

**STATE BAR OF NEW MEXICO
ETHICS ADVISORY COMMITTEE
FORMAL ETHICS ADVISORY OPINION**

FORMAL OPINION: 2024-004

TOPIC: Using Generative Artificial Intelligence in the Practice of Law

RULES IMPLICATED: Rules 16-101, 16-103, 16-104, 16-105, 16-106, 16-109, 16-303, 16-501, 16-503, 16-804(C), NMRA (2024).

DATE ISSUED: September 24, 2024

DISCLAIMER FOR FORMAL OPINIONS: The Ethics Advisory Committee of the State Bar of New Mexico (“Committee”) is constituted for the purpose of advising lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued (“Rules”). One way in which the Committee attempts to advise lawyers is through “formal opinions,” which are published. In issuing formal opinions, the conclusions are based upon any facts that are referenced in the opinion. Lawyers are cautioned that should the Rules subsequently be revised, or different facts be presented, a different conclusion may be appropriate. The Committee does not opine on matters of substantive law although concerns regarding substantive law are sometimes raised in the opinions. The Committee’s opinions are advisory only, and are not binding on lawyers, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the question(s) presented, based upon the Rules in effect on the date issued.

QUESTION PRESENTED: May a lawyer use Generative Artificial Intelligence in the practice of law?

SUMMARY ANSWER: Under the New Mexico Rules of Professional Conduct, yes, they may; however, use of such technology raises a number of considerations which are highlighted here.

ANALYSIS:

Merriam-Webster Dictionary defines artificial intelligence (“AI”) as “the capability of computer systems or algorithms to imitate intelligent human behavior.”¹ AI has been used for many years in the practice of law, primarily in legal research and document assembly. More recently, however, Generative AI has advanced and offers the potential to automate various legal tasks. Generative AI differs from non-generative AI that lawyers have historically used in that Generative AI is capable of generating content. This latter capability includes the ability to generate correspondence, retention agreements, briefs, contracts, case summaries, estate planning documents, and a host of other legal documents. Likewise, Generative AI can analyze data and records, legal documents, search for relevant precedent, and suggest edits to existing materials.

The Committee is of the opinion that the responsible use of Generative AI is consistent with lawyers’ duties of competence (Rule 16-101, NMRA), diligence (Rule 16-103, NMRA) and charging reasonable fees and costs to clients (Rule 16-105, NMRA). Indeed, Comment 9 to Rule 16-101 NMRA (competence) specifically provides that “[t]o 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 . . .**” (emphasis added). Generative AI has several potential benefits for lawyers and clients. For example, Generative AI has the potential to make a lawyer’s initial drafting of legal documents, or the preparation of routine correspondence more efficient and, therefore, more cost effective for clients. Likewise, Generative AI can assist a lawyer in considering alternative approaches to drafting complex contracts or cross-examining witnesses. Further, Generative AI can streamline discovery for lawyers, resulting in time and cost savings.

The Committee is not suggesting that, currently, lawyers *must* use Generative AI in the practice of law. For those lawyers who choose to do so, however, they must do so responsibly, recognizing that the use of Generative AI does not change their fundamental duties under the Rules of Professional Conduct.

¹ <https://www.merriam-webster.com/dictionary/artificial%20intelligence>

This means, among other things, that lawyers must tailor their use of Generative AI to fit: (a) their own legal practice; (b) each specific matter in which it is used; and (c) each individual client for whose matter it is used. Moreover, the lawyer should determine whether, in certain matters, the lawyer must discuss the use of Generative AI with a client, consistent with a lawyer's duty to reasonably consult with clients about the means by which the client's objectives will be pursued, pursuant to Rule 16-104(A)(2). Further, the lawyer must be familiar with any rules of procedure, including local rules, as well as any court, agency, or administrative bodies' rules, policies, or procedures concerning the use of Generative AI, including whether it is allowed and what level of disclosure is required if it is used. The Committee urges lawyers who decide to use Generative AI to do so only after they have taken into consideration the foregoing items, but also the additional considerations set forth in the remainder of this opinion.

ADDITIONAL CONSIDERATIONS UNDER THE NEW MEXICO RULES OF PROFESSIONAL CONDUCT IN THE USE OF GENERATIVE AI:

The Committee believes that the following Rules of Professional Conduct are most commonly implicated by the use of Generative AI in the practice of law: (1) confidentiality of information (Rule 16-106); (2) candor toward the tribunal and truthfulness (Rules 16-303 and 804-(C)); (3) reasonable fees and costs (Rule 16-105); (4) conflicts of interest involving former clients (Rule 16-109); and (5) supervision of lawyers and legal staff (Rules 16-501 and 503). The Committee also reminds every prudent lawyer to consider whether a lawyer must discuss the use of Generative AI with a client, consistent with Rule 16-104, in certain matters as discussed more fully, below.

The following addresses the commonly implicated Rules of Professional Conduct in numerical order for ease of reference:

I. Confidentiality of Information, Rule 16-106 NMRA:

The use of Generative AI tools in the practice of law, like prior technological innovations, poses risks to client confidentiality. First, many Generative AI tools are owned by third party providers with varying degrees of security and policies regarding sharing data. Second, they may require a lawyer to prompt them with

specific information about a case to generate the legal product sought by the lawyer. Finally, many Generative AI tools are self-learning and therefore keep and use the information with which they are prompted to train the AI for future users. Thus, the use of these tools in the representation of a client squarely implicates client confidentiality under Rule 16-106.

“A fundamental principle in the client lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” Rule 16-106 comm. cmt. 4. This prohibition applies to both direct disclosures of protected information and “disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.” *Id.* at comm. cmt. 6. In order to prevent such disclosures a lawyer must not only limit directly sharing such information but must actively “make reasonable efforts to prevent the inadvertent... disclosure of, or the unauthorized access to, information relating to the representation of a client.” Rule 16-106(C).

Thus, Rule 16-106 requires that lawyers take active and well-informed steps to prevent the breach of client confidentiality when using Generative AI tools. First, lawyers must adequately understand the parameters and policies of the Generative AI tools they are using. The lawyer should determine whether the tool they intend to use shares data with third parties, stores and uses data for the purpose of training its own AI, and whether the program has adequate security to prevent inputted information from being unintentionally accessed. Second, lawyers must refrain from inputting any confidential information or information that could lead to the discovery of confidential information into Generative AI tools that lack adequate confidentiality and security protections. This includes Generative AI tools that share inputted information with third parties or keep inputted information to train their AIs. Third, lawyers should always anonymize client information and refrain from inputting details that could lead to the discovery of the client’s identity into Generative AI tools. Fourth, in appropriate cases lawyers should obtain a client’s informed consent before inputting confidential information into a Generative AI tool.

II. Candor toward the tribunal, Rule 16-303 NMRA and Truthfulness, Rule 16-804(C) NMRA:

The use of Generative AI tools in drafting documents filed with the courts directly implicates a lawyer’s duty of candor to the tribunal and truthfulness. As stated above, Generative AI tools can create inaccurate or false outputs either caused by AI hallucinations or by incomplete and careless prompts by the attorney using the tool. Due to the risks of AI hallucinations or inaccurate results, a lawyer must pay particular care to their duty of candor toward the tribunal under Rule 16-303 and their duty to avoid conduct involving dishonesty or deceit under Rule 16-804(C) when using Generative AI tools to draft documents filed with a court.

Rule 16-303(A)(1) states that a lawyer shall not knowingly “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” This rule recognizes the “special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.” Rule 16-303 comm. cmt. 2. This means that a “lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.” *Id.* As such, under the purview of this rule a lawyer must not only “recognize the existence of pertinent legal authorities,” but avoid “[l]egal argument based on a knowingly false representation of law.” *Id.* at comm. cmt. 4. Furthermore, under Rule 16-804(C) “[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Thus, when using Generative AI tools to draft documents submitted to a court, a lawyer must independently verify the accuracy and sufficiency of all research, citations, and analysis conducted by the AI tool. In doing so, the lawyer must not entirely rely on the Generative AI tool used to draft the document in the first place to verify the accuracy of its research or analysis. Such methods have been shown to be ineffective at catching mistakes made by the Generative AI tool as such tools can be misled by their own prior hallucination. *See, e.g., Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 458 (S.D.N.Y. 2023) (discussing a lawyer’s use of Generative AI to draft a document and the lawyer’s failure to independently verify the accuracy and existence of the sources cited by the tool used). Moreover, a lawyer must correct any errors or mistakes made by the tool. Failure to do so is a knowing misrepresentation of the law and a violation of, among other rules, the

lawyer's duty of candor to the court and the lawyer's duty to avoid engaging in dishonesty or misrepresentation. Finally, a lawyer should research and abide by the rules, orders, or other requirements in the relevant jurisdiction pertaining to the use and disclosure of Generative AI tools. Many courts are implementing such requirements to avoid the potential risk of missing or being tricked by AI hallucinations, *see* N.Y. State Bar Ass'n, *Rep. & Recommendations of the New York State Bar Ass'n Task Force on A.I.*, 2024 WL 1655076, *27-29 (Apr. 6, 2024), and abiding by such prophylactic measures also falls under a lawyer's duty of candor to the court.

III. Reasonable fees and costs, Rule 16-105 NMRA:

Using Generative AI tools in the representation of a client also implicates the reasonableness of the fees and costs for which a lawyer charges a client. Generative AI has the potential to render both the research and drafting of legal documents and the preparation for legal proceedings more efficient. This affects the time and labor involved in the representation of clients and therefore directly implicates what constitutes reasonable fees and costs for such representation under Rule 16-105.

Rule 16-105(A) states that “lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.” One of the factors considered in determining the reasonableness of fees charged to the client is “the time and labor required . . . and the skill requisite to perform the legal service properly.” Rule 16-105(A)(1). Moreover, although a lawyer may seek reimbursement for costs incurred, the costs must either be agreed to by the client in advance of representation or reasonably reflect the costs actually incurred by the lawyer during the representation. *Id.* at comm. cmt. 1. Lawyers must provide clients “at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the scope of the legal representation 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.” *Id.* at comm. cmt. 2. A detailed engagement letter specifying these matters is best practices and “reduces the possibility of misunderstanding.” *Id.*

Therefore, when using Generative AI tools in the representation of a client a lawyer must be conscientious of the actual time spent on a given task and only

charge the client for the time and labor actually incurred. If this means that a task is rendered more efficient by using the Generative AI tool employed, the lawyer must only use the time the lawyer actually spent on the given task to calculate their fee and not include the time saved by the use of the tool. If the lawyer incurs costs for using the Generative AI tool employed, the lawyer may seek reimbursement of the cost from the client but must inform the client of the actual cost incurred from using the tool in writing and the lawyer's intent to charge the client that cost prior to the representation.

IV. Conflicts of interest – duty to former clients, Rule 16-109 NMRA:

The use of Generative AI tools also potentially implicates the rules of professional conduct regarding conflicts of interest. Although a lawyer should be conscientious of how their use of Generative AI implicates all potential conflicts of interest, we believe the most prevalent risk regarding conflicts of interest when using Generative AI tools implicate a lawyer's duty to former clients. As stated above, Generative AI tools often require fact-intensive prompts in order to generate the work product the lawyer seeks. Since such tools often store and use prior prompts and outputs to train and improve the Generative AI tool there is a risk that future outputs may use information relating to the prior representation or concurrent representation by another lawyer in the same firm in a way that disadvantages the prior/other client. Therefore, the use of Generative AI tools directly implicates Rule 16-109.

Rule 16-109(C)(1), (2) prohibit “[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter” disclose or use information related to a former client to that client's disadvantage. *See also* Rule 16-109 comm. cmt 8. This is because even after the termination of a client-lawyer relationship the lawyer owes a duty of loyalty and confidentiality to the prior client. Rule 16-109 comm. cmt. 1.

Thus, when using Generative AI tools in the representation of a client, a lawyer must be aware of whether the tool stores and uses prior inputs to train the AI tool and what prior client information has been inputted into the AI tool. If the AI tool used by the lawyer or firm does not possess the appropriate safeguards to protect prior client information and to screen potential conflicts the lawyer must verify independently that no conflict exists with prior client information inputted

into the AI. If the lawyer cannot independently verify a lack of conflict, then the lawyer should not use the tool for their current representation. Moreover, lawyers should avoid inputting into the Generative AI tools they use confidential client information that could create or cause a conflict of interest with either their own future clients or their firm's other clients.

V. Supervision of Lawyers and Legal Staff, Rules 16-501 and 503 NMRA:

Lawyers who are partners in a law firm, or who possess managerial authority in a law firm are required to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm and all nonlawyer assistants in the firm conform to the Rules of Professional Conduct. Rules 16-501, 503 NMRA. This includes having appropriate internal policies and procedures in place and providing instruction and supervision to subordinate lawyers and staff. Rule 16-501 comm. cmt 2; Rule 16-503 comm. cmt 2. Thus, prior to using Generative AI, lawyers must develop appropriate policies and procedures on the ethical use of Generative AI and train all other lawyers and staff in the law firm on such policies and procedures. Moreover, lawyers should periodically review compliance with these policies and procedures by other lawyers and by staff in the law firm. Failure to take such steps could expose a lawyer to liability for the misuse of Generative AI in violation of the Rules of Professional Conduct by other lawyers or legal staff in the lawyer's law firm.

AN ADDITIONAL CONSIDERATION:

In addition to the Rules of Professional Conduct noted above, the Committee reminds lawyers considering use of Generative AI to also consider whether the particular circumstances applicable to the client or matter implicate the lawyer's duty of communication under Rule 16-104, NMRA.

The use of Generative AI in the representation of a client can offer the client certain benefits, but also poses unique risks, as discussed above. Whether a lawyer must discuss these risks and benefits with a client consistent with Rule 16-104 and a lawyer's duty to reasonably consult with a client about the means by which the client's objectives are to be accomplished, depends upon a number of factors. While it is not possible to identify or illustrate every situation requiring a lawyer to

advise a client about the lawyer's use of Generative AI, lawyers should be cognizant of the fact that they may need to discuss their use of Generative AI with a client if: (a) the use of Generative AI plays a significant role in producing final products for clients; (b) a client inquires about a lawyer's use of Generative AI; or (c) the use of Generative AI requires the lawyer to disclose confidential client data to obtain any resulting product. There may be other circumstances in which a lawyer must inform the client about the lawyer's use of Generative AI and a lawyer should evaluate each matter on a case-by-case basis to determine whether Rule 16-104 is implicated by the lawyer's use of Generative AI.

CONCLUSION:

In summary, while a lawyer licensed in New Mexico may use Generative Artificial Intelligence in the practice of law, if they choose to do so they must do so responsibly and they must fully adhere the ethical standards of both the New Mexico Rules of Professional Conduct, and any tribunal or agency rules, policies, procedures or orders.