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FEATURE ARTICLE

The Ethics of Using Nonlawyer Assistants in Law Practice

In recent years, there has been increasing interest in the ethical rules governing lawyers' and law firms' use of nonlawyer assistants. On June 7, 2023, the ABA Standing Committee on Ethics and Professional Responsibility added to the growing commentary on this subject with Formal Opinion 506, which explores the use of nonlawyers[1] to do client intake tasks.

The Opinion begins with a general statement:

> Lawyers may train and supervise nonlawyers to assist with initial client intake tasks if the lawyers have met their obligations for management and supervision of the nonlawyers pursuant to ABA Model Rule of Professional Conduct 5.3 and prospective clients are given the opportunity to consult with the lawyers to discuss the matter.

Model Rule 5.3 requires lawyers who are partners or managers in a firm to ensure that the firm has policies that assure a nonlawyer's conduct is "compatible" with the professional and ethical obligations of the lawyer. The Opinion notes that for-profit law firms often use nonlawyers to do relatively complex tasks:

> …for-profit law firms have offered limited scope online legal services that provide website intake questions, a menu of available limited scope legal document completion services (such as simple powers of attorney, LLC formation, property deed transfers, and name changes), a conflict checking algorithm, and then "click-to-accept-terms" engagement agreements. Delegating initial client intake to nonlawyers also is common in mass tort and class action practices. There, trained intake personnel may check for conflicts of interest, collect basic information from prospective plaintiffs or

1 As in Formal Opinion 506, the term "nonlawyer" is used throughout this article, consistent with the term as used in Rule 5.3, to include all law firm employees, agents, contractors, and vendors who are not licensed lawyers (or otherwise authorized to practice law) but work under the supervision of a licensed lawyer including, for instance, paralegals, legal assistants, case managers, firm administrators, intake staff, and clerks.

> class members for lawyers to ascertain their eligibility to make a claim, and explain how fees and costs are charged in such cases. If the prospective client meets the eligibility criteria and specifics set forth by the lawyers, then the intake personnel send the prospective clients the standard fee agreement for consideration.

While acknowledging the many benefits of using nonlawyers for these tasks, the Opinion urges, "Without proper policies, training, and supervision in place, this delegation could lead to ethical violations and unfortunate consequences for clients and lawyers."

The Opinion focuses on two critical provisions of the Model Rules when analyzing the risks of using the assistance of nonlawyers: Rules 1.4 and 1.5. Rule 1.5(b) requires lawyers to communicate to their clients the:

> scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible ... preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.

Rule 1.4(b), as summarized by the committee, requires that:

> a lawyer communicate with clients and provide the clients, to the extent reasonably necessary, with explanations that allow the clients to make informed decisions regarding their representation.

The Opinion notes that some of these communication duties "also apply in the context of explaining fee agreements to prospective clients" and deems waiting until after engagement to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation "imprudent."

This analysis suggests that relying on nonlawyers to communicate specifics about the scope and terms of engagement is, at the very least, risky. However, the Opinion states that, with proper policies, training, and supervision,

> a lawyer may delegate…answering general questions about the fee agreement or process of representation, and even obtaining the prospective client's signature on the fee agreement as long as the prospective client is offered an opportunity to communicate with the lawyer to discuss the matter.

Of course, if a lawyer or law firm does permit nonlawyers to perform such tasks, the

delegation does not insulate the lawyer or law firm from continuing responsibility for ethical breaches by a nonlawyer. Rule 5.3 imposes such liability on lawyers in such situations.

In addition to the various risks outlined above, lawyers and law firms who make such delegations to nonlawyers must also be careful that such delegations do not violate unauthorized practice of law rules in the jurisdictions in which they practice. Model Rule 5.5 prohibits lawyers from assisting others in the unauthorized practice of law. Thus, when using nonlawyers, even within a law firm context, the law firm must be certain that the tasks assigned to the nonlawyers do not involve unauthorized practice to avoid violating the requirements of Model Rule 5.5.

Formal Opinion 506 does not directly deal with what is currently the most-discussed question about legal ethics and practice management: the use of AI. One use that AI service providers have touted is law firm client intake. There seems to be little doubt that the use of an AI program to provide services to clients would constitute the use of a "nonlawyer assistant" under the Rules. Thus, it seems quite likely that Formal Opinion 506 will apply to the use of AI nonlawyer assistance for client intake tasks. However, the practical reality of how to train AI programs in the *Rules of Professional Responsibility* and supervise their client intake activities is a question that must be resolved; and its resolution may prove more difficult than applying the Rules to human assistants.

While Formal Opinion 506 is an important guide to using human nonlawyer assistance in client intake, additional thought and discussion is needed when applied to non-human, nonlawyer assistance.

NEW AUTHORITY

Generative AI Mishaps

It sometimes seems that AI has taken over the practice of law. Certainly, numerous AI programs are being marketed to lawyers and law firms; equally certain, they are creating problems. Perhaps the most serious ethical and practical problem

discovered to date is that created by lawyers who use "generative AI."

> George Lawton, a tech journalist, defines "generative AI" as follows:
>
> Generative AI is a type of artificial intelligence technology that can produce various types of content, including text, imagery, audio and synthetic data. The recent buzz around generative AI has been driven by the simplicity of new user interfaces for creating high-quality text, graphics and videos in a matter of seconds…
>
> The rapid advances in so-called *large language models* (LLMs) — i.e., models with billions or even trillions of parameters — have opened a new era in which generative AI models can write engaging text, paint photorealistic images and even create somewhat entertaining sitcoms on the fly. Moreover, innovations in multimodal AI enable teams to generate content across multiple types of media, including text, graphics and video. This is the basis for tools like Dall-E that automatically create images from a text description or generate text captions from images.[2]

What has been so exciting—and controversial—is the use of generative AI in law practice to produce research memoranda and court documents including briefs. The benefits of generative AI are obvious, as are the extreme ethical risks they pose. Several months ago in the *LEMR* we pointed out some of these risks and predicted that lawyers who became first adopters of generative AI to produce practice documents might well run afoul of the *Rules of Professional Conduct*. Indeed, a number of ethics experts cautioned against such use. Unfortunately, lawyers have already faced judicial ire because of this.

A New York attorney, in a case involving Avianca Airlines, used Generative AI to create a brief in the case. Unfortunately, the AI program created a brief using a number of bogus citations—citations that looked real but were, in fact, totally made up. The lawyer, apparently, did not have any idea that this was the case. He made the mistake of submitting the brief without checking the citations. When the judge discovered this was the case, he was outraged and ordered a sanctions hearing for June 8. According to the lawyer's statements to the court, the legal team on the case used the generative capabilities of ChatGPT to produce the brief. The lawyer stated that:

> …the citations… were provided by ChatGPT, which also provided

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2 George Lawton, "What is AI. Everything You Need to Know," available online at https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

> its legal source and assured the reliability of... its content.[3]

In the Opinion and Order On Sanctions issued June 22, 2023, the presiding judge held that the attorneys "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question."[4] He listed the "many harms" that result from citing false authorities:

> The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.

The judge also found "bad faith on the part of the individual Respondents based upon acts of conscious avoidance and false and misleading statements to the Court" based on the attorneys' failure to promptly "come clean" after being questioned about the existence of the cited cases. He ultimately imposed a $5,000 sanction.

It is not at all surprising that other judges around the U.S. have begun to issue orders about the use of generative AI in court filings. And it seems certain that disciplinary cases will begin to appear regarding the use of generative AI and the *Rules of Professional Conduct*.

How should lawyers handle the use of generative AI? The answer would seem to be: use it with great caution, check local court rules as to its use, monitor legal news and disciplinary cases on the subject, and learn as much about the specific application they propose to use, including its reliability and weaknesses. Failure to be alert to the risks involved in using generative AI in law practice may well lead to both judicial and disciplinary problems no lawyer wants.

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3 https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.32.1_1.pdf?utm_source=Sailthru&utm_medium=Newsletter&utm_campaign=Daily-Docket&utm_term=053023.

4 Opinion and Order on Sanctions, *Mata v. Avianca, Inc.*, D.S.N.Y. Case No. 22-cv-1461, Doc. 54 (June 22, 2023).

ETHICS & MALPRACTICE RESEARCH TIP

Selected Articles from *The Current Index of Legal Periodicals*

1. Ethan Wright, Note, *A Downward Spiral: The Relationship Between Distrust and Regulation in the Legal Profession*, 45 J. Legal Prof. 261 (2021).

> The American legal profession has always jealously guarded its independence from outside interference. This autonomy from outside control depends upon public trust in the profession. Many would argue that various events in the past decade have severely compromised this trust.

2. Gordon Goodman, *The Ethics of Cryptocurrency*, 18 Hastings Bus. L.J. 175 (2022).

> Cryptocurrency remains a complex and risky medium of exchange, but many individuals—some of ill repute—are using it to pay for goods and services, including legal services. Lawyers who contemplate using cryptocurrency or accepting it as payment must be certain they understand it and the risks associated with its use.

A BLAST FROM THE PAST

An attorney at law is an officer of the Court. The terms of the oath exacted of him at his admission to the Bar prove him to be so; "you shall behave yourself in your *office* of attorney within the court, with all due fidelity to the court as the client."

—*In the Matter of Austin*, The Register of Pennsylvania 245 (Samuel Hazard ed., 1835)

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