

California Bar to Set Guidelines for Using Generative AI to Practice Law, More States to Follow

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Can generative AI offer legal advice? On November 16, 2023, the State Bar of California **approved** guidelines to help lawyers navigate their ethical obligations when using generative artificial intelligence (AI). Titled “Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law,” the **guidance** sets forth the initial recommendations of the Committee on Professional Responsibility and Conduct of the California State Bar regarding use of generative AI in practice of law. Guidance to California Lawyers is in line with the State Bar’s **Rules of Professional Conduct** and the state’s **statutory authority** and includes the following:

- Confidentiality – A lawyer must not input any confidential information of the client into generative AI solution unless the lawyer knows that the provider will not share the information with others or use the information for itself, such as to train or improve its AI product. In addition, the lawyer must anonymize the input so that it does not identify the client. In other words,

be wary and treat the 'prompt' of a generative AI solution as you would the ears of a stranger.

- Competence – The lawyer must understand how the Generative AI solution works, including its limitations and potential use of client data. Further, the lawyer cannot simply trust that the output from the generative AI tool is correct, but must review and analyze these outputs to support 'the interests and priorities' of the client. Importantly, the guidelines state that the 'duty of competence requires more than the mere detection and elimination of false AI-generated results.' In other words, the lawyer cannot over-rely on the generative AI solution, because doing so would essentially result in a delegation of the lawyer's professional judgment to generative AI which should remain the lawyer's responsibility at all times.
- Communication regarding generative AI use – The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use.
- Billing for AI work – A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent on the legal work. While the time that is charged may include crafting or refining generative AI inputs, or reviewing and editing generative AI outputs, the lawyer must not charge hourly fees for the time saved by using generative AI. A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI.
- Candor to the Tribunal – A lawyer must review all submissions that are made to the court for accuracy, including analysis and citation to case law. Generative AI already has a history of 'hallucinating' or making up **non-existent case law and bogus quotations**.

- Prohibition on discrimination, harassment, and retaliation – Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees).

California Bar's guidance marks a much needed first step for developing rules and regulations on AI use in law. Other state bars are also working on AI guidance – the Florida Bar's proposed [opinion](#) on lawyers' AI use is open for comment until January 2, 2024. In the Fall 2023 issue of the State Bar Journal, the North Carolina State Bar published an [article](#) by its ethics counsel listing key ethical considerations for the use of AI in the legal profession. Although the practice of law is governed by states, federal guidance may soon become imperative for consistency across the nation. Along the way, the fundamental questions to be addressed include identifying what activities constitute the practice of law and what activities if any, can leverage the use of AI. As AI increasingly becomes a necessary resource for lawyers to represent the clients competently and efficiently, it may make sense to require a license or certification for AI to participate in the practice of law, much like requiring a license or certification for human lawyers and paralegals. For example, for a generative AI solution to be allowed in the legal field, certification may require that the inputs and outputs of the AI solution are kept confidential and not shared. Similarly, certification may require additional cross-checking for AI-aided case law citations to address 'hallucinations.'

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