



ARTICLE

UNDERSTANDING THE DUTY OF
COMPETENCE FOR ATTORNEYS USING
GENERATIVE AI

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What does it mean for an attorney to use generative AI (“GAI”) competently? How much does the attorney need to know about the technology to ethically utilize it? Are there certain tasks for which using GAI is inappropriate? This Article explores recent guidance by the American Bar Association and state bar associations regarding attorneys’ ethical duty of competence and use of GAI. When synthesized, this guidance establishes the principle of informed decision-making, which requires the attorney know enough about the risks and benefits of the GAI tool they are using to make an informed decision that using it for a particular task is in the client’s best interest. Informed decision-making includes an obligation to mitigate against any limitations of the GAI tool being used by retaining cognitive agency and verifying outputs.

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I. INTRODUCTION AND SUMMARY

Ethical duties appear poised to be the primary regulatory tool for responsible use of generative AI (“GAI”) by attorneys. This reality necessitates a clear understanding of what the duty of competence requires for attorneys using GAI. Recent state bar and American Bar Association (“A.B.A.”) guidance have coalesced around a foundational concept of informed decision-making, which requires that attorneys have sufficient knowledge about the GAI tool they are using and the specific task at hand to make an informed decision that employing the tool for that task is in the client’s best interests. The duty of competence also requires attorneys to mitigate against GAI tools’ limitations, including not only hallucinations but also incomplete, inaccurate, and misgrounded outputs. Further, recent ethical guidance requires that attorneys retain cognitive agency when completing tasks that require human judgment and reasoning. These tasks render GAI’s “black box,” or lack of explainability on how it reaches outcomes, particularly problematic and require attorneys to resist automation complacency, which refers to humans’ reduced capacity to understand or complete the tasks for which they rely on GAI.

Part II contends that ethical duties will take the leading role in regulating attorney use of GAI relative to Rule 11, local rules, or standing orders. Part III discusses the ethical duty of competence generally, and the recent flurry of A.B.A. and state bar ethical guidance regarding the use of GAI in legal practice. Part IV synthesizes recent

guidance and explores the concept of informed decision-making. Part V identifies verification of generated outputs as the other common thread in recent ethical guidance on competent use of GAI. Verification requires more than checking for hallucinations—it requires humans use nuanced, creative, and explainable legal reasoning and judgment.

II. ETHICAL DUTIES EMERGE AS THE MAIN TOOL REGULATING ATTORNEY GENERATIVE AI USE

In the last two years, courts have considered Rule 11 sanctions, local rule amendments, standing orders, and the rules of professional responsibility to address irresponsible attorney use of GAI.¹ Rule 11 of the Federal Rules of Civil Procedure and its state counterparts require lawyers to engage in “reasonable inquiry under the circumstances” that the legal arguments they assert are based on existing law or non-frivolous bases to extend or change law.² While Rule 11 is useful for egregious attorney conduct, such as filing briefs with hallucinated cases, it is too blunt of a tool to meaningfully regulate attorneys’ use of GAI as attorneys and law-specific GAI tools become more adept. While Rule 11 may apply to blind reliance on hallucinated cases, it is less likely to regulate an attorney who missed nuanced or creative arguments through irresponsible use of GAI. A lawyer accused of violating Rule 11 is generally given an opportunity to self-correct.³ As explained by one scholar, Rule 11 might capture bad faith use of GAI,

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1. For a more detailed discussion of these potential regulation methods, see generally Anna Conley, *Legal Education’s Role in Combating Automation Bias and Complacency with Generative AI in the Practice of Law*, KILAW J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4778017 [<https://permacc/BEQ9-7WWR.staff-uploaded>].
 2. FED. R. CIV. P. 11(b) (“By presenting to the court a pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (2) the claims, defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . .”). For an example of a state counterpart with the same language, see MONT. R. CIV. P. 11(b)(2).
 3. FED. R. CIV. P. 11(c)(2).

but not negligent GAI use, rendering it unlikely to capture a significant number of use cases.⁴

Similarly, despite an initial wave of standing orders specifically regulating attorney use of GAI, such standing orders appear to be waning.⁵ An emerging consensus views standing orders as “veritable mosaic of inconsistent, individual rulings consisting of wildly varying requirements that fail to account for the ever-changing technology landscape.”⁶ Court rules regarding the use of GAI are also not proliferating. In 2023, the Fifth Circuit Court of Appeals proposed a new rule requiring counsel and pro se parties to certify that GAI was not used, or if it was, certify that all AI-generated citations and legal analysis have “been reviewed for accuracy and approved by a human.”⁷ In June 2024, however, the Fifth Circuit decided not to adopt the proposed rule, stating that “[p]arties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require.”⁸ It appears that instead of using standing orders or amended local rules, courts are poised to use existing ethical duties to manage attorney use of GAI.⁹

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4. See Jessica R. Gunder, *Rule 11 Is No Match for Generative AI*, 27 STAN. TECH. L. REV. 308, 343–46 (2024) (discussing Rule 11’s history and shortcomings regulating attorney use of GAI); see also Conley, *supra* note 1 (discussing cases involving Rule 11 and attorney use of GAI).
 5. See *Standing Orders & Local Rules on the Use of AI*, ROPES & GRAY, <https://www.ropesgray.com/en/sites/artificial-intelligence-court-order-tracker> [<https://perma.cc/2F6V-F36M>] (last visited Oct. 8, 2025).
 6. Hon. John G. Browning, *Robot Lawyers Don’t Have Disciplinary Hearings—Real Lawyers Do: The Ethical Risks and Responses in Using Generative Artificial Intelligence*, 40 GA. ST. U. L. REV. 917, 954 (2024).
 7. Notice of Proposed Amendment to 5th Cir. R. 32.3 (5th Cir. 2023).
 8. Court Decision on Proposed Rule (5th Cir. 2024) <https://www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf> [<https://perma.cc/B5RB-PL6K>].
 9. See Browning, *supra* note 6, at 932–44 (discussing various standing orders and discussing concerns regarding standing orders regulating GAI use); Gunder, *supra* note 4 (discussing same issues); Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 68, 70, 75–76 (2023) (pointing to Rule 11, and Model Rules of Conduct 1.1, 2.2 and 1.6 as preferred alternatives to standing orders).

DUTY OF COMPETENCE & GENERATIVE AI

Ethical regulation of attorneys and technology has long lagged behind technological advances.¹⁰ Advances such as electronic research, email, and e-discovery have forced continual revisiting of ethical duties applicable to attorneys when using, or not using, new technology.¹¹ To date, technological advances changed an attorney's work flow through different communication mediums and legal research sources, but they left the research and writing process to the attorney. The sea change with GAI is that technology can now do the research and writing *in place of* the attorney. The A.B.A. and state bars are responding to the emergence of GAI with ethical opinions outlining the interplay between GAI and existing ethical duties.¹² Ethical duties implicating GAI use include competence, diligence, client communication, fees, confidentiality, candor to the tribunal, truthfulness, and the duty to supervise.¹³ This Article focuses solely on

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10. See Gary Marchant & Joseph R. Tiano, Jr., *Artificial Intelligence and Legal Ethics*, in ARIZONA SUMMIT ON ARTIFICIAL INTELLIGENCE: LAW AND THE COURTS 1 (2023) (“[T]echnologies such as [AI] tend to outpace their legal governance given the rapid pace of technology versus the slower pace of governance.”) <https://www.azcourts.gov/Portals/225/AI%20and%20Legal%20Ethics%20Final%20White%20Paper.pdf> [<https://perma.cc/Q4DF-KBH8>]; Ankur Doshi, *Understanding the Ethics Surrounding Generative AI: Remain Vigilant*, 84 OR. ST. B. BULL. 7, 9 (2024) (noting that “the legal profession lags in the adoption of new technologies” and “struggles to adopt until technology becomes more mainstream,” citing email and cloud computing); see also Heidi Frostestad Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, 10 J.L. TECH. & INTERNET 1, 2 (2019) (“The legal profession, though, is notoriously slow to adapt to innovations in the legal practice.”).
 11. For a detailed (pre-GAI) discussion of technological competence, see Kuehl, *supra* note 10, at 2–4.
 12. See A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512 Generative Artificial Intelligence Tools (2024) [hereinafter A.B.A. Op. 512]; State Bar Ethics Opinions and Guidance *infra* Table A [hereinafter State Bar Guidance].
 13. See Browning, *supra* note 6, at 921 (describing competence as being “arguably the biggest” duty “jeopardized” by irresponsible use of GAI, but confidentiality, supervision, and candor to the tribunal are also implicated); Caitlain Devereaux Lewis, *All In: Strategic Approaches to Incorporating AI into Legal Higher Education*, (Apr. 21, 2024) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4818383 [<https://perma.cc/8NXH-3BB3> (staff-uploaded)] (discussing “core competencies related to information literacy” and various ethical duties associated with use of GAI). For further information regarding ethical duties other than competence, see A.B.A. Op. 512, *supra* note 12; State Bar Guidance, *infra* Table A.

the duty of competence and how we can understand the contours of competence relative to attorneys' use of GAI.

III. THE DUTY OF COMPETENCE

Model Rule of Professional Conduct Rule 1.1 states: "Competence Client-Lawyer Relationship – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."¹⁴ A competent attorney can identify legal issues implicated in a factual situation, can analyze law and evidence, is adequately prepared, and understands the risks and benefits of technology.¹⁵ Comments to Model Rule 1.1 state "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."¹⁶ A comment to the rule notes that some "important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting" are always required.¹⁷ Regarding preparation, competence requires "inquiry into and analysis of the factual and legal elements of the problem" by using "methods and procedures" that meet "the standards of competent practitioners."¹⁸ The requisite level of knowledge, skill and preparation depend on the stakes and complexity of the matter.¹⁹

Regarding technology, the comments require that a lawyer "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"²⁰ Attorneys have been using "extractive" AI, which extracts information from datasets

14. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (A.B.A. 2012).

15. *Id.*, cmt. 2.

16. *Id.*

17. *Id.*

18. *Id.*, cmt. 5.

19. *Id.*, cmts. 1, 4–5 ("Requisite knowledge and skill" are determined by the "relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer to or associate with" another attorney. Regarding preparation, the comments state that "[t]he required attention and preparation are determined in part by what is at stake").

20. *Id.*, cmt. 8.

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using algorithms, for decades for legal research and case management tasks.²¹ “Generative” AI, however, is a relatively new type of AI. It uses algorithms to duplicate language patterns from the applicable dataset to generate the content it predicts the human user wants based on the user’s prompts to the GAI.²² GAI platforms “use statistical models to predict future values in a series of past values,” and large language models (“LLMs”) “predict what word will come next in a series”²³ Attorneys are using publicly available, law-specific and in-house GAI platforms, and such use will continue and proliferate.²⁴

In recent months, the A.B.A. and state bars have provided a flurry of guidance on what competence looks like for attorneys using GAI.²⁵ Most notably, in July 2024, the A.B.A. specifically addressed ethical obligations and duties regarding use of GAI in Formal Opinion 512.²⁶

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21. See N.C. State Bar, Proposed Formal Ethics Op. 1 (2024) [hereinafter N.C. Proposed Formal Ethics Op. 1] (“Most lawyers have likely used some form of AI when practicing law, even if they didn’t realize it (e.g., widely used online legal research subscription services utilize a type of extractive AI, or a program that ‘extracts’ information relevant to the user’s inquiry from a large set of existing data upon which the program has been trained).”); Pa. Bar Ass’n Comm. On Legal Ethics & Pro. Resp. and Phila. Bar Ass’n Pro. Guidance Comm., Joint Formal Op. 2024-200 (2024) [hereinafter Pa. & Phila. Joint Formal Op. 2024-200] (“AI has already been used for many years in various legal software applications including document review, legal research, and document assembly.”); Mo. Office of Legal Ethics Counsel & Advisory Comm., Informal Op. 2024-11 (2024) (“Various forms of artificial intelligence are used by lawyers every day.”); Ill. Ad Hoc Comm., Rep. and Recommendations I.B (2023) [hereinafter Ill. Rep. and Recommendations] (discussing “current uses” of AI by attorneys, including in e-discovery, “assessment of legal risk by prediction and compliance, decision making for legal processes, contract review, due diligence review, legal research, document preparation, and fraud detection”).
22. See Kim Martineau, *What is Generative AI?*, IBM BLOG (Apr. 20, 2023), <https://research.ibm.com/blog/what-is-generative-AI> [<https://perma.cc/TRT5-J393>]; D.C. Bar Ethics Op. 388 (2024) [hereinafter D.C. Bar Ethics OP. 388] (“In the case of a request for something in writing, GAI uses a statistical process to predict what the next word in the sentence should be.”).
23. Gunder, *supra* note 4, at 316.
24. See *State of Practice #3 Legal Landscape*, BL (2023), <https://assets.bbhub.io/bna/sites/18/2024/03/2023-State-of-Practice-Legal-Landscape.pdf> [<https://perma.cc/5YZY-MPJB>].
25. A.B.A. Op. 512, *supra* note 12; State Bar Guidance, *infra* Table A.
26. A.B.A. Op. 512, *supra* note 12.

This recent ethical guidance consistently defines competent use of GAI to require: (1) informed decision-making and (2) verification of outputs. Informed decision-making requires that attorneys know enough about a specific GAI tool's strengths and limitations to make an informed decision that using the tool for a specific task is in the best interest of the client. When using GAI for tasks requiring human judgment and legal reasoning, competence requires that attorneys retain cognitive agency. The obligation to verify outputs includes not just checking for hallucinations, but awareness and mitigation of inaccurate, incomplete and misgrounded outputs.

IV. COMPETENCE REQUIRES ATTORNEYS MAKE AN INFORMED DECISION THAT USING A SPECIFIC GENERATIVE AI TOOL FOR A SPECIFIC TASK IS IN THE CLIENT'S BEST INTEREST

Competence relative to emerging technology is an evolving concept.²⁷ Like extractive AI and email, GAI will become commonplace technology for attorneys as it improves and creates increased efficiencies and high-quality work product.²⁸ In the same way competent lawyers are expected to use email and conduct electronic research, over time competence will likely require the

27. See Doshi, *supra* note 10, at 9 (“Many technologies which were once new and the subject of intense scrutiny are now mandatory to practice law.”); see also Ellie Margolis, *Surfin’ Safari-Why Competent Lawyers Should Research on the Web*, 10 YALE J. L. & TECH. 82, 119 (2007) (“As technology continues to change, so too will the standard for competence in legal research.”); Gunder, *supra* note 4, at 358 (citing the same quote from Margolis).

28. A.B.A. Op. 512, *supra* note 12, at 4 (GAI may become “ubiquitous in legal practice and establishing conventional expectations regarding lawyers’ duty of competence.”); see also D.C. Bar Ethics Op. 388, *supra* note 22 (“[T]here may come a time when lawyers’ use of GAI is standard practice.”); Ky. Bar Ass’n, Ethics Op. E-457, 5 (2024) [hereinafter Ky. Ethics Op. E-457] (“In the near future, using AI may become as commonplace as an attorney’s current use of other technological systems which have now become an indispensable part of the practice of law.”); Marchant & Tiano, *supra* note 10, at 3 (“Most attorneys likely currently lack the necessary technical competence to understand these AI systems, yet such systems are quickly becoming ubiquitous in the substance and process of law.”).

ability to use GAI.²⁹ Competence does not require attorneys to “become GAI experts.”³⁰ Instead, current ethics guidance requires that an attorney makes an “informed decision” that using a specific GAI tool for a specific task is in the client’s best interest, understanding the available options, benefits, risks, limitations and terms of service.³¹

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29. Ky. Ethics Op. E-457, *supra* note 28, at 5 (explaining that as AI technology develops “not using an available AI tool may constitute a failure to meet the lawyer’s duty of attaining and maintaining competence . . .”).
 30. A.B.A. Op. 512, *supra* note 12, at 2; *see also* D.C. Bar Ethics Op. 388, *supra* note 22 (“Most lawyers are not computer programmers or engineers and are not expected to have those specialized skills.”).
 31. A.B.A. Op. 512, *supra* note 12, at 5; *see also* *Artificial Intelligence for Attorneys—Frequently Asked Questions*, STATE BAR MICH., <https://www.michbar.org/opinions/ethics/AIFAQs> [<https://perma.cc/NRN3-7BQ3>] (last visited Nov. 2024) (“[L]awyers generally must understand the technology available to improve the legal services they provide to clients. Lawyers have a duty to identify the technology that is needed to effectively represent the client, as well as determine if the use of such technology will improve service to the client.”); N.J. Bar Ass’n, Task Force on AI and the Law, Reports, Requests, Recommendations, and Findings 11 (2024) [hereinafter N.J. Bar Ass’n] (requiring attorneys to “[r]emain cognizant of the critical areas where AI is likely to have the most significant initial impact on legal practice”); D.C. Bar Ethics Op. 388, *supra* note 22 (“[T]he lawyer should . . . be reasonably confident that use of and reliance on the technology will not be inconsistent with any of the lawyer’s other obligations under the Rules of Professional Conduct” and “lawyers who rely on the technology should have a reasonable and current understanding of how to use the technology with due regard for its potential dangers and limitations.”); Fla. Bar Ethics Op. 24-I, 7 (2024) [hereinafter Fla. Bar Ethics Op. 24-I] (“[A] lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer’s ethical obligations.”), Marchant & Tiano, *supra* note 10, at 2 (quoting the same language); Pa. & Phila. Joint Formal Op. 2024-200, *supra* note 21, at 9 (“[I]f a lawyer chooses to use AI or any other technology, the lawyer has the responsibility to (1) understand the technology and how it works (2) understand the benefits of the technology (3) understand the risks of the technology . . .”); Ky. Ethics Op. E-457, *supra* note 28, at 3 (“Whether the attorney is researching relevant case law, reviewing documents, or drafting court pleadings, care must be taken that the attorney understands how AI works, how it may be used responsibly and in conjunction with the Supreme Court Rules of Professional Conduct.”); Dazza Greenwood, *Task Force on Responsible Use of Generative AI for Law*, MIT PRINCIPLE 4, <https://law.mit.edu/pub/generative-ai->
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Informed decision-making has two components. First, knowledge of the specific GAI tool's benefits and limits; and second, consideration of the specific task at issue. As to the first component, an attorney stays "informed" by knowing what AI tools are available,³² and knowing enough about any technology that the attorney uses "to be reasonably confident that the technology will advance the client's interests in the representation."³³ Considerations may include the benefits, limitations, reliability and risks of available GAI tools.³⁴ As

responsible-use-for-law/release/9 [https://perma.cc/7FMR-XYZM] [hereinafter MIT Principles] (explaining that using GAI without "understanding how the technology works and or critically reviewing how outputs are generated" is not consistent with the duty of competence). The duty to understand risks associated with technology has long applied to attorneys' use of emerging technology. See Kuehl, *supra* note 10, at 5.

32. N.J. Bar Ass'n, *supra* note 31, at 13 ("[A]ttorneys must keep abreast of and adapt to evolving technological landscapes and embrace opportunities for innovation and specialization in emerging AI-related legal domains"); see also Pa. & Phila. Joint Formal Op. 2024-200, *supra* note 21 (lawyers must "stay informed about ethical issues and best practices for using AI in legal practice" just as "lawyers are required to maintain competence across all technological means relevant to their practice"); Ill. Rep. and Recommendations, *supra* note 21, at IV.2 ("Best practices . . . would require a lawyer to stay informed of changes in artificial intelligence").
 33. D.C. Bar Ethics Op. 388, *supra* note 22; see N.C. Proposed Formal Ethics Op. 1, *supra* note 21 ("A lawyer may use AI in a variety of manners in connection with her law practice, and it is a lawyer's responsibility to exercise her independent professional judgment in determining how (or if) to use the product of an AI tool in furtherance of her representation of a client.").
 34. N.C. Proposed Formal Ethics Op. 1, *supra*, note 21, at 1; State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law, 2 (2023) [hereinafter State Bar of Cal. Standing Com. on Pro. Resp. & Conduct] ("Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations" and terms of use and policies regarding data use); Ill. Rep. & Recommendations, *supra* note 21, at IV.A ("[A] lawyer should have awareness of the benefits and risks of relevant technology, which includes artificial intelligence"); Ill. Rep. and Recommendations, *supra* note 21, at IV.2 ("Best practices . . . require that lawyers investigate the use of artificial intelligence prior to deploying it. This inquiry should at a minimum require understanding how to utilize the technology without inadvertently disclosing client confidences."); The Pro. Ethics Comm. For the State Bar of Tex. Op. 705, 2 (Feb. 2025) ("What's clear . . . is that if a lawyer opts to use a
- footnote continued on next page*

to the second component, an attorney should not allow GAI to replace human reasoning and judgment in tasks requiring these skills.

A. *The Specific Generative AI Tool Matters – Understanding a Tool’s Strengths and Limitations*

Informed decision-making requires some understanding of the GAI tool an attorney is using. Not all GAI tools are created equal. The free versions of publicly available LLMs are completely different tools from law-specific retrieval augmentation generation (“RAG”) systems such as Advanced Lexis+AI and Westlaw AI-Assisted Research. Publicly available LLMs can “hallucinate” by making things up that do not exist.³⁵ In short, “a hallucination is a euphemism for a lie.”³⁶ In law, hallucinations take the form of case citations that do not exist that the LLM creates based on what its predictive language pattern algorithm thinks the user wants.³⁷ In the first two and a half years of ChatGPT, attorneys using generative AI have filed briefs with non-existent cases

generative AI tool in the practice of law, the lawyer must have a reasonable and current understanding of the technology—because only then can the lawyer evaluate the associated risks of hallucinations or inaccurate answers, the limitations that may be imposed by the model’s use of incomplete or inaccurate data, and the potential for exposing client confidential information.”).

- 35. See D.C. Bar Ethics Op. 388, *supra* note 22 (discussing hallucinations); Pa. & Phila. Joint Formal Op. 2024-200, *supra* note 21, at 9 (discussing the same).
- 36. N.Y. State Bar Ass’n, Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence, 37 (2024) [hereinafter N.Y. State Bar Ass’n, Rep. and Recommendations].
- 37. For examples of legal hallucinations, see Ill. Rep. and Recommendations, *supra* note 21, at VI.A.3. For detailed studies of hallucinations by public and law-specific LLMs, see Matthew Dahl et al., *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models*, 16 J. LEGAL ANALYSIS 64 *passim* (2024); Varun Magesh et al., *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, 22 J. EMPIRICAL LEGAL STUD. 216, 217–220 (2025).

in over 40 different cases.³⁸ Public-facing LLMs continue to hallucinate.³⁹

Beyond hallucinations, LLMs, including law-specific RAG tools such as Lexis+AI and Westlaw AI-Assisted Research, can provide inaccurate, incomplete or misgrounded outputs.⁴⁰ A hypothetical illustration of an incorrect output is “[t]here is no right to same sex marriage in the United States.”⁴¹ A related example of misgrounded information would be referring to *Miranda v. Arizona* for the proposition that there is a right to same sex marriage in the United States.⁴² The correct assertion of law is misgrounded on the wrong source for the rule. Incomplete outputs do not provide seminal or up-to-date cases or statutes or fail to identify all relevant sources in

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38. The author has located 46 cases in a non-exhaustive search. A list of these cases, which grows weekly, is on file with the author. High profile cases include *Mata v. Avianca, Inc.*, 687 F.Supp.3d 443, 450–52 (S.D.N.Y. 2023); *Park v. Kim*, 91 F.4th 610 (2d Cir. Jan. 30, 2024) and *United States v. Cohen*, 724 F. Supp. 3d 251 (S.D.N.Y. Mar. 20, 2024). See also Conley, *supra* note 1 (discussing cases); Gunder, *supra* note 4 (same). Pro se parties have also been sanctioned for filing briefs with hallucinated cases. See, e.g., Joseph Fawbush, *Pro Se Litigant Fined 10k for Filing AI-Generated Reply Brief*, FINDLAW BLOG <https://www.findlaw.com/legalblogs/practice-of-law/pro-se-litigant-fined-10k-for-filing-ai-generated-reply-brief/> [<https://perma.cc/FCX5-GPC4>] (last updated Feb. 16, 2024).
 39. See, e.g., Introducing GPT-4.5 (Feb. 27, 2025) <https://openai.com/index/introducing-gpt-4-5/> [<https://perma.cc/6923-4WE3>] (showing OpenAI’s claim that the new GPT has a 37.1% simple QA Hallucination Rate), Dahl et al., *supra* note 37, at 66 (“[O]ur findings reveal the widespread occurrence of legal hallucinations . . .”).
 40. Magesh et al., *supra* note 37, at 216 (finding that law-specific LLMs provide incomplete, inaccurate or ungrounded outputs between 17%–33% of the time, and concluded that these findings “inform the responsibilities of legal professionals in supervising and verifying AI outputs, which remain an important open question for the responsible integration of AI into law”); see also A.B.A. Op. 512, *supra* note 12, at 3 (“[I]f the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete or discriminatory results.”).
 41. Magesh et al., *supra* note 37, at 221; see also Dahl et al., *supra* note 37, at 65 (LLMs can “regurgitate a falsely homogenous sense of the legal landscape to their users, collapsing important legal nuances and perpetuating representational harms”).
 42. Magesh et al., *supra* note 37, at 221.

response to a prompt. Intentional decisions by attorneys regarding the GAI tool used and the type of task for which it is used, together with verification, can mitigate the risk of hallucinations, inaccurate, incomplete or misgrounded information.⁴³

A recent study of LLMs and RAGs identified two additional “potential failure points.”⁴⁴ First, their “susceptibility to contra-factual bias, i.e., their ability to respond to queries anchored in erroneous legal premises.”⁴⁵ Put simply, a researcher may prompt the LLM or RAG for outputs based on faulty assumptions. In such situations, rather than contradict the researcher’s faulty assumption, some GAI tools provide an “uncritical answer[.]” to the faulty prompt.⁴⁶ The second “failure point” identified is GAI tools’ “certainty in their responses, i.e., their self-awareness of their propensity to hallucinate.”⁴⁷ Put another way, LLMs and RAGs can exhibit high levels of confidence in faulty answers.⁴⁸ Attorneys using GAI should be aware of these risks when using the tool and analyzing its outputs.

B. The Specific Task Matters – Generative AI Should Assist, Not Supplant Human Reasoning and Judgment

As set forth in the Florida bar’s ethical guidance, “a lawyer should carefully consider what functions may be ethically delegated to [GAI].”⁴⁹ Four foundational aspects of professional competence include knowledge, professional judgment, persuasion and content

43. See Gunder, *supra* note 4, at 314 (“Hallucinations can be prevented or mitigated by: (1) ensuring the product you are using has high-quality training data or employs retrieval-augmented generation; (2) limiting the use of the AI technology to specific purposes; (3) limiting the output you receive through data templates or by defining boundaries; and (4) implementing human oversight, including ‘validating and reviewing’ the output.”).

44. Dahl et al, *supra* note 37, at 82.

45. *Id.*

46. *Id.* Dahl et al. explain that LLMs “struggle to accurately gauge their own level of certainty without post-hoc recalibration.” *Id.* at 66.

47. *Id.*

48. *Id.* at 84 (the LLMs studied “systematically *overestimate* their confidence relative to their actual rate of hallucination”); *see also* Gunder, *supra* note 4, at 313 (“[G]enerative AI can express false confidence in incorrect answers.”).

49. Fla. Bar Ethics Op. 24-1, *supra* note 31, at 4.

creation.⁵⁰ Examples of knowledge in law include knowledge of applicable substantive, procedural and remedial legal rules.⁵¹ Professional judgment applies knowledge to a situation to make a nuanced determination of risks and benefits of potential paths forward.⁵² Attorneys use knowledge and professional judgment in analytical tasks such as analyzing deposition transcripts, reviewing discovery, case valuation or risk exposure, and predictive analyses of case outcomes. Persuasion includes negotiations and presenting arguments to courts.⁵³ Content creation includes a myriad of types of documents, including client engagement letters, case chronologies, witness outlines, deposition preparation, discovery requests and responses, mediation statements, contracts, memos, pleadings, and briefs, just to name a few. Such content communicates knowledge, professional judgment and/or persuasion.

Responsible use of GAI differs depending on the task for which it is used.⁵⁴ Where the task requires the exercise of professional judgment, GAI is an inappropriate substitute for experienced,

50. Sylvain Magdinier, *Transformers: How Generative AI Will Change the Core Competencies of the Business Lawyer*, AM. BAR: BUS. L. TODAY (Oct. 20, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-october/transformers-how-generative-ai-will-change-core-competencies-of-the-business-lawyer/ [https://perma.cc/84LV-NRZH].

51. See *id.* (defining “knowledge” to include “applicable laws and regulations; the client’s business . . . and market/industry practice and content standards”).

52. For an interesting discussion of the various aspects of human legal reasoning and judgment, see Timothy D. Geary, *Artificial Intelligence in the Practice of Law: How Natural Law Theory Helps Us Draw the Line*, 48 OKLA. CITY U. L. REV. 269, 272, 278 (2024).

53. See Magdinier, *supra* note 50.

54. Fla. Bar Ethics Op. 24-1, *supra* note 31 (“[A] lawyer should carefully consider what functions may ethically be delegated to generative AI”); Marchant & Tiano, *supra* note 10, at 4 (“Competent legal representation will increasingly involve an obligation to use AI tools in appropriate situations.”); accord MIT Principles, *supra* note 31, at principle 7 (“Responsible parties decide on use cases/tasks that GAI can and cannot perform and sign off on use on a client/matter basis.”); N.Y. State Bar Ass’n, Rep. and Recommendations, *supra* note 36, at 1, 57 (“You have a duty to understand the benefits, risks and ethical implications associated with the [AI or GAI tools], including their use for communication, advertising, research, legal writing and investigation.”).

well-researched attorney cognition.⁵⁵ At a basic level, attorneys should know that GAI may appear to be engaging in legal reasoning, but it is not.⁵⁶ Instead, it is using algorithms to duplicate language patterns from the applicable dataset to generate the content it predicts you want.⁵⁷ GAI “create[s] ‘new’ content that is statistically similar to what [they have] seen before”⁵⁸ This is a function of language pattern duplication, not legal reasoning or professional judgment.⁵⁹ “GAI tools lack the ability to understand the meaning of the text they generate or evaluate its content.”⁶⁰ GAI systems are “therefore prone to

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55. N.J. Bar Ass’n, *supra* note 31, at 1, 12 (“Significant concern arises when attorneys rely on AI to replace their professional judgment The legal community must grapple with the critical question of distinguishing between processes that enhance human performance and those that supplant it.”); accord Hunter Cyran, *New Rules for a New Era: Regulating Artificial Intelligence in the Legal Field*, 15 CASE W. RESERVE J.L. TECH. & INTERNET 1, 18–19, 24–3–31 (2024) (“[S]ubstituting human thought for generative AI in persuasive legal writing would upend legal evolution and cause prolonged stagnation” and discussing seven areas in which human output is required for “effective representation”); Lewis, *supra* note 13, at 21 (“Perhaps because they are one of the more abstract lawyering topics, legal analysis and legal reasoning are tasks where current AI tools might be least helpful.”).
 56. See Martineau, *supra* note 22 (“Many generative models, including those powering ChatGPT, can spout information that sounds authoritative but isn’t true (sometimes called ‘hallucinations’) or is objectionable and biased.”); Colin E. Moriarty, *The Legal Ethics of Generative AI—A Robot May Not Injure a Lawyer or, Through Inaction, Allow a Lawyer to Come to Harm*, COLO. LAW., Oct. 2023, at 30, 32 (Oct. 2023) (Large language models “have had shocking success in mimicking human understanding and production of language. They have accomplished this not by being taught how to encode language directly, but by being fed enormous amounts of written language and being asked to synthesize a map or algorithm that successfully produces language matching what already existed.”).
 57. See D.C. Bar Ethics Op. 388, *supra* note 22 (“In the case of a request for something in writing, GAI uses a statistical process to predict what the next word in the sentence should be.”); see also Grossman et al., *supra* note 9, at 72 (“GenAI systems use deep-learning algorithms based on neural networks to model written language, speech, music, or other pattern-based media.”).
 58. See D.C. Bar Ethics Op. 388, *supra* note 22; Martineau, *supra* note 22.
 59. Accord D.C. Bar Ethics Op. 388, *supra* note 22 (“‘Statistically probable outputs’ are not what a lawyer searching for existing controlling authorities needs or wants.”).
 60. A.B.A. Op. 512, *supra* note 12, at 3.

occasionally miss important arguments or counter-arguments, or to misunderstand the concepts they write about.”⁶¹

Given that GAI tools are not engaging in reasoning, A.B.A. Opinion 512 prohibits lawyers from allowing “GAI tools alone to offer legal advice to clients, negotiate clients’ claims, or perform other functions that require a lawyer’s personal judgment or participation.”⁶² Instead, the ideal use of GAI by attorneys would be for “automating repetitive tasks” or “analyzing vast amounts” of authority or data.⁶³ Such use gives attorneys “more time to focus on complex strategy, research and client relationships.”⁶⁴ For tasks requiring legal reasoning and professional judgment, while “GAI may be used as a springboard or foundation for legal work” such as generating an initial analysis or draft, “lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment.”⁶⁵

Ultimately, the attorney, not the GAI, remains ethically accountable for all work done using GAI.⁶⁶ Several states’ ethical guidance has emphasized that “[a] lawyer’s professional judgment

61. Marchant & Tiano, *supra* note 10, at 4; Dahl et al., *supra* note 37, at 66 (summarizing findings of a study that “when asked a direct, verifiable question about a randomly selected federal case, LLMs hallucinate between 58% (ChatGPT 4) and 88% (Llama 2) of the time”).

62. A.B.A. Op. 512, *supra* note 12, at 4; *see also* Fla. Bar Ethics Op. 24-1, *supra* note 31, at 4 (“[A] lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer’s personal judgment and participation.”).

63. N.J. Bar Ass’n, *supra* note 31, at 11; *see also* Pa. & Phila. Joint Formal Op. 2024-200, *supra* note 21 (“AI technology has facilitated the automation of routine legal tasks, allowing legal professionals to focus on higher-value work requiring human expertise and judgment.”).

64. N.J. Bar Ass’n, *supra* note 31, at 11.

65. A.B.A. Op. 512, *supra* note 12, at 4.

66. *See, e.g.*, D.C. Bar Ethics Op. 388, *supra* note 21 (“What technology has not done is alter lawyers’ fundamental ethical obligations, and specifically, the duties lawyers owe to their clients—and to the courts.”); Fla. Bar Ethics Op. 24-1, *supra* note 31, at 1 (“Lawyers remain responsible for their work product . . .”); Moriarty, *supra* note 56, at 35 (“[I]t is the lawyer who will be sanctioned for an error, not the LLM . . .”).

cannot be delegated to [GAI] and remains the lawyer's responsibility at all times"⁶⁷

C. Competence and GAI's "Black Box"

Perhaps the biggest roadblock to competent use of GAI is its lack of explainability. If asked how an attorney arrived at an analysis set forth in a memo or brief, the attorney could talk through her research approach, where she started, how the law has changed or developed and what trends she observed in the cases. Unlike humans, "[e]ven for those who create generative AI products, there is a lack of clarity as to how it works."⁶⁸ This lack of explainability is often referred to as AI's "black box."⁶⁹ As one researcher explains, LLMs "provide no insights into how they built the memorandum. They show only the cases in the memorandum" and "essentially tell the user, 'Here's the output; we're

67. State Bar of Cal. Standing Com. on Pro. Resp. & Conduct, *supra* note 34, at 3; see also Pa. & Phila. Joint Formal Op. 2024-200, *supra* note 21 ("Lawyers must exercise their professional judgment in conjunction with AI-generated content, and recognize that AI is a tool that assists but does not replace legal expertise and analysis."); accord W. Bradley Wendel, *The Promise and Limitations of Artificial Intelligence in the Practice of Law*, 72 OKLA. L. REV. 21, 26–27 (2019) (arguing that humans are an indispensable actor in a legal system because law is a normative system premised on "mutual recognition of one another as free and equal agents").

68. Pa. & Phila. Joint Formal Op. 2024-200, *supra* note 21 (citing Cal. Bar Ass'n Comm. on Pro. Resp. & Conduct, *supra* note 34, at 1).

69. Fla. Bar Ethics Op. 24-1, *supra* note 31, at 1 ("The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine how a program came to a result."); Ky. Ethics Op. E-457, *supra* note 28, at 1, 3 ("AI lacks transparency because of its use of AI algorithms which operate as 'black boxes' making it difficult to understand how AI arrived at its conclusions."); see also Cyran, *supra* note 55, at 20–22 (discussing the "black box" paradox creating an "inverse relationship between AI accuracy and transparency") (citations omitted); Will Douglas Heaven, *Why Asking an AI to Explain Itself can Make Things Worse*, MIT TECH. REV. (Jan. 29, 2020), <https://www.technologyreview.com/2020/01/29/304857/why-asking-an-ai-to-explain-itself-can-make-things-worse/> [https://perma.cc/PKG7-QFXE (dark archive)] ("The success of deep learning is due to tinkering: the best neural networks are tweaked and adapted to make better ones, and practical results have outpaced theoretical understanding . . . [H]ow a trained model works [is] typically unknown. We have come to think of them as black boxes.").

not telling you how we got there – take it or leave it.”⁷⁰ An inability to explain the process or reasoning underlying work product is unacceptable for attorneys. Clients, courts, and colleagues expect attorneys to explain the reasoning behind assertions of law and prove assertions of fact.

It seems fair to require the GAI developers themselves to provide transparency and accountability,⁷¹ and the A.B.A. recommended as much in a 2023 Resolution.⁷² The A.B.A. “urged” AI developers to “ensure that their products, services, systems, and capabilities are subject to human authority, oversight, and control,” be “accountable for consequences caused by their products . . . unless they have taken reasonable measures to mitigate against . . . harm or injury” and “ensure transparency and traceability” in their AI products.⁷³ Failures by the GAI tools to provide explainability, accountability and transparency, however, will not be available as a defense to use by attorneys without knowledge of these risks. Instead of explainability, however, we see disclaimers and warnings on GAI tools. As such, the ethical duty to know the limitations of the specific GAI tool an attorney is using for the specific task at issue remains squarely on the attorney’s shoulders.

D. Resistance to Automation Complacency

Competence requires attorneys to avoid automation complacency, which occurs “[w]hen humans over-rely on automated systems or have their skills attenuated by such over-reliance.”⁷⁴ As explained by the California Bar’s guidance, “a lawyer should take steps to avoid overreliance on [g]enerative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing.”⁷⁵

70. Damien Riehl, *Integration of Artificial Intelligence has Transformational Potential for Lawyers*, MONT. LAWYER, Feb.–Mar. 2024, at 16, 18.

71. *Id.* at 18 (describing one “pitfall” of large language models as “[n]ot providing insights into the process used to achieve outputs”).

72. A.B.A. RESOL. 604, I (2023).

73. *Id.*

74. NAT’L INST. OF STANDARDS AND TECH., U.S. DEP’T OF COM., TOWARDS A STANDARD FOR IDENTIFYING AND MANAGING BIAS IN ARTIFICIAL INTELLIGENCE 49 (2022).

75. State Bar of Cal. Standing Com. on Pro. Resp & Conduct, *supra* note 34, at 2 (“Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer.”).

Relatedly, A.B.A. Opinion 512 clarifies that “[c]ompetent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work,” and that “regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.”⁷⁶

Automation complacency implicates the duty of competence because competent representation occurs when an attorney exercising nuanced professional judgment integrates GAI into representation of a client. To stay competent, the human attorney should retain cognitive agency to effectively use GAI as part of a complex, nuanced and reasoned case strategy. This requires attorneys to retain the ability to engage in such reasoning rather than supplant human cognitive agency with GAI.⁷⁷ This risk is larger than a failure to verify outputs, but is instead an inability to exercise professional judgment and meaningfully interrogate GAI outputs.⁷⁸

V. COMPETENCE REQUIRES VERIFICATION OF OUTPUTS

Once an attorney decides that using a specific GAI tool for a specific task is in the client’s best interest based on knowledge of the tool’s benefits and limitations, competence requires verification of

76. A.B.A. Op. 512, *supra* note 12, at 4.

77. Accord Amy Cyphert, Samuel J. Perl & S. Sean Tu, *AI Cannibalism and the Law*, 22 COLO. TECH. L. J. 301, 317 (2024) (GAI’s positive or negative impact on the legal profession “will ... depend on how ethically and professionally lawyers use them and whether they can resist the ‘easy out’ of overusing them for drafting tasks and instead use them to supplement, augment and improve their own writing”).

78. One issue related to automation complacency is the “recursive loop” which refers to generative AI outputs looping back into generative AI datasets, resulting in less human-created content in datasets, and a “gradual decline in output coherence and quality.” *Id.* at 302, 308. Some researchers use the term “AI cannibalism” to refer to “AI being trained on AI-generated content” and note “a significant portion of the internet could be full of AI-generated text in the not-so-distant future” resulting in it getting more and more difficult to “find good-quality guaranteed AI-free training data.” *Id.* at 307–08 (citations omitted). Although the recursive loop would likely take longer to degrade law-specific datasets, over time this may occur. *Id.* at 315–16 (discussing long-term “stagnation in the development of law” based on AI cannibalism).

outputs.⁷⁹ Verifying, critically analyzing and supplementing GAI outputs with human legal reasoning and professional judgment will remain an essential element of competence for the foreseeable future.⁸⁰ All ethical guidance to date requires that attorneys do not blindly trust GAI outputs, but instead, critically analyze, correct and supplement outputs.⁸¹ This requires “more than the mere detection and

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79. N.Y. City Bar Ass’n Comm. on Prof. Ethics, Formal Op. 2024-5 (2024) [hereinafter N.Y.C. Formal Op. 2024-5] (discussing the ethical obligations of lawyers and law firms with the use of GAI in the practice of law); State Bar of Cal. Standing Com. on Pro. Resp & Conduct, *supra* note 34, at 2 (“[I]t is possible that generative AI outputs could include information that is false, inaccurate, or biased.”); N.J. COURTS, Notice to the Bar: Legal Prac. Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers 4 (Jan. 24, 2024) <https://www.njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey> [<https://perma.cc/47DC-HLMQ>] (“Because AI can generate false information, a lawyer has an ethical duty to check and verify all information generated by AI to ensure that it is accurate.”).
80. Marchant & Tiano, *supra* note 10, at 4 (failure to validate facts, citations and legal reasoning of generative AI outputs “is tantamount to technologically incompetent legal practice”).
81. State Bar of Cal. Standing Com. on Pro. Resp & Conduct, *supra* note 34, at 2–3 (“AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary.”); N.Y.C. Formal Op. 2024-5, *supra* note 79 (quoting this language); Fla. Bar Ethics Op. 24-1, *supra* note 31 (“[A] lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer’s duties of competence”); Pa. & Phila. Joint Formal Op. 2024-200, *supra* note 21, at 1, 9 (“[I]f a lawyer chooses to use AI or other technology, the lawyer has the responsibility to . . . check and verify all citations and the materials cited”); Doshi, *supra* note 10 (“Attorneys that understand the risks employed with AI know that they must evaluate the content created by AI to ensure accuracy.”); Moriarty, *supra* note 56, at 35 (“Simply put, the lawyer must review every bit of an LLM’s work product . . . keeping firmly in mind that generative AI is a secondary source, at best.”); accord MIT Principles, *supra* note 31 (“Duty of Fiduciary Loyalty to the client in all usage of AI applications [requires an attorney to] critically review, confirm, or correct the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand . . . [and ensure] any language drafted by generative AI is checked for accuracy”).

elimination of false [GAI] results.”⁸² Competence requires a lawyer to “carefully scrutinize” GAI outputs, which includes the “soundness of the reasoning” of outputs.⁸³

A.B.A. Opinion 512 considers a spectrum of the “appropriate degree of independent verification or review” of GAI outputs.⁸⁴ A lesser amount of verification is appropriate where an attorney has previously tested a GAI tool’s accuracy or where the GAI designed specifically for lawyers performs a “discrete legal task, such as generating ideas.”⁸⁵ As attorneys gain familiarity with newly-developed law-specific GAI tools, erring on the side of caution is prudent.

Failure to critically evaluate GAI outputs is related to the concept of “automation bias,” which is defined as “the tendency of humans to blindly trust AI-generated outputs without critically evaluating them.”⁸⁶ Automation bias is “not a new phenomenon.”⁸⁷ Other regulated professions, such as healthcare and aviation, have observed

82. State Bar of Cal. Standing Com. on Pro. Resp & Conduct, *supra* note 34, at 3; Ill. Rep. and Recommendations, *supra* note 21, at IV.2 (“Best practices . . . would require as part of a lawyer’s competent representation personally checking any fact, law, or citation generated by artificial intelligence”); Marchant & Tiano, *supra* note 10, at 4 (“A competent attorney . . . needs to verify the validity of any facts and citations produced by a generative AI program such as ChatGPT.”).

83. State Bar of Cal. Standing Com. on Pro. Resp & Conduct, *supra* note 34, at 3 (“[A] lawyer may supplement any generative AI-generated research with human-performed research and supplement any generative AI-generated argument with critical, human-performed analysis and review of authorities.”); Marchant & Tiano, *supra* note 10, at 4 (An important aspect of competence when using generative AI is “[t]o double-check the soundness of the reasoning of text generated by AI systems”); *see also* Moriarty, *supra* note 56, at 35 (“Lawyers should check citations and independently consider the reasoning and conclusions based on the lawyer’s own review of the primary sources.”).

84. A.B.A. Op. 512, *supra* note 12, at 4.

85. *Id.*

86. Ken Knapton, *Navigating the Biases in LLM Generative AI: A Guide to Responsible Implementation*, FORBES (Sep. 6, 2023), <https://www.forbes.com/sites/forbestechcouncil/2023/09/06/navigating-the-biases-in-llm-generative-ai-a-guide-to-responsible-implementation/> [https://perma.cc/3M9J-KHWA].

87. Heaven, *supra* note 69.

that humans can make errors by trusting AI instead of their own expertise.⁸⁸ As explained by one scholar, “when it comes to automated systems from aircraft autopilots to spell checkers, studies have shown that humans often accept the choices [AI] make[s] even when they are obviously wrong.”⁸⁹

The significant number of cases in which courts have sanctioned lawyers for filing briefs with hallucinated cases illustrate that the legal profession is not immune from automation bias.⁹⁰ Not only do these cases illustrate Rule 11 violations, they also are examples of failures to meet the ethical duty of competent use of technology.⁹¹ As GAI improves, automation bias can result in attorneys missing not only hallucinations, but also inaccurate, incomplete and misgrounded outputs.⁹²

88. See Conley, *supra* note 1, at 4–7 (discussing automation bias); see also Cyran, *supra* note 55, at 17 (discussing automation bias generally and in the aviation industry).

89. Heaven, *supra* note 69.

90. See Conley, *supra* note 1 (discussing automation bias and arguing that recent hallucinated filings cases illustrate automation bias); Doshi, *supra* note 10 (“Attorneys . . . did not understand the potential risks of using the new technology [GAI], including the potential for fabricating citations, nor did they properly evaluate what had been generated, using their own professional judgment to supervise the work performed by the tool.”); Browning, *supra* note 6, at 922 (discussing cases and noting “[c]learly, a substantial percentage of lawyers (not to mention the judges before whom they practice) are either not yet using generative AI or are using it without a full understanding of the technology’s capabilities and limitations”); Gunder, *supra* note 4, at 316 (“[T]hese attorneys erred when they subsequently accepted the generative AI work product and used it in their filings without stopping to check and verify the work product.”). Gunder further notes “these litigants are relying on fictitious generative AI output due to their lack of knowledge of how generative AI works and its propensity to hallucinate.” *Id.* at 344.

91. Browning, *supra* note 6, at 922 (noting these cases “not only fail in their grasp of the AI tools themselves, but also fail to heed some of the most basic ethical obligations that attorneys have: the duty to provide competent representation,” including “the duty to provide independent professional judgment”).

92. Accord Cyran, *supra* note 55, at 17 (“If AI could eventually generate mostly reliable legal citations and rules, automation bias suggests lawyers would become less diligent in verifying the AI’s work and would not catch these hallucinations.”).

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GAI tools' lack of explainability coupled with their ability to use predictive language patterns to create believable and apparently well-reasoned outputs exacerbates automation bias. Because it looks good and no one is really sure how it works, we trust it when we should not.⁹³ As explained by California's ethical guidance, "generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses."⁹⁴

VI. CONCLUSION

Attorneys' ethical duties have continually needed to adjust to technological advances. GAI is a "game changer" in that it is technology that can, at least in the literal sense, complete tasks previously done by attorneys. The risks of automation bias and complacency are much higher because of this change. It appears that ethical duties will carry the huge weight of ensuring that attorneys resist these risks. At the most foundational level, this requires that attorneys know enough about the specific GAI tool that they are using and the task at hand to make an informed decision that its use is in the client's best interest. Attorneys retaining cognitive agency, particularly where the task involves human judgment and reasoning, is essential. Verification, defined as not just checking for hallucinations, but also identifying inaccurate, incomplete and misgrounded outputs, is a foundational requirement of competence.

93. See Heaven, *supra* note 69. Heaven quotes researcher Mark Riedl who observed the correlation between lack of explainability and automation bias generally. Riedl observed "[w]e've always known that people over-trust technology, and that's especially true with AI systems," and "the more you say it's smart, the more people are convinced that it's smarter than they are." *Id.* Heaven concludes "[e]xplanations that anyone can understand should help pop that bubble." *Id.*

94. State Bar of Cal. Standing Com. on Pro. Resp & Conduct, *supra* note 34, at 1; see also Grossman, Grimm & Brown, *supra* note 9, at 73 ("GenAI is hard to detect because its creator's primary goal was to develop a tool that would model the style of ordinary language, and because the models on which GenAI is based have quickly gotten better and massively more complex . . . [LLMs] can convincingly mimic human-generated content.").

Table A

Bar	Document	Date
American Bar Association	A.B.A. Standing Committee on Ethics and Professional Responsibility Formal Opinion 512 Generative Artificial Intelligence Tools	July 29, 2024
State Bar of California	State Bar of California Standing Committee on Professional Responsibility and Conduct Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law	November 16, 2023
D.C. Bar	D.C. Bar Ethics Opinion 388 Attorneys' Use of Generative Artificial Intelligence in Client Matters	April 2024
Florida Bar	Ethics Opinion 24-1	January 19, 2024
Illinois State Bar	Report to President Shawn Kasserman by ad hoc committee charged to provide recommendations to the ISBA Board of Governors on steps ISBA can take to deal with impact of AI in the practice of law	September 27, 2023
Kentucky Bar Association	Ethics Opinion KBA E-457	March 15, 2024

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Office of Legal Ethics Counsel & Advisory Committee of the Supreme Court of Missouri	Informal Opinion 2024-11	April 25, 2024
New York City Bar Association Committee on Professional Ethics	Formal Opinion 2024-5: Ethical Obligations of Lawyers and Law Firms Relating to the use of Generative Artificial Intelligence in the Practice of Law	August 7, 2024
New York State Bar Association	Report and Recommendation of the New York State Bar Association Task Force on Artificial Intelligence	April 6, 2024
North Carolina State Bar	Proposed 2024 Formal Ethics Opinion 1 – Use of Artificial Intelligence in a Law Practice	July 18, 2024 (adopted November 1, 2024)
Pennsylvania Bar Association and Philadelphia Bar Association	Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee Joint Formal Opinion 2024- 200 Ethical Issues Regarding the Use of Artificial Intelligence	May 22, 2024
The Professional Ethics Committee for the State Bar of Texas	Opinion No. 705	February 2025

