from agreeing to, charging, or collecting an illegal or clearly excessive fee or clearly excessive amount for expenses. Subsection (b) sets forth the factors to be considered in evaluating what is clearly excessive. With limited exceptions, written fee contracts for legal services are not required in Oregon, but lawyers who fail to reduce the terms of payment to writing risk problems in proving their right to a particular fee and the possibility of discipline.

Lawyers may charge clients for reasonable time spent for case-specific research and drafting when using AI. To the extent the use of AI results in significant time savings, lawyers may not ethically engage in any billing practices that duplicate charges or that falsely inflate billable hours. *See, e.g.*, ABA Formal Ethics Op No 93-379 (1993) (prohibiting billing multiple clients for the same time spent on research or “recycled work product”). In accordance with the American Bar Association's (ABA's) guidance, lawyers may bill time related to learning specialized AI, including GAI, at the client's request, subject to a clear agreement with the client.⁶ Otherwise, lawyers may not charge for the time spent developing competence in the use of such tools.

With respect to costs, lawyers must not duplicate charges that are already accounted for as overhead. *See In re Jacob*, 318 Or 10, 18, 860 P2d 811 (1993) (a lawyer who charges an additional fee for work covered by a flat-fee agreement violates the excessive fee prohibition); ABA Formal Ethics Op No 93-379 (1993) (lawyer should charge clients only for costs that reasonably reflect the lawyer's actual costs); Florida Bar Ethics Opinion 24-1 at 5–6 (Jan 19, 2024).

Lawyers must inform their clients, preferably in writing, if they intend to charge clients for the actual costs of using AI. This obligation is similar to informing clients of the intent to pass on costs associated with using research databases. Likewise, clients may not be charged for research of a general nature that is not case-specific and is intended for lawyers' own general knowledge of a legal issue.⁷ Lawyers who are unable to determine the actual cost associated with a particular client's matter may not ethically prorate the periodic charges of a specialized AI, including GAI, and instead must account for those charges as overhead.

⁵ *See, e.g.*, Oregon RPC 1.4(b); Oregon RPC 1.5(a).

⁶ ABA Formal Ethics Op No 512 at 14.

⁷ *See* Florida Bar Ethics Opinion 24-1 at 6 (citing *Attorney Grievance Commission of Maryland v. Manger*, 396 Md 134, 913 A2d 1, 5 (2006) (“While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client.”)).

Confidentiality

Before using AI (or any technology) to assist with client legal matters, lawyers must consider their ethical obligations under Oregon RPC 1.6, which states that “[a] lawyer shall not reveal information relating to the representation of a client” 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.”

AI includes nascent technologies that rely on complex algorithms to generate new content by learning from vast quantities of data. Some of the of algorithms are “open,” continuously learning from data inputs, including potentially sensitive information, thereby enhancing the algorithm’s response accuracy over time. An open model poses confidentiality risks as it may inadvertently incorporate and disclose sensitive client data that is input by lawyers or their assistants.⁸ Other algorithms are “closed” and operate in isolation, ingesting data and then isolating it to prevent further external utilization. In those models, data is processed and retained within a secure environment, which is critical for preserving the confidentiality of client information but limits the scope of AI’s learning capacity.

If lawyers would like to use their clients’ information in an open model, lawyers must obtain their clients’ informed consent. “[I]nformed consent” denotes 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.” Oregon RPC 1.0(g). To obtain informed consent, lawyers must clearly describe the risks (which may include disclosure and the possible loss of confidentiality or valuable intellectual property rights) and benefits of using AI, as well as alternatives that do not involve potentially revealing the client’s information. When using an open model without client consent, lawyers need to anonymize or redact information that the client considers sensitive.⁹ Lawyers must ensure that the anonymization or redaction is complete and effective, and even so, the client’s informed consent may still be required.¹⁰

The use of AI in a closed model should inherently provide greater confidentiality protection than the use of AI in an open model. However, the mere engagement of a closed model does not absolve the necessity for a lawyer to be vigilant. Lawyers should approach contract negotiations with any AI providers carefully, taking the time to review the terms and conditions much as lawyers review any cloud service and recycling vendors to understand procedural and security commitments that reasonably safeguard client confidentiality.¹¹ Lawyers must ensure that these contracts include provisions that address how data is to be handled, encrypted, stored, and ultimately destroyed. The contract must include clear terms that protect client confidentiality and

⁸ For further discussion on the confidentiality concerns of open-model GAI, *see* ABA Formal Ethics Op No 512 at 6-7.

⁹ *See* OSB Formal Ethics Op No 2011-184; OSB Formal Ethics Op No 2024-204.

¹⁰ *See* OSB Formal Ethics Op No 2011-184 (“Framing a question as a hypothetical is not a perfect solution, however. Lawyers face a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer’s firm to determine the client’s identity. When the facts are so unique or when other circumstances might reveal the identity of the consulting lawyer’s client even without the client being named, the lawyer must first obtain the client’s informed consent for the disclosures.”).

¹¹ *See* OSB Formal Ethics Op No 2011-188 (rev 2015) (cloud services); OSB Formal Ethics Op No 2005-141 (rev 2015) (paper recycling services).

ensure that the technology uses strict privacy protocols in compliance with the confidentiality requirements of Oregon RPC 1.6. Moreover, any such agreements must delineate clear parameters around data usage, ensuring that sensitive client information is neither exposed to, nor used by, any external systems or entities, and is protected against both inadvertent and unauthorized disclosures. This is particularly critical in AI models using heuristics, which take data to train the model. Even in a closed AI model, lawyers may determine that it is appropriate to anonymize or redact certain information that their client considers sensitive or that could create a risk of harm to the client.

In summary, lawyers must attentively align the choice of any technology, including AI, with the ethical mandates concerning client confidentiality. If the lawyer chooses to use either a closed or open AI model, the lawyer must consider whether their clients' consent is required. The lawyer must also carefully review the operative contract to ensure the confidentiality parameters of the technology. In addition, if the lawyer chooses to use an open AI model, the lawyer may also need to take additional precautions against disclosure through the anonymization or redaction of sensitive client information.

Responsibilities of Partners, Managers, and Supervisory Lawyers; Responsibilities of a Subordinate Lawyer; and Responsibilities Regarding Nonlawyer Assistance

Oregon RPC 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers.¹² Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the Oregon Rules of Professional Conduct, and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants similarly conform to the rules. These responsibilities impact the use of AI by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of AI, including specifically GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using such technologies. Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained, including in the ethical and practical use of AI relevant to their work, as well as on risks associated with AI use. Training must include the basics of the actual type of AI being used (rather than just AI in general), the capabilities and limitations of the tools, ethical issues in the use of that specific AI, and best practices for secure data handling, privacy, and confidentiality. Importantly, supervisory lawyers must ensure subordinate lawyers and nonlawyers understand the difference between open-model and closed-model AI systems, as well as the unique ethical issues attendant to each.

Lawyers have additional supervisory obligations when they rely on others outside the law firm who employ, or may employ, AI in connection with the legal representation. Rule 5.3(a) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to "make reasonable

¹² See also ABA Formal Ethics Op No 512 on GAI. This opinion confirms that attorneys who utilize GAI must appreciate its effect on the attorneys' ethical obligations. The opinion discusses the use of GAI 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.

efforts” to ensure the nonlawyer’s conduct conforms with the lawyer’s professional obligations. Rule 5.3(b) further imposes responsibility on lawyers with direct supervisory authority over nonlawyers to the extent that the nonlawyer’s conduct does not conform with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party performs competently and protects the confidentiality of information relating to the representation. These opinions note the importance of reference checks and vendor credentials, understanding vendor’s security policies and protocols, familiarity with vendor’s hiring practices, using confidentiality agreements, understanding the vendor’s conflicts check system to screen for adversity among firm clients, and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to AI providers and tools as well as other nonlawyer assistance that utilizes or may utilize AI and other technologies.

Ultimately, Oregon lawyers are professionally responsible to supervise the accuracy of all their work product, including that which is produced by AI and the ethical use of AI by subordinate lawyers and nonlawyers. Subordinate lawyers must not use AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer’s professional responsibility and obligations. Oregon RPC 5.2.

Candor Toward the Tribunal, Truthfulness in Statements to Others, and Misconduct

Lawyers must verify any work done by or with the assistance of any third-party technology, including AI. Oregon RPC 3.3 prohibits lawyers from knowingly¹³ making a false statement of fact or law to a tribunal, which, if made, must be disclosed and corrected without violating client confidences. Oregon RPC 3.3(a)(1), (c). These duties extend throughout the entirety of a legal proceeding. Oregon RPC 3.3(c). Oregon RPC 4.1 is similarly straightforward: while representing a client, lawyers shall not knowingly make a false statement of material fact or law to a third person.

Lawyers must check for any rules, orders, or other requirements that the court may have in place either prohibiting the use of technology (including AI) in court filings or requiring the disclosure of its use. The most obvious way in which a lawyer could run afoul of Oregon RPCs 3.3 and 4.1 is through the submission of and reliance on unverified and fictitious cases, citations, quotes, or conclusions generated by AI.¹⁴ Therefore, to avoid violation of Oregon RPCs 3.3 and 4.1, lawyers must review for accuracy any GAI output discussing case-specific facts or providing a case citation, quotation, or conclusion to ensure that the GAI did not hallucinate when providing its answer, or simply get the answer wrong. Lawyers who discover that they inadvertently provided

¹³ Oregon RPC 1.0(h) defines knowingly as “denot[ing] actual knowledge of the fact in question, except that for purposes of determining a lawyer’s knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person’s knowledge may be inferred from circumstances.”

¹⁴ This may occur more often than has previously been reported. For example, in a test examining more than 200,000 legal questions, AI researchers at Stanford University found that general-purpose large language models—including Meta, Google, and OpenAI programs—hallucinate at least 75% of the time when answering questions about a court’s core rulings. Isabel Gottlieb & Isaiah Poritz, *Legal Errors by Top AI Models “Alarming Prevalent,” Study Says*, Bloomberg Law (Jan 12, 2024).

the court with a false statement of fact or law must notify the court and correct the false statement without violating client confidences.