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Generative AI: Ethics Issues

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Key Takeaways

1. Do not input confidential information without adequate protections
2. Check all AI-generated content for accuracy and bias
3. Consider disclosing use of AI

State Bar Practical Guidance

Guiding principles (not “best practices”) for complying with existing professional responsibility obligations:

- Confidentiality
- Competence & Diligence
- Comply with the Law
- Supervise
- Communication
- Charging for Work Product & Costs
- Candor
- Anti-Discrimination
- Other Jurisdictions

Duty of Confidentiality

“A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections.”

- Anonymize client information
- Avoid entering details that can identify client
- Review terms of use and privacy policy
- Consult with IT/cybersecurity experts and ensure provider does not share or use inputs

Duties of Competence & Diligence

“AI-generated outputs can be used as a starting point but must be carefully scrutinized” for accuracy and bias, and to ensure it supports the client’s interests

- Understand how the tech works, its limitations, and terms of use and policies governing use of client data
- Avoid overreliance on AI
- Don’t delegate your professional judgment to AI

Rule 1.1, Rule 1.3

Prohibition on Discrimination

- Be aware of and continuously learn about possible AI biases and the risks they may create
- “[F]irms should establish policies and mechanisms to identify, report, and address potential AI biases”

Rule 8.4.1

Communication Regarding Use

“The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use.”

- Evaluate your communication obligations based on facts & circumstances:
 - Novelty of technology
 - Risks of using generative AI
 - Scope of representation
 - Sophistication of client
- Review applicable client guidelines

Candor to the Tribunal

- Review all outputs, including citations, for accuracy before submission
- Correct any errors or misleading statements made to the court
- Check for any rules or orders requiring disclosure

Rule 3.1, Rule 3.3

Charging For Work & Costs

- May charge for actual time spent, but not hourly fees for time saved
- May charge for costs
- Fee agreement should explain basis for all fees and costs

Rule 1.5; Bus. & Prof. Code § 6147-6148

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