

FAUGHNAN LAW  
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## Ethics Issues and The Rise of Generative AI

TN Municipal Judges  
Conference  
December 20, 2024

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FAUGHNAN ON ETHICS  
Thoughts on legal ethics, professional responsibility, and other aspects of the law of lawyering



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### Today's Agenda

- A quick overview of how the last 18 months of GAI and the law has gone
- ABA Formal Op. 512 and a walkthrough of the ethics rules in play
- A walkthrough of the reaction of the courts
- A walkthrough of the practical realities, upsides, and downsides of GAI

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### Generative AI – What is it?

In visual form



[makeagif.com](http://makeagif.com)

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## From *Avianca* to today

- Many lawyers and judges first learned about GAI as a result of some New York lawyers getting in trouble
- Guardrails were then added to ChatGPT and some other programs
  - A few more instances of lawyers getting in trouble for similar transgressions, but the news reports mostly failed to point out that those instances still involved situations before the new guardrails
- It does still happen though...  
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## Retrieval augmented GAI

- This is likely the topic of most interest to lawyers and judges (even if they do not inherently know it)
- "The process of optimizing the output of a large language model, so it references an authoritative knowledge base outside of its training data sources before generating a response." (from Amazon Web Services)
- "RAG extends the already powerful capabilities of LLMs to specific domains or an organization's internal knowledge base, all without the need to retrain the model." Id.
- This definition explains your LEXIS AI, Westlaw AI, and similar programs [So worth remembering that RAGAI is still different from GAI (and of course AI is different from GAI)]  
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## ABA Formal Op. 512

To date, this represents the most authoritative guidance and treatment of the ethics issues in play for lawyers

- Model Rule 1.1 (Competence)
- Model Rule 1.4 (Communication)
- Model Rule 1.5 (fees)
- Model Rule 1.6 (confidentiality)
- Model Rule 3.1
- Model Rule 3.3 (candor to tribunal)
- Model Rules 5.1 & 5.3 (supervisory responsibilities)
- Model Rule 8.4(c)

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## ABA Formal Op. 512

- **Competence**
  - Need not be an expert in GAI
  - “must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use”
  - “reliance on, or submission of, a GAI tool’s output – without an appropriate degree of independent verification or review of its output – could violate the duty to provide competent representation”
  - “Ultimately, any informed decision about whether to employ a GAI tool must consider the client’s interests and objectives.”

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## ABA Formal Op. 512

- **Confidentiality**
  - “Because many of today’s self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client’s informed consent is required prior to inputting information relating to the representation into such a GAI tool.”
  - “To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.”
  - Contra – “if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.”

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## ABA Formal Op. 512

- **Model Rule 1.4 – Communication**
  - Only about where Rule 1.6 does not already require telling the client what you are contemplating
  - If client asks, then have to disclose
  - “also necessary when its output will influence a significant decision in the representation, such as when a lawyer relies on GAI technology to evaluate potential litigation outcomes or jury selection”

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## ABA Formal Op. 512

- Meritorious claims and contentions and candor
- Model Rules 3.1, 3.3, and 8.4(c)
- "output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false"
- "In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments."
- Professor Ethan Mollick of Wharton has called ChatGPT an "omniscient, eager-to-please intern who sometimes lies to you".  
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## ABA Formal Op. 512

- Model Rules 5.1 & 5.3 – supervisory responsibilities
- "Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools."
- Training
- Model Rule 5.3 also extends to outside providers
- Opinion analogizes requirements in language similar to providers of cloud services

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## ABA Formal Op. 512

- Model Rule 1.5 – fees
- "before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing"
- "If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness."
- Can also impact "reasonableness" for a flat fee or contingent fee

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## Keeping score – the courts

- Many, many different courts (federal and state) have enacted rules about the use of (G)AI
- Ropes & Gray has a wonderful online court order tracker:
  - [Artificial Intelligence Court Order Tracker | Ropes & Gray LLP \(ropesgray.com\)](https://ropesgray.com)
- The various versions of court rules can be broadly described:
  - Some are careful to address only GAI and require only disclosure or verification
  - Some are not and address all AI (whether they mean to or not)
  - Some caution against using AI
  - A small number actually attempt to prohibit AI usage altogether (but some only for pro se litigants)

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## Keeping score – the courts

- Notably, the Fifth Circuit after public comment *declined* to adopt any such rule
- An unusual concurrence was written by an Eleventh Circuit judge
  - Lengthy and written solely to explain his journey with using GAI in an ultimately abandoned effort to determine the common definition of “landscaping”
  - Posits that judges should be willing to consider whether GAI is a useful tool for determining “common meaning” from a textualist perspective
- There are other ways that courts likely are (or maybe should be) thinking about putting it to use

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## Practical concerns

- As discussed earlier, ChatGPT for example is *not* a legal research tool
- But there has been hope that the LEXIS/Westlaw collaborations with GAI would mean reliable legal research
  - Stanford study released earlier this year
  - 17%-33% “hallucinations” occurring still
- Real reason to believe that GAI might never be a great way to perform legal research

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## Practical concerns

- Paper released by a team of Apple researchers
- Main conclusion – GAI like ChatGPT is not capable of formal reasoning
- “[T]he researchers modified the wording of each problem by adding minor details that seemed relevant, but that didn’t change the problem’s conclusion or the reasoning required to reach it. For example, a problem that involved counting apples might have the added detail “five of the apples were a bit smaller than average.” The result was a “catastrophic” collapse in performance, affecting even the best LLMs available today.”

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## Practical concerns

- The Stanford study highlights some of the ways that even “Retrieval Augmented Generation” suffers for the things lawyers need to know when doing research, such as:
  - Being able to distinguish and understand when the court is speaking rather than just saying what the parties have argued
  - Being able to distinguish between a court’s holding and other aspects of a court opinion
  - Being able to respect the order of authority in terms of courts and court structure in federal and state courts

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## Law firms have begun to embrace it

- The moment when law firms and carriers were inclined to try to enact policies to prevent lawyers from using GAI has passed
- Firms now are working on enacting policies regarding how to use
- Some firms are also investing significant expense and time into developing their own proprietary GAI tools
- Also need to realize how many other products of use by lawyers and law firms already have GAI built into their product now

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## There are genuine “use cases”

- There are lots of aspects of written work that can be made more efficient through GAI, however
- GAI can be used to craft first drafts of letters on complicated subjects nearly instantaneously
- GAI can be used to revise those letters into different styles, tones, and for varying audiences rapidly
  - Make what you’ve written “more polite” or “less combative”
  - Make what you’ve written readable by someone with a 5<sup>th</sup> grade education
  - Translate what you’ve written into another language

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## More use cases of note

- Proofreader
- Idea generation
- Summarization
- Hypo generation
- Writing a letter of recommendation
- Anonymization/de-identification

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## More use cases of note

- Video conference note taking and summarization of meeting content
- Create company policies
- Web site design
- Create a syllabus for teaching a course
- Simply easily overcoming the “blank page” problem

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## But is the “juice” worth the “squeeze”?

- Yet, the energy usage involved in GAI is staggering to think about
  - “ChatGPT consumes over half a million kilowatts of electricity each day, an amount staggering enough to service about two hundred million requests”
  - “ChatGPT’s daily power usage is nearly equal to 180,000 U.S. households, each using about 29 kilowatts”
  - “A single ChatGPT conversation uses about 50 centilitres of water, equivalent to one plastic bottle”

(stats all from Forbes March 12, 2024)

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## Questions?

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