

CAALAC Retreat
February 2024

Cutting Edge Ethics

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Presenter

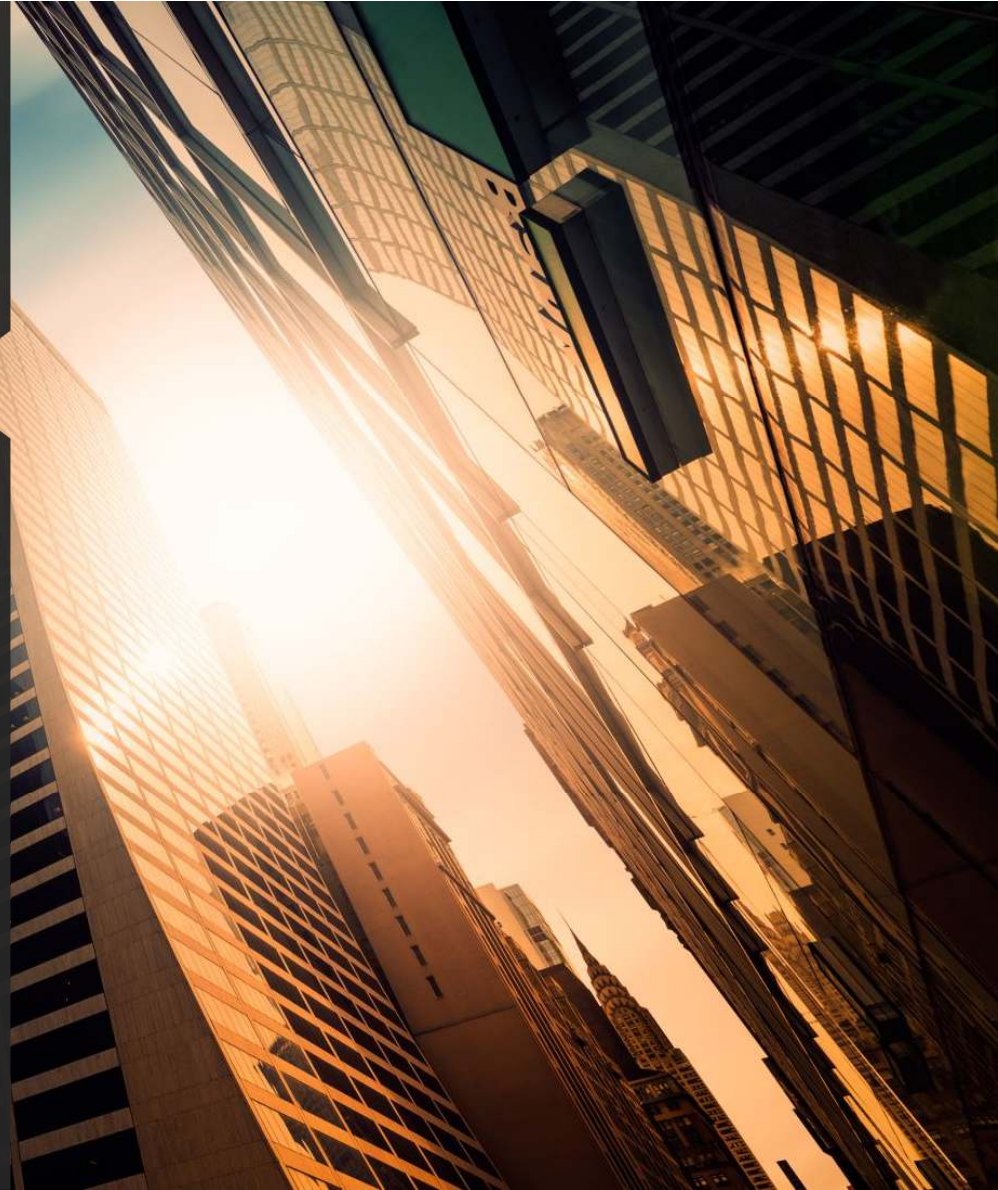
**Heather Linn Rosing
Klinedinst PC**



Topics

- Conflict of Interest Analysis for City Attorneys
- New Rule of Professional Conduct 8.3
- Ethics and Artificial Intelligence
- State Bar Discipline System Overview

Conflict of Interest Analysis for City Attorneys



Conflicts of Interest: Morality or Technicality?





The Evolution of the Rules of Professional Conduct



Framework for COI Analysis



**Threshold
Question:
Who is the
client?**



RPC 1.13

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows* or reasonably should know* is (i) a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization, the lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Comment to RPC 1.13

[1] This rule applies to all forms of private, public and governmental organizations. (See Comment [6].) An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

Comment to RPC 1.13

[6] It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code section 6068, subdivision (e) and rule 1.6. This rule is not intended to limit that authority.

Do City Attorneys Have Individual Clients?



- Representation of individuals within the City government?
 - Government Code section 995
 - Except as otherwise provided in Section 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity. . .


Do City Attorneys Have Individual Clients?

- Government Code section 41801
 - The city attorney shall advise the city officials in all legal matters pertaining to city business.
 - NOTE: This is advice to the person in their official capacity, in the course of their official duties, and not with regard to any interests that are separate and distinct from the City's interests.
- QUESTION: When do these individual people, officials, or agencies acquire separate client status for purposes of a conflict of interest analysis?
- Case studies
 - Ward v. Superior Court (May 24, 1997) 70 Cal.App.3d 23
 - Civil Service Com. v. Superior Court (1984) 163 Cal.App.3d 70
 - Castro v. Los Angeles Bd. of Supervisors (1991) 232 Cal.App.3d 1432
- Confidentiality considerations and admonitions




The State Bar's Guidance: COPRAC 2001-156

An attorney for a governmental entity usually has only one client, namely, the entity itself, which acts through constituent sub-entities and officials.



A constituent sub-entity or official may become an independent client of the entity's attorney only if the constituent sub-entity or official possesses the authority to act independently of the main entity and if the entity's attorney is asked to represent the constituent sub-entity or official in its independent capacity.



Thus, no conflict for the governmental attorney is created by a disagreement between a government entity and its constituents, or between constituents of the entity; a conflict can occur only in the unusual situation of a constituent or official with this independent right of action that might require the attorney to choose between conflicting duties.



Practical Conflict Analysis

Common COI Scenarios

Direct adversity to
a current client
(1.7(a))

Joint representation
(1.7(b))

Lawyer relationships
and responsibilities
(1.7(b)(c))

Lawyer error
(1.7(b))

Business
transactions with
clients (1.8.1)

Former clients (1.9)
• Including prospective
clients (1.18)

Lawyer as witness
(3.7)

Lateral transitions
(1.11)

Lawyers leaving
government service
to go to private
practice

Lawyers leaving
private practice to
go to government
service

Direct adversity to a current client (1.7(a))

A lawyer cannot be directly adverse to a current client, even in a separate matter, without informed written consent.

This is primarily because of the existence of the duty of loyalty.

Joint representation (1.7(b))

- An example is where the City Attorney's office is representing the City in litigation, and also representing an employee of the City in the same litigation.

COPRAC Formal Opinion 2001 - 156

- Under rule 3-310(C) of the California Rules of Professional Conduct, does a conflict of interest arise when constituent sub-entities or officials of a city (e.g., the city council and the mayor) seek legal advice on the same matter and the constituents' positions on the matter are antagonistic?

COPRAC Formal Opinion 2001-156: The State Bar's Answer

- Whether a conflict of interest arises under rule 3-310(C) of the California Rules of Professional Conduct ordinarily depends on a determination of the city attorney's client.
- An attorney who represents an entity generally has only one client, the entity itself.
- This also is generally true when an attorney represents a municipal corporate entity, which acts through its constituent sub-entities and officials.
- Consequently, since the constituent sub-entities and officials of a city are normally not separate clients of the city attorney, a city attorney's provision of legal advice on the same matter to constituent sub-entities and officials will not necessarily give rise to a conflict of interest even if the constituent sub-entities and officials take contrary positions on the matter.
- Constituent sub-entities may become separate clients only if they have lawful authority to act independently of the public entity and if they take a position contrary to the overall public entity's position on a matter within the ambit of the constituent sub-entities' independent authority.



COPRAC Formal Opinion
2001-156

Although Attorneys in the Public Sector Are Governed by the Same Conflict of Interest Rules as in the Private Sector, the Application of the Rules Must Take Into Account Factors Peculiar to the Government Context.

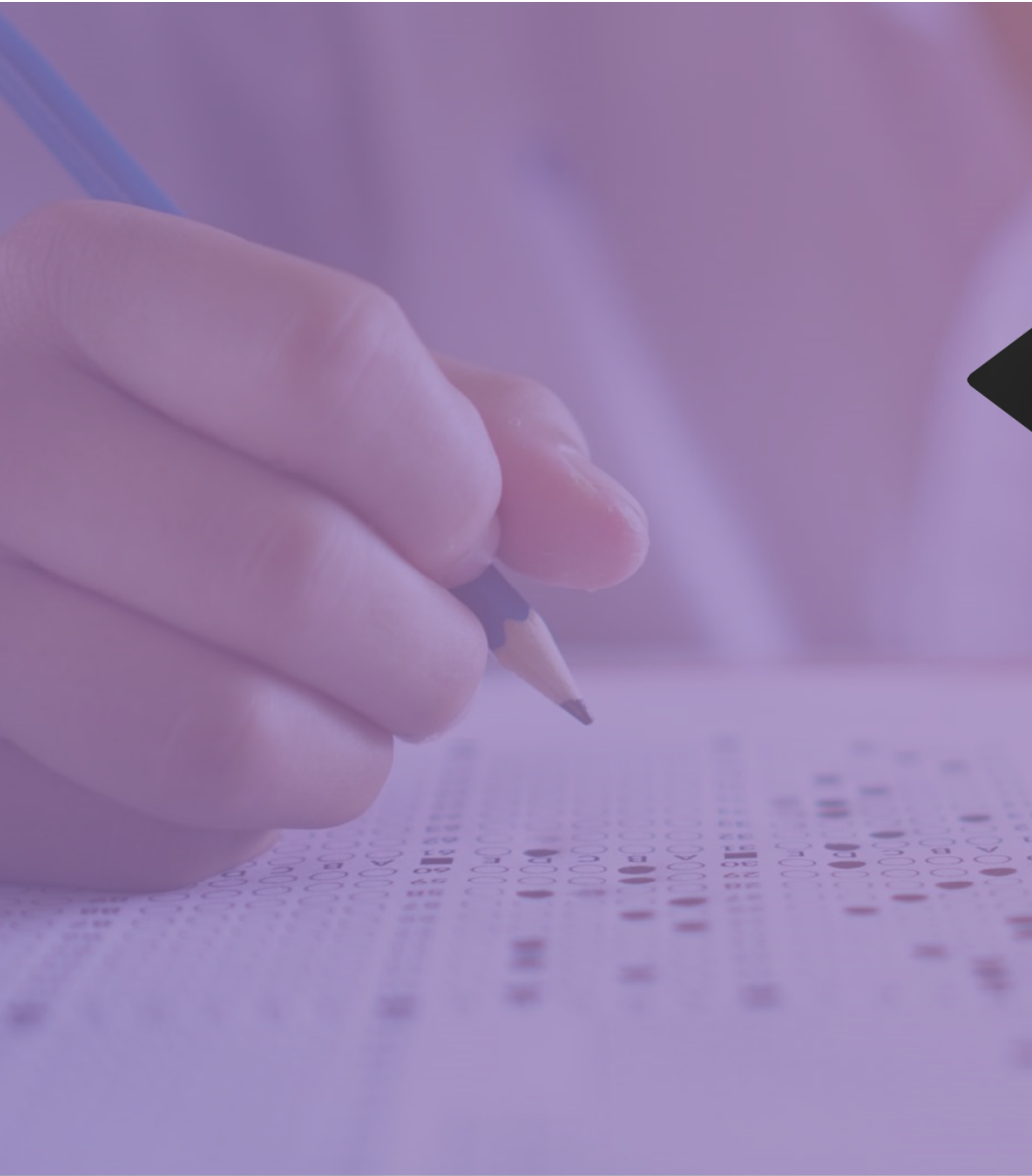
COPRAC Formal Opinion 2001 - 156

All members of the State Bar of California, including those who represent governmental entities, are governed by the Rules of Professional Conduct.³ (See *Santa Clara County Counsel Attys. Assoc. v. Woodside* (1994) 7 Cal.4th 525 [28 Cal.Rptr.2d 617]; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157 [172 Cal.Rptr. 478]; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 32-33 [138 Cal.Rptr. 532]; and L.A. County Bar Assn. Formal Opinion No. 459.)⁴

COPRAC Formal Opinion 2001-156

The courts have, however, articulated special considerations applicable to evaluating claims of conflict of interest in the public sector. For example, in *In re Lee G.* (1991) 1 Cal.App.4th 17, 34 [1 Cal.Rptr.2d 375], the Court of Appeal pointed out that the conflict of interest "rules developed in the private sector . . . do not squarely fit the realities of public attorneys' practice." (See also *People v. Christian* (1996) 41 Cal.App.4th 986, 999 [48 Cal.Rptr.2d 867] (hereinafter *People v. Christian*)).





COPRAC Formal Opinion 2001-156

Application of the rules, especially conflict of interest rules, in the governmental context is complicated by the difficulty of identifying the client of the government attorney. Although attorneys in the public sector are governed by the same conflict of interest rules as those in the private sector, the application of the rules must take into account factors peculiar to the governmental context (See *Ward v. Superior Court, supra*, 70 Cal.App.3d at p. 30.)

Lawyer relationships and responsibilities (1.7(b)(c))

- ❑ For informed written consent, the focus is on a **significant risk** of a **material limitation**:
 - ❑ Posed by the lawyer's responsibilities to or relationships to another client
 - ❑ Posed by the lawyer's responsibilities to or relationships with a former client or third person
 - ❑ Posed by the lawyer's own interests
- ❑ For disclosure:
 - ❑ Relationship with another party
 - ❑ Relationship with a witness
 - ❑ Familial or intimate relationships with the other party's lawyer



Lawyer error (1.7(b))

- ❑ Lawyers make mistakes.
- ❑ Does the mistake rise to the level of posing a significant risk of a material limitation in the lawyer's representation of the client, by virtue of the lawyer's own interests?
- ❑ If not, it is a mistake rise to the level of a significant development that needs to be disclosed? (RPC 1.4, B&P Code section 6068(m))

Business transactions with clients (1.8.1)

- Government Code section 1090 makes the scenario unlikely to arise in the context of municipal lawyers.
- The RPC requires that the terms be fair and reasonable, that they be put in writing, and that the client is advised to seek the advice of independent counsel—and then provides informed written consent.

Former clients (1.9), including prospective clients (1.18)

Lawyers cannot be adverse to a former client in the same or a substantially related matter without informed written consent.

A duty of confidentiality may be owed to prospective clients.

This scenario could therefore implicate the same duties that are owed to former clients under RPC 1.9.

This gives rise to the necessity to be cautious about soliciting or accepting confidential information.

Lawyer as witness (3.7)

Lawyers cannot be the trial attorney and a witness unless:

| | | |
|---|--|--|
| The testimony relates to an uncontested issue | The testimony relates to the nature and value of the legal services rendered in the case | The lawyer has obtained the informed written consent of the client |
|---|--|--|



For governmental entities, the consent must be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed

Lateral transitions (1.11)

Lawyers leaving government service to go to private practice

- May not generally not use or reveal information protected by the duty of confidentiality
- Shall not represent a client in connection with a matter in which the lawyer personally and substantially participated while with the governmental agency
- The private practice law firm is prohibited from representation if the public lawyer is prohibited from representation, unless there is ethical wall screening and written notice

Lawyers leaving private practice to go to government service

- Shall not participate in a matter in which the lawyer participated personally and substantially while in private practice without informed written consent of the governmental agency

New Rule of Professional Conduct 8.3 (8/1/2023)



California State Bar Resources

FAQs

Reporting Scenarios

MCLE Presentations

Ethics Hotline

<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Rule-83-Required-Reporting>

Rule 8.3(a) – Duty to Report

A lawyer **shall, without undue delay, inform the State Bar, or a tribunal*** with jurisdiction to investigate or act upon such misconduct,

when the lawyer **knows* of credible evidence** that another lawyer has committed

- a **criminal act** or
- conduct involving **dishonesty, fraud,* deceit, or reckless or intentional misrepresentation** or
- **misappropriation of funds or property**

that raises a substantial* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Rule 8.3(b) – Other Violations

Except as required by paragraph (a), a **lawyer may, but is not required to,** report to the State Bar a violation of these Rules or the State Bar Act.

Rule 8.3(c) – Criminal Act

For purposes of this rule, "criminal act" as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California.

Rule 8.3(d) - Exceptions

This rule does not require or authorize disclosure of information

- gained by a lawyer while participating in a substance use or mental health program, or
- protected by **Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2;**
- **mediation confidentiality;**
- the lawyer-client privilege;
- other applicable privileges; or
- by **other rules or laws**, including information that is confidential under Business and Professions Code section 6234.

Rule 8.3 – Comment 2 – Seeking Counsel is Protected

The duty to report under paragraph (a) is not intended to discourage lawyers from seeking counsel.

This rule does not apply to a lawyer who is consulted about or retained to represent a lawyer whose conduct is in question, or to a lawyer consulted in a professional capacity by another lawyer on whether the inquiring lawyer has a duty to report a third-party lawyer under this rule.

The duty to report under paragraph (a) **does not apply** if the report would involve disclosure of information that is gained by a lawyer while participating as a member of a **state or local bar association ethics hotline** or similar service.

Rule 8.3 – Comment 6 – State Bar or Other Tribunal

The rule permits reporting to either the State Bar or to "a tribunal* with jurisdiction to investigate or act upon such misconduct." A determination whether to report to a tribunal,* instead of the State Bar, will depend on whether the misconduct arises during pending litigation and whether the particular tribunal* has the power to "investigate or act upon" the alleged misconduct. Where the litigation is pending before a non-judicial tribunal,* such as a private arbitrator, reporting to the tribunal* may not be sufficient.

If the tribunal* is a proper reporting venue, evidence of lawyer misconduct adduced during those proceedings may be admissible evidence in subsequent disciplinary proceedings. (Caldwell v. State Bar (1975) 13 Cal.3d 488, 497.) Furthermore, a report to the proper tribunal* may also trigger obligations for the tribunal* to report the misconduct to the State Bar or to take other "appropriate corrective action." (See Bus. & Prof. Code, §§ 6049.1, 6086.7, 6068.8; and Cal. Code of Jud. Ethics, canon 3D(2).)

Rule 8.3 – Com. 3 - *Undue Delay, Communications and Conflicts*

The duty to report without **undue delay** under paragraph (a) requires the lawyer to report as soon as the lawyer reasonably believes* the **reporting will not cause material prejudice or damage to the interests of a client of the lawyer or a client of the lawyer's firm.***

The lawyer should also consider the applicability of other rules

- Rule 1.4 (the duty to communicate),
- Rule 1.7(b) (material limitation conflict),
- 5.1 (responsibilities of managerial and supervisory lawyers), and
- 5.2 (responsibilities of a subordinate lawyer).

Rule 8.3 – Comment 4 Substantial Question

This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule.

The **term "substantial* question" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.**

**Rule 8.3 –
Comment 1 –
Duty to Self
Report
Preserved**

This rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required by these rules or the State Bar Act. (See, e.g., rule 8.4.1(d) and (e); Bus. & Prof. Code, § 6068, subd. (o).)

Self Reporting: Main Categories

**SR-3. Reportable Actions, Reported by Self
Main Categories**

| Type | Description |
|---|---|
| Summary: All Reportable Actions, Reported by Self | Sum of all cases listed below. |
| Three or more malpractice lawsuits filed within 12 months (6068, subd.(o)(1)) | Self-reported multiple lawsuit cases. |
| Judgment in civil case for fraud, misrepresentation, gross negligence, etc. (6068, subd.(o)(2)) | Self-reported judgment cases. |
| Judicial sanctions imposed (6068, subd.(o)(3)) | Self-reported sanction order cases. |
| Felony indictment (6068, subd. (o)(4)) | Self-reported conviction matters with a felony charge. |
| Conviction of felony, or misdemeanor related to practice of law (6068, subd. (o)(5)) | Self-reported conviction matters with a convicted status. |
| Discipline by professional agency or licensing board (6068, subd. (o)(6)) | Self-reported discipline in other jurisdiction cases. |
| Reversal of judgment based on misconduct, gross incompetence, etc. (6068, subd. (o)(7)) | Self-reported reversals of judgment case. |
| Settlement or judgment for fraud, misrepresentation, gross negligence, etc. (6086.8, subd. (c)) | Self-reported insurance claims. |

Rule 8.3 – Com. 5

Exceptions for Treatment/ Diversion

Information about a lawyer's misconduct or fitness may be received by a lawyer while participating in a substance use or mental health program, including but not limited to the Attorney Diversion and Assistance Program. (See Bus. & Prof. Code, § 6234.) In these circumstances, **providing for an exception to the reporting requirement of paragraph (a) of this rule encourages lawyers to seek treatment through such programs**. Conversely, without such an exception, lawyers may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Rule 8.3 – *Comment 7*

A report under this rule to a tribunal* concerning another lawyer's criminal act or fraud* may constitute a "reasonable* remedial measure" within the meaning of rule 3.3.(b).

**Rule 8.3 –
Comment 8 –
Threatening
Violates Rule
3.10**

In addition to reporting as required by paragraph (a), a report may also be made to another appropriate agency.

A lawyer must not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of rule 3.10.

Rule 8.3 – Comment 9

A lawyer may also be disciplined for participating in an agreement that precludes the reporting of a violation of the rules. (See rule 5.6(b); and Bus. & Prof. Code, § 6090.5.)

California Code, Business and Professions Code - BPC § 6090.5

(a) It is cause for suspension, disbarment, or other discipline for any licensee, whether acting on their own behalf or on behalf of someone else, whether or not in the context of litigation to solicit, agree, or seek agreement, that:

(1) Misconduct or the terms of a settlement of a claim for misconduct shall not be reported to the State Bar.

(2) A complainant shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the State Bar.

(3) The record of any action or proceeding shall be sealed from review by the State Bar.

(b) This section applies to all agreements or attempts to seek agreements, irrespective of the commencement or settlement of a civil action.

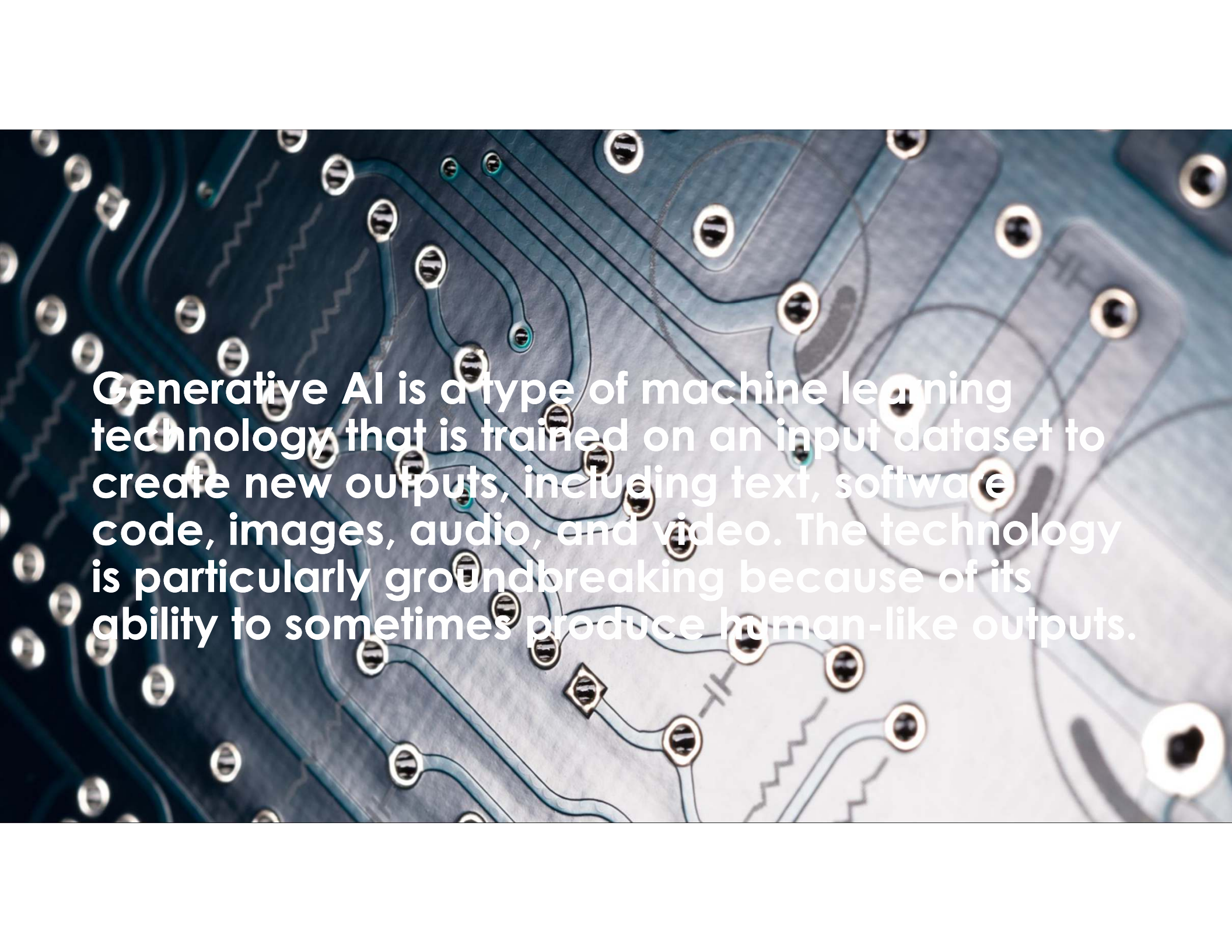
Rule 8.3 – Comment 10 – Penalties for False Complaints

Communications to the State Bar relating to lawyer misconduct are "privileged, and no lawsuit predicated thereon may be instituted against any person." (Bus. & Prof. Code, § 6094.)

However, lawyers may be subject to criminal penalties for false and malicious reports or complaints filed with the State Bar or be subject to discipline or other penalties by offering false statements or false evidence to a tribunal.* (See rule 3.3(a); Bus. & Prof. Code, §§ 6043.5, subd. (a), 6068, subd. (d).)



Ethics and Artificial Intelligence



Generative AI is a type of machine learning technology that is trained on an input dataset to create new outputs, including text, software code, images, audio, and video. The technology is particularly groundbreaking because of its ability to sometimes produce human-like outputs.

How will Language Modelers like ChatGPT Affect Occupations and Industries?

Ed Felten (Princeton)
 Manav Raj (University of Pennsylvania)
 Robert Seamans (New York University)¹

Table 2: Top 20 Industries Exposed to AI, Original and with Language Modeling Adjustment

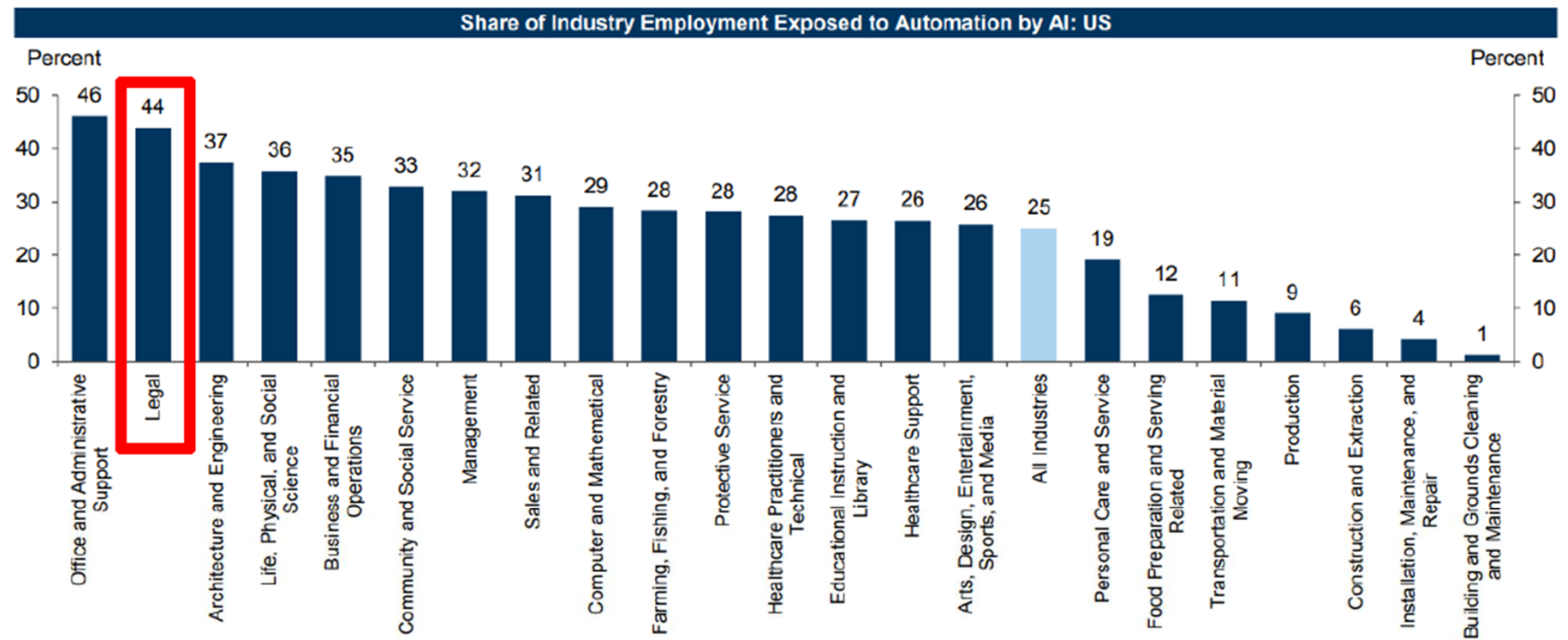
| Rank | Top 20 Industries from Original AIOE | Top 20 Industries after Language Modeling Adjustment |
|------|---|---|
| 1 | Securities, Commodity Contracts, and Other Financial Investments and Related Activities | Legal Services |
| 2 | Accounting, Tax Preparation, Bookkeeping, and Payroll Services | Securities, Commodity Contracts, and Other Financial Investments and Related Activities |
| 3 | Insurance and Employee Benefit Funds | Agencies, Brokerages, and Other Insurance Related Activities |
| 4 | Legal Services | Insurance and Employee Benefit Funds |
| 5 | Agencies, Brokerages, and Other Insurance Related Activities | Nondepository Credit Intermediation |
| 6 | Nondepository Credit Intermediation | Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures |
| 7 | Other Investment Pools and Funds | Insurance Carriers |
| 8 | Insurance Carriers | Other Investment Pools and Funds |
| 9 | Software Publishers | Accounting, Tax Preparation, Bookkeeping, and Payroll Services |
| 10 | Lessors of Nonfinancial Intangible Assets (except Copyrighted Works) | Business Support Services |
| 11 | Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures | Software Publishers |
| 12 | Credit Intermediation and Related Activities (5221 And 5223 only) | Lessors of Nonfinancial Intangible Assets (except Copyrighted Works) |
| 13 | Computer Systems Design and Related Services | Business Schools and Computer and Management Training |
| 14 | Management, Scientific, and Technical Consulting Services | Credit Intermediation and Related Activities (5221 And 5223 only) |
| 15 | Monetary Authorities-Central Bank | Grantmaking and Giving Services |
| 16 | Office Administrative Services | Travel Arrangement and Reservation Services |
| 17 | Other Information Services | Junior Colleges |
| 18 | Data Processing, Hosting, and Related Services | Computer Systems Design and Related Services |
| 19 | Business Schools and Computer and Management Training | Management, Scientific, and Technical Consulting Services |
| 20 | Grantmaking and Giving Services | Other Information Services |

Notes: This table lists the top 20 industries most exposed to AI from the original AIOE (Felten et al., 2021) and the top 20 industries most exposed to advances in AI language modeling.



Global Economics Analyst
The Potentially Large Effects of Artificial Intelligence on Economic Growth (Briggs/Kodnani)

Exhibit 5: One-Fourth of Current Work Tasks Could Be Automated by AI in the US and Europe



LexisNexis International Legal Generative AI Report Findings:

Most Potential for Generative AI in Legal

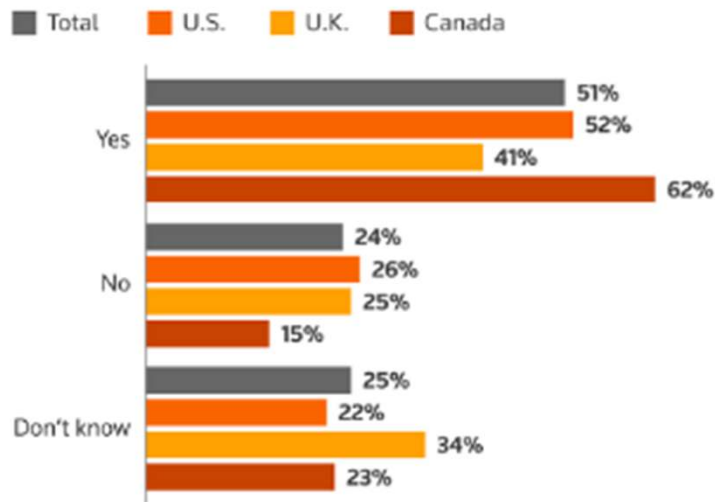
| | TOTAL | US | CANADA | FRANCE | UK |
|----------------------------------|-------|-----|--------|--------|-----|
| Researching matters | 65% | 59% | 61% | 77% | 66% |
| Drafting documents | 56% | 53% | 57% | 55% | 59% |
| Document analysis | 44% | 40% | 40% | 52% | 47% |
| Writing emails | 35% | 30% | 45% | 34% | 32% |
| Conducting due diligence | 27% | 27% | 26% | 18% | 32% |
| Understanding new legal concepts | 23% | 19% | 34% | 24% | 20% |
| Developing litigation strategies | 12% | 11% | 12% | 18% | 9% |
| Other | 4% | 5% | 3% | 5% | 4% |
| None / See no potential | 5% | 0% | 10% | 5% | 7% |

<https://www.lexisnexis.com/pdf/lexisplus/international-legal-generative-ai-report.pdf>

Figure 2: Attitudes towards ChatGPT and Generative AI for legal work

Should ChatGPT/generative AI be applied to legal work?

By country



By job title



By country: U.S. n=257, U.K. n=88, Canada n=60.
 By job title: Partner/managing partner n=139, Lawyer n=104, Associate n=123.

Source: Thomson Reuters 2023



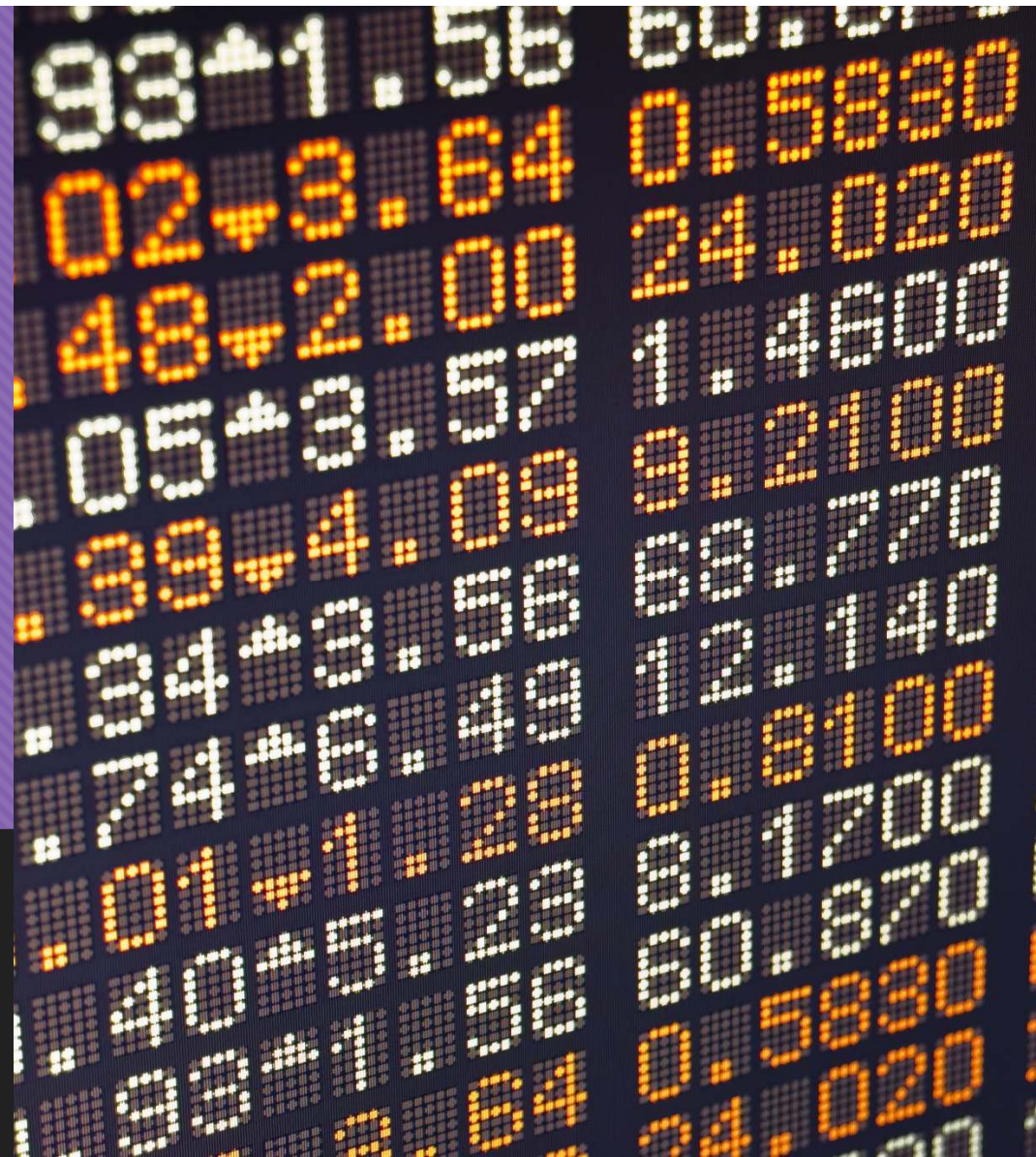
Tools of the “Future” – Generative AI Made with the Legal Profession “In Mind”

- ▶ Harvey AI (Open.AI GPT): is built on a version of Open.AI's GPT AI, but is tailored for legal work. It combines general internet data from the GPT model with legal-specific data, including case law and reference materials.
- ▶ CoCounsel (Casetext Inc. acquired by Thomson Reuters/Westlaw in August 2023): Built on Open.AI's GPT-4, “combines the power of next-generation AI with the security and data privacy law firms require,”
 - ▶ Note: Claims that “Client data is never used to train the models, and law firms retain complete control over their data. CoCounsel is the most secure AI in legal technology.”
- ▶ Lexis+ AI: AI that searches, summarizes, and drafts for you using the most trusted, authoritative content from LexisNexis®
- ▶ Westlaw Edge: Similar to Lexis – AI enhanced capabilities to help attorneys search more effectively.



The Ethics of Using AI to Practice Law

California State Bar Guidance



State Bar Web Resources

<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Technology-Resources>

 The State Bar of California

Ethics & Technology Resources

[f](#) [X](#) [in](#) [✉](#)

NEW! On November 16, 2023, the State Bar Board of Trustees approved the [Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law](#), developed by the Committee on Professional Responsibility and Conduct to assist lawyers in navigating their ethical obligations when using generative artificial intelligence. The Practical Guidance will be a living document that is periodically updated as the technology evolves and matures, and as new issues are presented.

This page lists resources addressing attorney professional responsibility issues that arise in connection with the use of websites, email, chat rooms, and other technologies. The resources include advisory ethics opinions, articles, and MCLE programs.

- [Ethics Opinions](#)
- [Articles](#)
- [Online MCLE Programs](#)

Competence is the Key!

Rule 1.1 Competence
(Rule Approved by the Supreme Court, Effective March 22, 2021)

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

Comment

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

ABA Model Rule 1.1 and its comment [8]

○ ABA Model Rule 1.1 Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

○ Comment 8: Maintaining Competence

- [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
- Most states have adopted some version of comment [8] except for Alabama, Georgia, Maine, Maryland, Mississippi, Nevada, New Jersey, Oregon, Rhode Island, and South Dakota

○ ABA Resolution 19A112, August 2019

- [U]rges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law, including (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.

STATE BAR PUBLICATION: GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Duties of Competence and Diligence

[Rule 1.1](#)

[Rule 1.3](#)

Duty of Confidentiality

[Bus. & Prof. Code, § 6068, subd. \(e\)](#)

[Rule 1.6](#)

[Rule 1.8.2](#)

Duty to Comply with the Law

[Bus. & Prof. Code, § 6068\(a\)](#)

[Rule 8.4](#)

[Rule 1.2.1](#)

Professional
Responsibilities Owed to
Other Jurisdictions
[Rule 8.5](#)

**Prohibition on
Discrimination,
Harassment, and
Retaliation**

[Rule 8.4.1](#)

**Communication
Regarding Generative AI
Use**

[Rule 1.4](#)

[Rule 1.2](#)

**Candor to the Tribunal;
and Meritorious Claims
and Contentions**

[Rule 3.1](#)

[Rule 3.3](#)

**Duty to Supervise
Lawyers and Nonlawyers,
Responsibilities of
Subordinate Lawyers**

[Rule 5.1](#)

[Rule 5.2](#)

[Rule 5.3](#)

Rules of Professional Conduct Implicated

Model Rule 1.1 – Competence

Model Rule 1.3 – Diligence

Model Rule 1.4 – Communications

Model Rule 1.5 – Fees

Model Rule 1.6 – Confidentiality of Information

Model Rule 3.3 – Candor Toward the Tribunal

Model Rule 3.4 – Fairness to Opposing Party & Counsel

Model Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

Model Rule 5.2 – Responsibilities of a Subordinate Lawyer

Model Rule 5.3 – Responsibilities Regarding Nonlawyer Assistance

Model Rule 8.4 – Professional Misconduct

Rapidly Developing Regulatory Frameworks in Other States

Florida lawyers have new guidelines for using generative AI after the Board of Governors voted unanimously January 19 to approve **Ethics Advisory Opinion 24-1**.

Florida Bar Ethics Opinion 24-1 January 19, 2024: The Overview

Lawyers may use generative artificial intelligence (“AI”) in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program’s policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer’s ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

Florida Bar Ethics Opinion 24-1: Fees

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

Florida Bar Ethics Opinion 24-1: Advertising and Intake

As noted above, a lawyer should be careful when using generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion or deception, a lawyer must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

Cautionary Tales



Using AI to Draft or Oppose a Motion to Dismiss?

Re: [Case Name and Number]

[Defendant's Name]'s Motion to Dismiss Plaintiff's Complaint for Legal Malpractice

Dear Judge [Judge's Last Name]:

I, [Your Name], on behalf of the Defendant, hereby submit this Motion to Dismiss pursuant to [relevant rule of procedure] because the Plaintiff has failed to establish the necessary element of causation for the legal malpractice claim alleged against the Defendant. The following arguments and supporting reasons are presented:



Here's What Happens When Your Lawyer Uses ChatGPT

A lawyer representing a man who sued an airline relied on artificial intelligence to help prepare a court filing. It did not go well.



As an Avianca flight approached Kennedy International Airport in New York, a serving cart collision began a legal saga, prompting the question: Is artificial intelligence so smart? Nicolas Economou/NurPhoto, via Getty Images

Mata v. Avianca, Inc., No. 22-cv-1461 (PKC) (S.D.N.Y.)

Lawyers representing client in personal injury case to sue an Avianca Airlines employee for harming client's knee on a flight bound for New York

Lawyers used ChatGPT in opposition to a motion to dismiss – cited non-existent cases

\$5,000 monetary sanction imposed jointly and severally and lawyers and their firm and ordered to send 34-page sanctions opinion to client and "judges" who wrote the "fake" opinions

Judge Castel found that the lawyers acted in bad faith and made false and misleading statements to the Court and threatened of discipline from N.Y. State Bar

Mata v. Avianca, Inc., No. 22-cv-1461 (PKC) (S.D.N.Y.)

Judge Castel identified the following harms from using improper use of AI:

Time and money wasted by opposing party in exposing deception

Diverting Court's time from other matters

Clients are deprived of arguments based on authentic judicial precedents

Harm to reputation of judges and courts whose names are falsely invoked as authors of "bogus" opinions

May lead to citizens defying judicial rulings by disingenuously claiming doubt about their authenticity

May promote cynicism about the legal profession and American judicial system



Recent Los Angeles Superior Court Case

○ This Prolific LA Eviction Law Firm Was Caught Faking Cases In Court. Did They Misuse AI? | Laist



When landlords in Southern California want to evict their tenants, they often hire Dennis Block. His law firm, Dennis P. Block and Associates, [describes itself](#) as the state's "leading eviction law firm."

But in one recent eviction case, Block didn't just lose. His firm was also sanctioned for submitting a court filing a judge said was "rife with inaccurate and false statements."

Eviction Case and Likely Use of AI

But when L.A. Superior Court Judge Ian Fusselman took a closer look, he spotted a major problem. Two of the cases cited in the brief were not real. Others had nothing to do with eviction law, the judge said.

At first glance, the filing from April looks credible. It's properly formatted. Block's signature at the bottom lends a stamp of authority. Case citations are provided to bolster Block's argument for why the tenant should be evicted.

The court never got to the bottom of exactly how the filing was prepared. But six legal experts told LAist they could think of a likely explanation: misuse of a generative AI program.

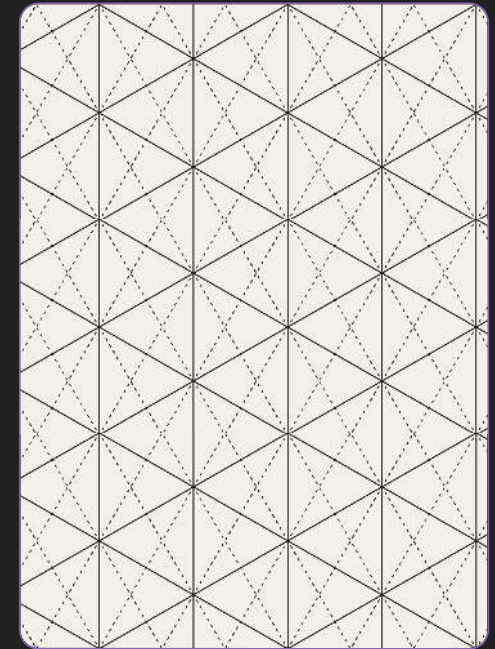
"LLMs can generate fake information that basically is what you want to believe," Hoofnagle said. "LLMs say these things in such an unqualified and confident way that they're convincing."

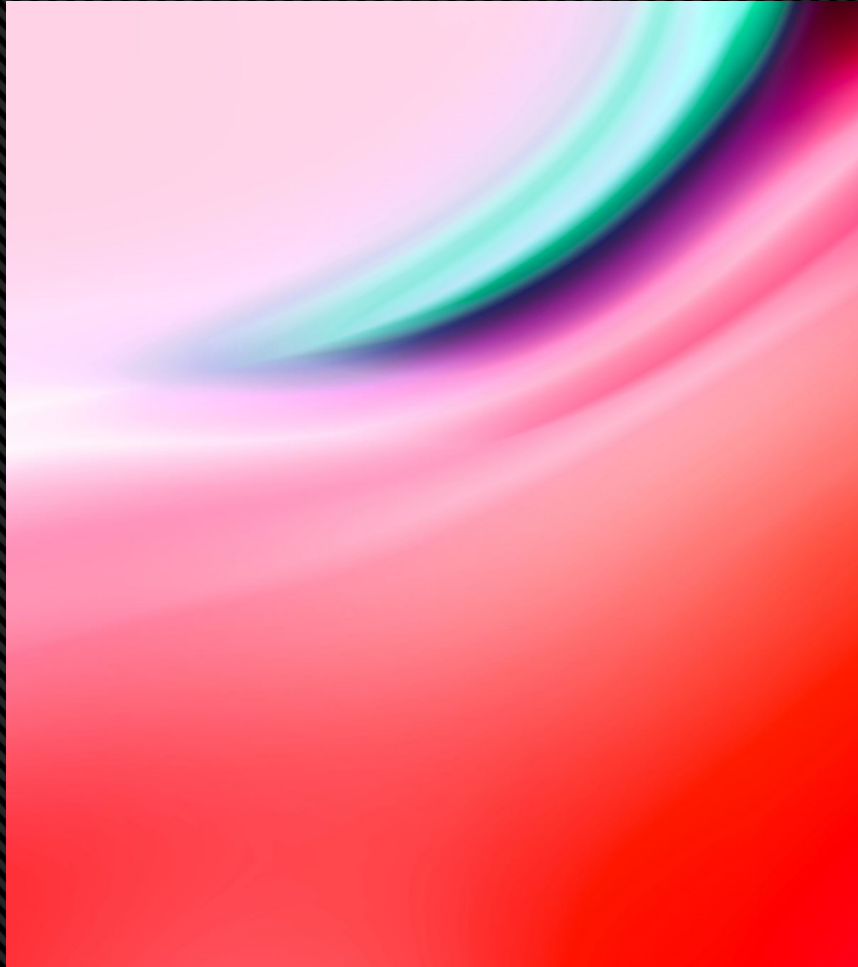
The Courts: AI Disclosure Bans and Disclosure Requirements

- Northern District of Illinois,

- Magistrate Judge Gabriel Fuentes

- Any party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that This mission is too important for me to allow you to jeopardize it." 2001: A SPACE ODYSSEY (Metro Goldwyn-Mayer 1968).





▶ **Northern District of Texas,
Judge Brantley Starr**

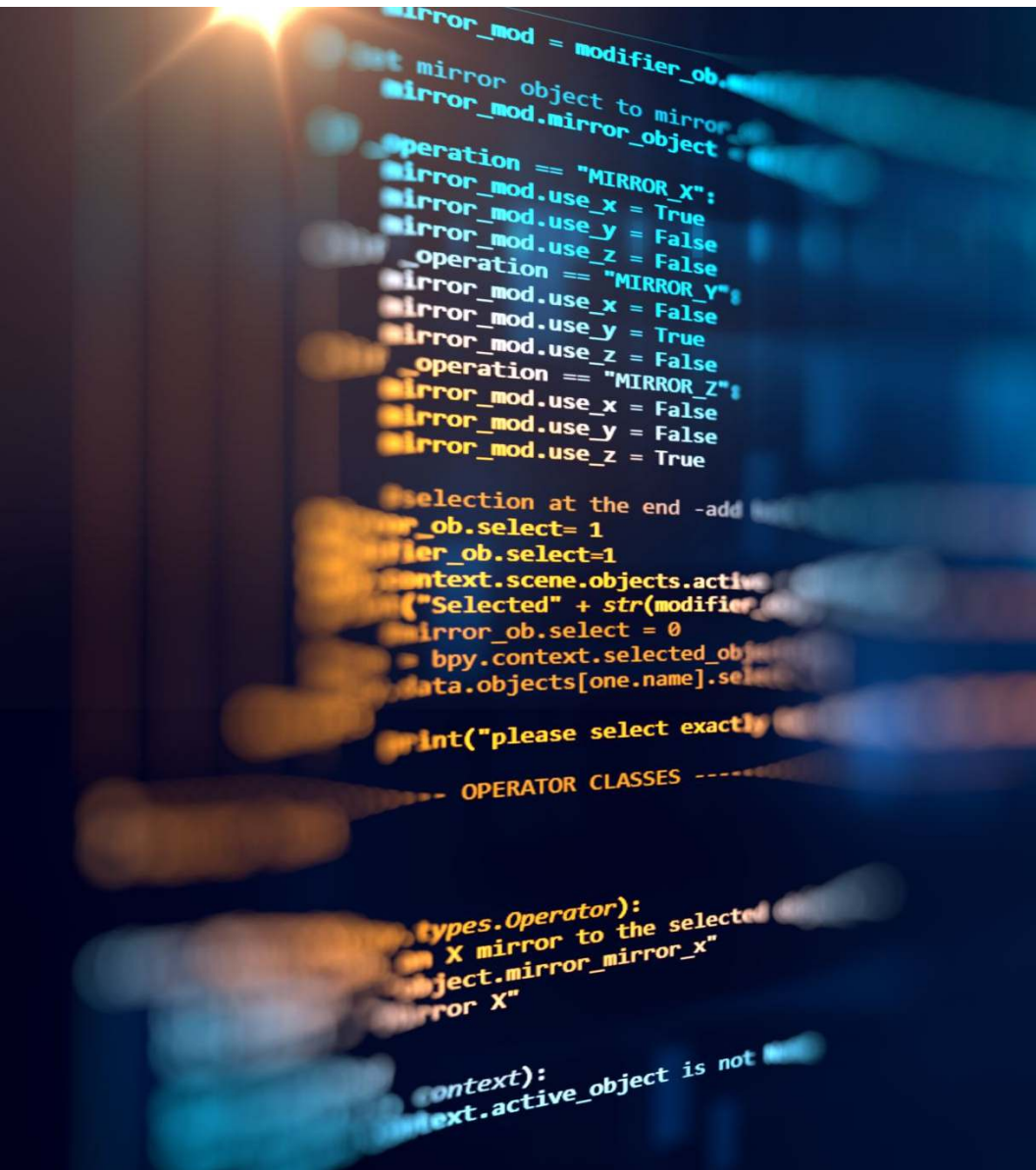
▶ All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them.



► Eastern District of Pennsylvania,

Judge Michael M. Baylson

► If any attorney for a party, or a pro se party, has used Artificial Intelligence (“AI”) in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, MUST, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and CERTIFY, that each and every citation to the law or the record in the paper, has been verified as accurate.



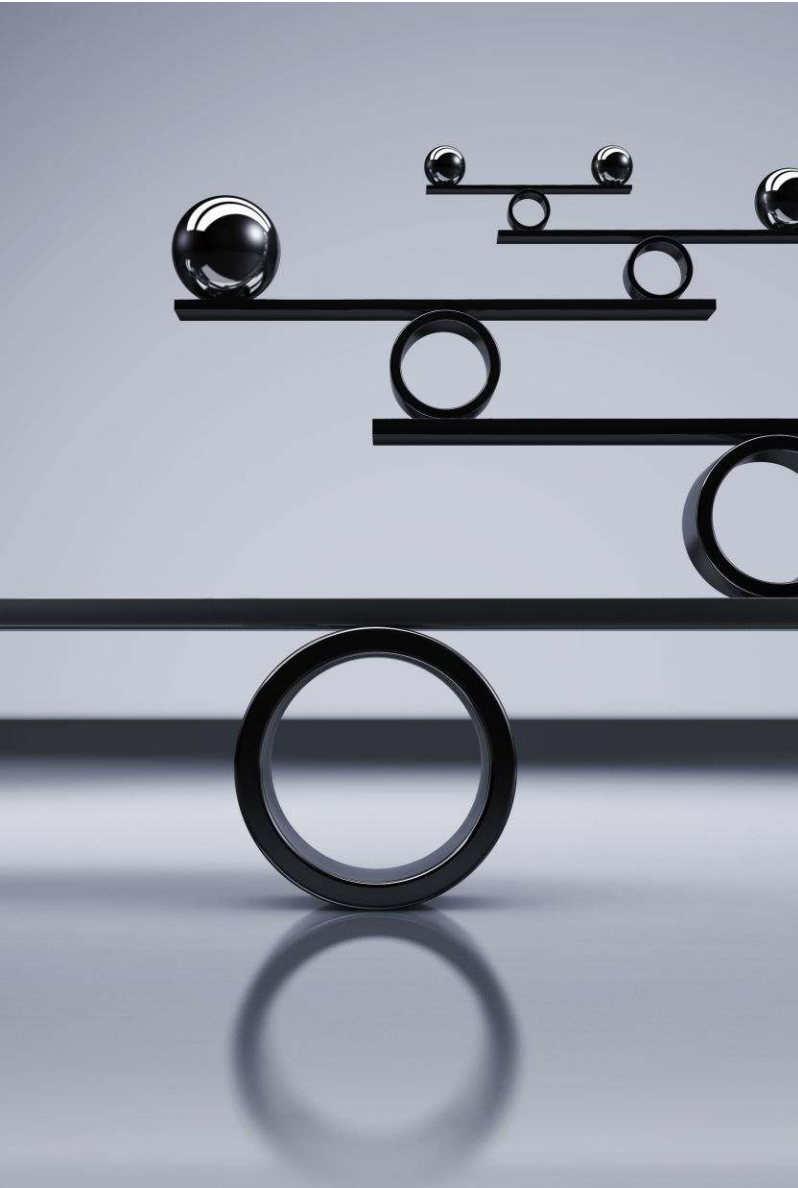
▶ U.S. Court of International Trade, Judge Stephen Vaden

- ▶ Any submission that “contains text drafted with the assistance of a generative artificial intelligence program on the basis of national language prompts” must be accompanied by:
 - ▶ A disclosure notice identifying the program used and the specific portions of text that have been so drafted
 - ▶ A certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party



District of Montana,
Judge Donald W.
Molloy

In granting a California lawyer's pro hac vice application, Judge Molloy ordered that "[u]se of artificial intelligence automated drafting programs, such as Chat GPT, is prohibited."




ABA Task Force on Law and Artificial Intelligence

https://www.americanbar.org/groups/leadership/office_of_the_president/artificial-intelligence/?login

Task Force Mission

The AI Task Force mission is to (1) address the impact of AI on the legal profession and the practice of law, (2) provide insights on developing and using AI in a trustworthy and responsible manner, and (3) identify ways to address AI risks.



State Bar Discipline System Overview

Discipline



The State Bar of California's highest priority is protection of the public. The State Bar licenses, regulates, and disciplines the 260,000 attorneys in California.

Discipline Statistics

Public protection is the State Bar's highest priority. In fiscal year 2023*, the State Bar:

- Opened over 17,000 cases against California attorneys and nonattorneys holding themselves out fraudulently as licensees.
- Filed notices of disciplinary charges in State Bar Court against 154 attorneys.
- Recommended disbarment for 76 attorneys and suspension for another 122.
- Opened more than 800 cases of unauthorized practice of law (UPL).
- Referred 300 UPL cases to law enforcement.

Reimbursed nearly \$3.7 million to no fewer than 325 victims of attorney misconduct.

Table 4. Case Types Reported in 2023 ADR SR Tables

| Case Type | FY 2019 | FY 2020 | FY 2021 | FY 2022 | FY 2023 | Covered by ADR Tables |
|-------------------------------|---------------|---------------|---------------|---------------|---------------|------------------------------|
| Complaints | 13,894 | 13,781 | 12,501 | 12,731 | 13,636 | SR-1, SR-2, SR-5 |
| State Bar Initiated Inquiries | 302 | 240 | 344 | 310 | 266 | SR-1, SR-2, SR-5 |
| Probation Referrals | 123 | 94 | 58 | 79 | 49 | SR-1, SR-2, SR-5 |
| Reportable Action, Self | 157 | 169 | 161 | 183 | 152 | SR-1, SR-2, SR-3, SR-4, SR-5 |
| Reportable Actions, Other | 2,285 | 2,016 | 1,267 | 1,686 | 1,760 | SR-1, SR-2, SR-3, SR-4, SR-5 |
| Criminal Conviction Matters | 296 | 3442 | 1,765 | 292 | 281 | SR-1, SR-3, SR-4, SR-10 |
| Unauthorized Practice Of Law | 907 | 806 | 711 | 688 | 873 | SR-1, SR-8, SR-9 |
| Other ⁵ | 288 | 431 | 383 | 386 | 343 | SR-1, SR-7 |
| Total Cases | 18,252 | 20,979 | 17,190 | 16,355 | 17,360 | |



Annual Discipline Report

<https://www.calbar.ca.gov/Portals/0/documents/reports/2023-Annual-Discipline-Report.pdf>

Thank you
for your time

Questions?

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