

INTERIM GUIDELINES FOR THE ETHICAL USE OF GENERATIVE AI BY RHODE ISLAND LAWYERS

Artificial intelligence has long been a feature of modern legal practice. Tools such as spell and grammar checkers, predictive typing, computer-based legal research, and e-discovery programs represent well-known and noncontroversial uses in most cases. The advent of generative artificial intelligence (“GAI”) changes this calculus, however, because unlike preexisting artificial intelligence tools which perform discrete, repetitive tasks according to in-built programming, GAI tools independently produce original content such as text, audio, and video in a far more dynamic and sophisticated manner. These novel capabilities offer risk and reward for the practitioner in equal measure, promising the opportunity for greater output and efficiency but raising distinct ethical concerns in the process.

The use of GAI does not change the ethical responsibilities of lawyers, as was true with the introduction of computers and the internet. The following guidelines are intended to provide Rhode Island lawyers with direction and assistance for using GAI tools consistent with their duties and responsibilities under Article V of the Supreme Court Rules, the Rhode Island Rules of Professional Conduct. These guidelines offer a general, non-comprehensive rubric against which lawyers may measure their GAI use against their ethical obligations under the Rules of Professional Conduct.

The Supreme Court recognizes that GAI will continue to evolve quickly, and it expects that these guidelines may as well.

Lawyers with specific questions related to GAI use should request an advisory opinion from the Supreme Court’s Ethics Advisory Panel.

Rule 1.1. Competence.

Rule 1.1 requires a lawyer to provide “competent representation to a client,” with competence measured by “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [6] to Rule 1.1 was recently amended by our Supreme Court to clarify that competent representation also includes the duty to “keep abreast of . . . the benefits and risks associated with existing and developing technology . . .” Although this language does not demand lawyers adopt or use any particular technology such as GAI, it does require them, at a minimum, to remain aware of the nature, capabilities, applications, and limitations of such tools. To do otherwise may result in a violation of the duty of competency as GAI use continues to propagate throughout the legal industry. The widespread adoption of email represents an illustrative example of this principle in action. Once a novel, emerging technology, email quickly afforded lawyers the ability to work much more efficiently than using regular mail, eventually becoming ubiquitous in legal practice and establishing new expectations vis-à-vis the contours of competent representation. Given the fast pace of its development and growth, GAI may follow a similar path. And GAI, while it has the potential to automate routine tasks and enhance legal research, is known to hallucinate, fabricating responses that look legitimate to lawyers, like using fictitious cases. Lawyers must ensure that

using GAI meets the duty to provide competent representation while also being cautious of its risks.

Rule 1.3. Diligence.

Rule 1.3 imposes a duty on lawyers to “act with reasonable diligence and promptness in representing a client.” The Commentary to Rule 1.3 clarifies that this duty of diligence requires acting with dedication and commitment to the client’s matters and interests and with zeal in advocating on the client’s behalf, despite opposition, obstruction, or personal inconvenience to the lawyer.

Lawyers may find that adopting GAI tools enhances their ability to serve their clients. As such, they can integrate GAI tools into their practices to the extent they deem necessary or advantageous in the discharging their responsibilities. However, lawyers should not outsource so much of their practice to GAI tools that doing so dilutes their dedication and attention to clients and their matters and interests incommensurate with their duties under Rule 1.3.

Rule 1.4. Communication.

Rule 1.4 addresses a lawyer’s duty to communicate with his or her clients, including the responsibility to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Rule 1.4(a)(2). It also includes the duty to “keep the client reasonably informed about the status of the matter,” “promptly comply with reasonable requests for information,” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rules 1.4(a)(3), (a)(4), and (b). Comment [1] to Rule 1.4 explains that these obligations are “necessary for the client effectively to participate in the representation . . . to promote more effective representation . . . [and to ensure that] the client [has] an understanding of the nature of the lawyer-client relationship”

As with Rule 1.1, this language does not affirmatively obligate lawyers to inform their clients every time they utilize GAI tools during a given representation. Rather, lawyers should communicate their GAI use to their clients when doing so advances the purposes of Rule 1.4. Relevant considerations include, but are not limited to, the significance of the GAI tool to accomplishing the task at hand, the importance of the task to the representation as a whole, the extent to which the client’s knowledge of the lawyer’s GAI use will advance the client’s understanding of the representation, and the extent to which the client’s knowledge of the lawyer’s GAI use informs the client’s evaluation of or confidence in the lawyer’s work.

Notwithstanding, lawyers who have chosen to integrate GAI tools into their everyday practices to supplement substantive legal work or as more than a work supplement should consider disclosing such use to clients in a retainer or engagement agreement at the outset of the representation. This proactive disclosure will ensure the client understands the full scope of the lawyer’s GAI activities before conducting any substantive work. A lawyer must certainly disclose the use of GAI when a client asks, or when he or she enters client information into a GAI system. See Rule 1.6.

Rule 1.5. Fees.

Rule 1.5 governs lawyers' fees and expenses. Pursuant to Rule 1.5(a), lawyers' fees must be reasonable under the circumstances. A non-exhaustive list of considerations for determining the reasonableness of a fee includes, but is not limited to, "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Rule 1.5(a)(1). Rhode Island law permits hourly, fixed, and/or contingent fee arrangements.

Under Rule 1.5(b), a lawyer must communicate to the client the basis upon which he or she shall charge for fees and expenses prior to or within a reasonable time after commencing the representation. This must be accomplished in writing, via a fee agreement, engagement letter, or other suitable document. It should set forth, at a minimum, "the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation." Rule 1.5, Comment [2].

GAI tools offer the promise of increased efficiency and work capacity, much like the shift from books to computers for legal research. However, it is critical to remember that a lawyer may only charge for the actual time spent on a task. For example, if a GAI tool allows a lawyer to provide a legal service in one hour instead of the usual two, the billable time would be one hour. Equally important is the need for fixed or contingent fees to accurately reflect the value of the work provided, as charging otherwise could lead to an unreasonable fee.

Charging for GAI-related expenses falls within the same rubric. Comment [1] to Rule 1.5 explains with respect to expenses that "[a] lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer." Accordingly, a lawyer may not charge a client for the expenses associated with operating a GAI tool used for everyday legal work but, rather, must treat such costs as office overhead because they are akin to routine expenses for rent, utilities, productivity software, and malpractice insurance. The reasonable out-of-pocket costs associated with obtaining access to specialty GAI tools which the lawyer does not regularly use may be charged to a client, by contrast, when requested by the client or when necessitated by the nature of the representation.

Finally, a lawyer may not charge a client for the costs relating to GAI training or learning how to use a particular GAI tool due to the lawyer's ongoing duty of competence. However, the lawyer may charge for the reasonable cost of learning how to operate a specific GAI tool requested by the client in furtherance of the representation.

Rule 1.6. Confidentiality.

Pursuant to Rule 1.6, a lawyer must treat as confidential all information related to a representation, regardless of source, unless the client gives his or her informed consent to disclosure, disclosure is impliedly authorized to carry out the representation, or a recognized

exception applies. “The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.” Rule 1.6, Comment [1]. These duties also extend to former and prospective clients as well. See Rules 1.9 and 1.18.

The market is replete with GAI tools of many kinds, some advertised for general use and others intended specifically to serve particular industries like law. Moreover, some GAI tools are open in that they store the information input by users and the outputs produced by the tool. Other models operate using a closed system that does not store the information input or generated by the tool. Before using any GAI tool for legal work, a lawyer should read and understand the tool’s Terms of Use, privacy policy, and/or related policies to ascertain such important facts as whether and to what extent the tool preserves the confidentiality and security of information, whether such obligations are enforceable, whether the lawyer is to be notified of a data breach or other security event, and whether the tool retains input information after the discontinuation of services. This understanding is crucial to ensure the lawyer’s compliance with Rule 1.6 and to protect client information. Consultation with technology professionals may also be necessary to fully understand a tool’s nature. This will ensure the lawyer does not utilize GAI tools which may store, disclose, or otherwise permit access to input client information by individuals outside the lawyer’s firm or those inside the firm who should not have such access. It will also allow the lawyer to ascertain the tool’s security defenses and the risk of possible data breaches.

Rules 1.7 and 1.10. Conflicts of Interest.

Lawyers are prohibited from representing a client when the representation involves a concurrent conflict of interest as defined in Rule 1.7(a), unless one or more of the exceptions enumerated in Rule 1.7(b) applies. When lawyers are associated in a firm, Rule 1.10(a) operates to extend a concurrent conflict of interest faced by one lawyer to all lawyers in the firm unless certain exceptions apply.

One remedy to cure the presence of a concurrent conflict of interest among the members of a firm is to screen the affected lawyer off from knowledge of or participation in the matter and apportioning him or her no part of the fee earned from the representation. Requirements for screening procedures are set forth in Rule 1.0(k) and include “the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” When enacting such procedures, the implementing lawyer or lawyers must ensure that whatever GAI tools the firm uses are included such that the screened lawyer cannot access, inadvertently or otherwise, client information to which he or she should not have access. See also Rule 1.6.

Rule 1.18. Duties to Prospective Clients.

Rule 1.18 sets forth a lawyer’s responsibilities to prospective clients, defined as those persons who discuss with a lawyer the possibility of forming a lawyer-client relationship with

respect to a matter. See Rule 1.18(a). A lawyer's responsibilities to a prospective client include prohibitions on representing clients with interests materially adverse to those of the prospective client in the same or a substantially related matter, or revealing information learned from a prospective client except as permitted under Rule 1.9. See Rules 1.18(b) and (c). These restrictions apply even when no lawyer-client relationship ensues from the parties' initial discussions.

One fast-emerging GAI tool marketed to lawyers and law firms is a website chatbot or public-facing interactive GAI interface or "agent" that can engage with and/or screen site visitors in real time. These tools offer the ability to track and handle site traffic in a far more organized and dynamic way than traditional website analytics programs, potentially leading to increased business for the lawyer or firm without the need for human input. The impersonal nature of such communications does not lessen a lawyer's duties to persons seeking to potentially form a lawyer-client relationship, however. He or she owes such persons the same duties under Rule 1.18 as those with whom he or she interacts in person. Moreover, use of such tools may engender additional potential risks such as misrepresentation of the lawyer's services, the unintended acquisition of confidential information from a potential client, or the inadvertent creation of an attorney/client relationship.

Rule 2.1. Advisor.

Rule 2.1 obligates lawyers to "exercise independent professional judgment and render candid advice" when representing a client. The Commentary to Rule 2.1 makes clear that such advice may be given on purely legal grounds but may also stray into moral, ethical, social, political, economic, and other relevant areas as well. Whatever the subject, lawyer advice must be honest, candid, and based upon the lawyer's training, expertise, and experience.

Given their complexity, GAI tools may provide lawyers with a touchstone for investigating and responding to client inquiries and problems. While a lawyer may reasonably consult a GAI tool in the same way he or she would study a legal treatise, query a database like Westlaw or LexisNexis, or question an outside subject-matter expert, he or she should not substitute GAI output for his or her own advice. To do so would undermine the lawyer's duty to render candid guidance based upon his or her "independent" judgment and potentially call his or her competence and diligence into question. See Rules 1.1 and 1.3.

Rules 3.1 and 3.3. Meritorious Claims and Contentions and Candor Toward the Tribunal.

Rules 3.1 and 3.3 pertain to a lawyer's ethical duties to the courts as well as clients during litigation and other proceedings. Rule 3.1 requires, in part, that a lawyer "not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rule 3.3(a) establishes that a lawyer cannot knowingly make a false statement of fact or law to a tribunal or fail to correct a material false statement of fact or law previously made to a tribunal, fail to disclose controlling authority to a tribunal adverse

to the lawyer's position, or offer false evidence. Related Rules include Rule 4.1, which prohibits a lawyer from making a false statement of material fact or law to a third person, and Rule 8.4(c), which states that it is misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." These prohibitions apply to intentional as well as unintentional statements and actions.

It is important to remember that GAI tools, while helpful, are not without risks. As noted in the context of Rule 1.1 and competency, GAI tools are prone to hallucinations that produce false or fictitious information. In the legal context, GAI tool hallucinations may encompass citations to nonexistent or inapposite cases, inaccurate or misleading analysis of authority, and the inclusion or advocacy of inapposite or unreliable arguments or positions. GAI tools have also produced outputs that include, endorse, or suggest unfair stereotypes, emphasize prejudices, or display biases. These risks underscore the need for caution and vigilance when using GAI tools in legal work.

Therefore, the role of a lawyer in using GAI tools is not just to rely on their outputs but to critically review and verify them. Before submitting or filing any documents or other work product created by, with, or through a GAI tool, a lawyer must review all such outputs for accuracy and correctness, verify citations and statements of fact or law, fix errors and misstatements, and revise false or misleading arguments and positions. This diligence is crucial to ensure the authenticity, factual accuracy, and absence of manipulation or misrepresentation in any GAI-produced, processed, or enhanced evidence or other exhibit upon which the lawyer relies and, by extension, help mitigate the risks of using GAI tools in legal work.

Rules 5.1 and 5.3. Lawyer Supervisory Responsibilities.

A lawyer's supervisory responsibilities are governed by Rules 5.1 and 5.3. Partners, managers, and supervisory lawyers must both make reasonable efforts to institute measures ensuring the lawyers and non-lawyer employees and independent contractors under their supervision conform to the Rules of Professional Conduct and supervise such persons to ensure their compliance with the Rules. Recognized compliance measures include, but are not limited to, "those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised." Rule 5.1, Comment [2]. Partners, managers, and supervisory lawyers are ultimately responsible for the conduct of the subordinate lawyers and non-lawyer employees and independent contractors they supervise. See Rules 5.1(c) and 5.3(c).

Partners, managers, and supervisory lawyers are responsible for a firm's use of GAI tools. They should establish policies that define the permissible scope of GAI use by their subordinates and ensure compliance with these policies and their professional obligations. This includes providing comprehensive training on key topics such as the basics of GAI technology and operation, confidentiality, privacy, data security best practices, professional ethics, and acceptable use cases. In the case of independent contractors, they must ensure that such third parties use GAI tools properly and ethically, protect the security and confidentiality of information (including through the implementation of confidentiality agreements), have and maintain the proper

credentials, and can be held accountable in an appropriate legal forum when necessary.

Rules 7.1 through 7.5. Information About Legal Services.

The provisions governing lawyer advertising, Rules 7.1 through 7.5, chiefly prohibit lawyers from engaging in communications about the lawyer, his or her firm, or the services he or she provides that are false or misleading. *See, e.g.*, Rules 7.1(a)-(c); Rule 7.3(b)(3); Rule 7.5(a). As with many areas of legal practice, GAI tools may be used to conduct lawyer advertising without the need for much, if any, human input. When employing such tools, whether in-house or through a third-party provider, a lawyer remains responsible for the content of the advertising. Therefore, he or she should ensure that the work product does not contravene the limitations set forth in Rules 7.1 through 7.5 before publication or broadcast.

Rules 8.3 and 8.4. Identifying and Reporting Professional Misconduct.

The legal profession has long defined itself as self-governing, wherein its members form the first line of defense against malfeasance by their fellows. *See* Preamble [10]. This duty is codified in Rules 8.3 and 8.4. Rule 8.4 defines the parameters of professional misconduct for lawyers, including committing a criminal act reflecting on the lawyer’s honesty, trustworthiness, or fitness, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or engaging in conduct prejudicial to the administration of justice. Rule 8.3(a) requires a lawyer to report the professional misconduct of another lawyer to the appropriate disciplinary authority when such misconduct “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects”

Given the increasingly-widespread adoption and use of GAI tools across the legal profession, courts and lawyer disciplinary bodies have begun levying sanctions against GAI misuse bearing on a lawyer’s honesty and trustworthiness—most often, involving the inclusion of incorrect or misleading case and statutory citations and quotations in legal briefs and other documents. Lawyers must therefore exercise due diligence not only in reviewing their own GAI output as required under Rules 1.3, 3.1, and 3.3, but also with respect to the output of opposing counsel.

The discovery of such errors may require reporting to the tribunal during pending litigation or to the appropriate disciplinary authority outside litigation when, in the lawyer’s reasoned judgment, the misconduct is “substantial.” *See* Rule 8.3(a). Comment [3] to Rule 8.3 defines “substantial” to refer to “the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” Accordingly, even a single incorrect citation may require reporting under appropriate circumstances.