

## **Board of Trustees Directive to COPRAC:**

I'm tasking the Committee on Professional Responsibility and Conduct, which is charged with studying and providing consultation and assistance to the Board on matters involving professional responsibility, with exploring the use of and recommendations for regulation of AI in the legal profession. By the Board's November 2023 Board meeting, COPRAC should issue its recommendations, which may include practical guidance, an advisory opinion or other resources, changes to the Rules of Professional Conduct or other rules or statutes, or other recommendations to ensure that AI is used competently and in compliance with the professional responsibility obligations of lawyers.

## **MEMO TO THE BOARD OF TRUSTEES:**

On May 18, 2023, the Chair of the Board of Trustees directed the Committee on Professional Responsibility and Conduct (COPRAC), which is charged with studying and providing consultation and assistance to the Board on matters involving professional responsibility, to explore regulation of the ethical use of generative AI in the legal profession. The Chair directed that, by the Board's November 2023 meeting, COPRAC issue recommendations, which could include practical guidance, an advisory opinion or other resources, changes to the Rules of Professional Conduct or other rules or statutes, or other recommendations to ensure that AI is used competently and in compliance with the professional responsibility obligations of lawyers.

COPRAC undertook a review of the current state of generative AI and its implications for the legal profession to develop recommendations regarding lawyer use of this evolving technology. This work included:

- Surveying lawyers regarding current and planned uses of generative AI in their practices;
- Researching generative AI capabilities, limitations, and risks, including consultations with experts in artificial intelligence and founders of generative AI products;
- Reviewing the current Rules of Professional Conduct, statutory authority, case law, and ethics opinions to evaluate whether these existing authorities address the use of generative AI and to identify potential new ethical issues raised by generative AI; and
- Examining approaches taken by other jurisdictions to regulate the use of generative AI, specifically any regulations directed toward lawyers.

This work was accomplished through a COPRAC working group on AI that utilized consultants on an ad hoc basis, as well as discussion and consideration at four COPRAC meetings on June 23, July 28, September 15, October 20, 2023. Based on this work, COPRAC prepared *Guidelines for Use of Generative Artificial Intelligence in the Practice of Law* (Guidelines). This document is based on the principles and guidelines prepared by [MIT's Task Force on Responsible Use of Generative AI for Law](#), and addresses some of the initial concerns surrounding lawyer use of generative AI, as well as use of other applications of AI.

The current Rules of Professional Conduct do not expressly address the use of generative AI, creating uncertainty about lawyers' ethical duties when relying on generative AI.<sup>1</sup> However, the rules are intended to apply to all lawyers in California, including lawyers engaged in a variety of practice areas and situations. At this time, COPRAC believes the existing rules can be applied to generative AI use. The Guidelines set forth the applicable Rules of Professional Conduct and statutory authority that would regulate the improper use of generative AI, and provide illustrative examples of how an attorney might violate, and how to behave consistently with these ethics authorities.

COPRAC recognizes that as the technology further develops, additional regulation may be needed. Until the universe of generative AI uses and products stabilizes, these Guidelines will remind lawyers of their existing professional responsibility obligations and provide guidance in applying these obligations to new technology.

Historically, COPRAC has developed advisory ethics opinions that are issued for public input through the public comment process and ultimately approved by the Board of Trustees. Because of the quickly evolving landscape of generative AI, COPRAC recommends that Guidelines for responsible use of generative AI are more appropriate, and that the Guidelines should be a living document that is updated by COPRAC on a periodic basis. To that end, COPRAC recommends that the Board direct COPRAC to continue to explore the development of generative AI as it relates to the ethical practice of law and, if necessary, return further recommendations to the Board at a future meeting.

In addition to preparing these Guidelines for immediate publication and distribution and continuing COPRAC's examination of generative AI use by California lawyers, COPRAC also recommends that the Board take other action regarding generative AI:

### **Develop New Attorney Education**

COPRAC recommends that the Board direct the Office of Professional Competence (OPC) to develop a one-hour minimum continuing legal education (MCLE) course that would satisfy the new, one-hour requirement for continuing legal education on technology in the practice of law and that addresses the competent use of generative AI (State Bar rule 2.72(C)(2)(a)(iv)). COPRAC further recommends that the Board direct OPC to update the New Attorney Training include technological competence training for lawyers using generative AI. COPRAC believes that education in this area will allow lawyers to utilize generative AI for the benefit of their

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<sup>1</sup> Comment [1] to Rule 1.1 (Competence) is the only explicit reference to technology. The comment, adopted March 22, 2021, states, "[t]he 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."

clients and to expand access to legal services while upholding professional ethics without harm to the public while the technology continues to develop.

### **Explore Changes to Address the Unauthorized Practice of Law**

Generative AI products are being developed for a multitude of uses and for a variety of professions. They are also being developed to provide legal assistance to unrepresented persons. While generative AI may be of great benefit in minimizing the justice gap, it could also create harm if self-represented individuals are relying on generative AI outputs that provide false information. COPRAC recommends that the Board take action to:

- Consider whether what is, or is not, the unauthorized practice of law should be more clearly defined or articulated, through statutory or rule changes;
- Eliminate the Board prohibition against COPRAC's ability to address and advise on unauthorized practice of law issues;<sup>2</sup> and
- Consider whether generative AI should be a component of the State Bar's 2024 legislative priorities, including seeking possible amendments to Business and Professions Code section 6034.1 and possible regulations that would create a licensing or permitting requirement for individuals and organizations that offer foundation models to practicing attorneys or pro se litigants to perform legal tasks and/or processes in California.

### **Consider the Impact of Generative AI on Law Students and Bar Applicants**

Additionally, the Board may wish to consider whether it should take action to address generative AI use by law students by:

- Directing the Committee of Bar Examiners to explore requirements for California-accredited law schools to require courses regarding the competent use of generative AI; and
- Directing the Committee of Bar Examiners to explore regulations or rules related to the bar exam and generative AI.

COPRAC recognizes that these Guidelines and recommendations are a first step in the regulation of generative AI use by California licensees. Through these initial recommendations, COPRAC believes that the State Bar will allow for licensees and consumers to gain the benefits of this transformative technology, while alerting licensees to its dangers and promoting responsible use of generative AI in a manner that will prevent public harm.

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<sup>2</sup> If COPRAC agrees with this recommendation, a more detailed attachment would be included that provides the basis for the current restriction and a recommendation to eliminate the restriction that explains how COPRAC opinions that advise on UPL would be subject to further review through the Office of General Counsel and, if required, be approved by the California Supreme Court to avoid concerns of anticompetitive activity.

# GUIDELINES FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE (AI or GAI) IN THE PRACTICE OF LAW

## EXECUTIVE SUMMARY

Generative AI (GAI) is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, from solo practitioners to large firms.

Attorneys are obligated to adhere their to professional responsibility obligations when using GAI regardless of the tool and technological application. Currently, the technology exists as nothing more than a tool to be used in the practice of law and must be understood and treated as such. The Rules of Professional Conduct and the State Bar Act serve as guardrails to ensure ethical and professional conduct in the practice of law.

GAI tools are curated and available on a continuum *from* the free, readily available forms, to customized forms, and to the most proprietary, closed, enterprise forms. The more customized and proprietary the greater likelihood of increased reliability, competence, accuracy, and credibility of the output.

The use of GAI technology also may pose increased risks, exposure, and violations applicable laws surrounding the use of private data, such as Personally Identifiable Information (PII), concerning Intellectual Property (IP), and related to cybersecurity. These use considerations must be understood and evaluated.

When evaluating the appropriateness of GAI tools, developing an assessment matrix may be a helpful exercise to assist in selecting the tool that is most suitable and effective for your use; **some factors to consider:** use case, firm size, application, deployment method, client sophistication, PII, cybersecurity, IP, and factors specific to individual legal practice.

GAI is positioned as a tool that functions as a credible assistant that can more cost effectively and efficiently perform routine and transactional tasks in the domains of data entry, research, data analysis, insights, and recommendations. The premise is by shifting these tasks to a technology assistant, higher order legal work will be done by humans resulting in increased quality of legal services.

GAI has the potential to transform the practice of law because of the speed and form of information consolidation and presentation which in this early stage of AI development is prone to errors of omission and commission.

GAI's goal is to provide a response, and it does just that. However, what it does not have is the ability to apply experience, judgement, logic, or wisdom to the information it generates. Thus, it is prone to provide information that is referred to as hallucinations. The information can be neither factual, accurate, or reliable. **Thus, when using GAI, the onus is on attorneys to review**

**and confirm all the inputs and outputs for accuracy as is customary and required when technology is not used.**

The selection of the GAI tool or, application, and regulation of GAI, that will determine the longer-term impact on the profession and society. GAI has the potential to offer positive transformation in the study and practice of law and enable State Bar of California to fulfill its Mission, *“to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system.”*

## **GUIDELINES**

These guidelines are based on existing professional responsibility obligations for lawyers, including the California Rules of Professional Conduct (Rules) and the State Bar Act, set forth in the Business & Professions Code and provide examples of how to behave consistently with such obligations. These guidelines are intended to address issues and concerns with the use of generative AI. They may apply to other technologies, including more established applications of AI.

<b>Applicable Authorities</b>	<b>How to Satisfy Ethical Obligations</b>
<b>Duty of Confidentiality</b> <a href="#">Bus. &amp; Prof. Code, § 6068, subd. (e)</a> <a href="#">Rule 1.6</a> <a href="#">Rule 1.8.2</a>	<b>Minimum Requirements:</b>  Generative AI products may utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and may also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security.  A lawyer should review the Terms of Use or other information to determine how the product utilizes the inputs. A lawyer that intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.  A lawyer must not input any confidential information of the client into the generative AI solution that lacks adequate confidentiality and security protections. A lawyer should anonymize client information and avoid entering details that can be used to identify the client.

Applicable Authorities	How to Satisfy Ethical Obligations
	<p><b>Best Practices:</b></p> <p>A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.</p>
<p><b>Duties of Competence and Diligence</b></p> <p><a href="#">Rule 1.1</a></p> <p><a href="#">Rule 1.3</a></p>	<p><b>Minimum Requirements:</b></p> <p>Generative AI outputs may include information that is false or inaccurate.</p> <p>A lawyer must ensure competence use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.</p> <p>Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.</p> <p>A lawyer must critically review, validate, and correct both the input and 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, including as part of advocacy for the client. The duty of competence requires more than detection and elimination of false AI-generated results. Competence requires the continuous application of legal reasoning and analysis regarding all the potential options and impacts presented, including those that are included or omitted from or by AI tools. Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer.</p> <p><b>Best Practices:</b></p> <p>Use AI-generated legal arguments can be used as a starting point, but should be reviewed, analyzed, supplemented, and improved.</p> <p>A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-</p>

Applicable Authorities	How to Satisfy Ethical Obligations
	<p>generated argument with critical, human-performed analysis and review of authorities.</p> <p>A lawyer may integrate generative AI with other relevant apps and tools in their workflow; learn to compose prompts to generate high-quality outputs that augment and improve upon existing human expertise; and anticipate challenges to their legal arguments.</p>
<p><b>Duty to Comply with the Law</b></p> <p><a href="#">Bus. &amp; Prof. Code, § 6068(a)</a></p> <p><a href="#">Rule 8.4</a></p> <p><a href="#">Rule 1.2.1</a></p>	<p><b>Minimum Requirements:</b></p> <p>A lawyer must comply with the law and cannot advise or assist a client in the violation of the law when using generative AI tools.</p> <p>There are many relevant and applicable legal issues surrounding generative AI use, including but not limited to compliance with privacy laws, intellectual property laws, and cybersecurity concerns. A lawyer must analyze the relevant laws and regulations to ensure compliance.</p>
<p><b>Duty to Supervise Lawyers and Non-Lawyers (including non-human non-lawyers)</b></p> <p><a href="#">Rule 5.1</a></p> <p><a href="#">Rule 5.3</a></p>	<p><b>Minimum Requirements:</b></p> <p>Managerial and supervisory lawyers have a duty to supervise subordinate attorneys and nonlawyer assistants. The use of generative AI should be treated as the use of a nonlawyer assistant, and should be reviewed for accuracy and for conformance with the professional obligations of the lawyer.</p> <p><b>Best Practices:</b></p> <p>Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of AI, and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm's lawyers comply with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use.</p>
<p><b>Communication Regarding Generative AI Use</b></p> <p><a href="#">Rule 1.4</a></p> <p><a href="#">Rule 1.2</a></p>	<p><b>Minimum Requirements:</b></p> <p>A lawyer should disclose to their client that they intend to use generative AI to carry out the representation, and the benefits and risks of such use.</p> <p><b>Best Practices:</b></p>

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	<p>The terms of the client engagement may describe the use of technology and specifically address the responsible use of generative AI. If needed, an amended engagement letter agreed upon with the client may address such use.</p>
<p><b>Charging for Work Produced by Generative AI</b></p> <p><a href="#">Rule 1.5</a></p> <p>Bus. &amp; Prof. Code, §§ <a href="#">6147</a>–<a href="#">6148</a></p>	<p><b>Minimum Requirements:</b></p> <p>Rule 1.5 of the Rules of Professional Conduct prohibits lawyers from charging unconscionable fees. Charging for work produced by generative AI may violate this rule.</p> <p>A lawyer should not charge fees for time or work that is not performed by a lawyer. A lawyer should not use AI to generate work product more efficiently, but charge as if they are doing the work themselves. However, a lawyer may charge for the time spent crafting and refining AI inputs and prompts, and reviewing and editing generative AI outputs.</p> <p>A fee agreement must explain the basis for fees and expenses.</p> <p><b>Best Practices:</b></p> <p>A lawyer may provide clients with detailed billing that indicates AI-augmented work and associated costs for enhanced transparency.</p>
<p><b>Candor to the Tribunal; and Meritorious Claims and Contentions</b></p> <p><a href="#">Rule 3.1</a></p> <p><a href="#">Rule 3.3</a></p>	<p><b>Minimum Requirements:</b></p> <p>A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy, and correct any errors or misleading arguments before submission to the court.</p> <p>A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.</p>
<p><b>Prohibition on Discrimination, Harassment, and Retaliation</b></p> <p><a href="#">Rule 8.4.1</a></p>	<p><b>Minimum Requirements:</b></p> <p>A lawyer is prohibited from engaging in unlawful harassment, discrimination and retaliation in relation to a law firm’s operations and in representing a client, or in terminating or refusing to accept the representation of a client.</p> <p>Generative AI may be trained on biased information, and a lawyer should be aware of such possible biases when utilizing generative AI to screen potential clients or employees, or when engaged in other activities that may violate rule 8.4.1.</p>



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	<p>The lawyer is responsible for ensuring compliance with rule 8.4.1, regardless of whether generative AI is used.</p> <p><b>Best Practices:</b></p> <p>Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.</p>
<p><b>Professional Responsibilities Owed to Other Jurisdictions</b></p> <p><a href="#">Rule 8.5</a></p>	<p><b>Minimum Requirements:</b></p> <p>A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.</p>