

THE Legal Ethics & Malpractice Reporter

*A monthly commentary on current ethical issues in law practice
for members of the Kansas and Missouri Bars*

SEPTEMBER 30, 2026

VOL. 7, No. 9

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LLC

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About This Publication

THE *Legal Ethics & Malpractice Reporter (LEMR)*, for short) is a free, monthly publication covering current developments in ethics and malpractice law—generally from the perspective of the Kansas and Missouri *Rules of Professional Conduct*. Founded in 2020, this publication was envisioned by KU Law professor Dr. Mike Hoeflich, who serves as its editor in chief. In partnership with Professor Hoeflich, JHC’s legal ethics and malpractice group is pleased to publish this monthly online periodical to help attorneys better understand the evolving landscape of legal ethics, professional responsibility, and malpractice.

In addition to the digital format you’re presently reading, we publish *LEMR* as mobile-friendly blog articles [on our website](#). We also share a digest newsletter to our *LEMR* email subscribers whenever a new issue is published. (You may [subscribe here](#) if you aren’t already a subscriber.)

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FEATURE ARTICLE

The Right to Be Wrong

A GREAT deal of attention has been focused on generative artificial intelligence (GAI) and the dangers of the documents produced being error prone. The vast majority of this attention has been focused on one kind of mistake: so-called hallucinations, situations where AI cites a non-existent case in its work product. Judges have unanimously condemned the use of documents containing hallucinations, and lawyers are now attempting to find ways to prevent this. But AI problems in document production are not limited to hallucinations. AI also makes substantive mistakes, including mistakes in interpretation, vocabulary, and intent.

In a recent letter from Sullivan & Cromwell apologizing for submitting documents with multiple hallucinations, the firm also acknowledged the existence of non-hallucinatory mistakes (although the letter does specify what these were). Still, the letter focused almost entirely on hallucinations and the process used to eliminate them. Should lawyers focus on hallucinations primarily? Or should the profession recognize that the problem of mistakes in documents and other work product may go beyond hallucinations?

The Sullivan & Cromwell letter tracks recent judicial discussions of AI problems, which substantially focus on ethical and procedural rules that may be violated when a final product contains hallucinations, (particularly MRPC 1.1 and 5.3 and FRCP 11(b)). These provide several means of critiquing lawyer citations of hallucinated documents, including incompetence, failure to supervise, and signature of documents that do not meet the requirements of verification of 11(b). The problem is that this focus on AI-generated hallucinations has led lawyer attention to be focused only on hallucinations and not the possibility of other errors, which are equally subject to these rules.

It might be useful in understanding this problem by using a hypothetical. Imagine a situation in which an associate in a small firm is asked to draft a mortgage for a borrower on an apartment building that is being purchased by the client. The task of drafting the mortgage is given to a first-year junior associate. There is also a partner in charge of the matter and a senior associate directly supervising the junior associate. Now consider two possible scenarios. In the first scenario, the junior associate who is well-trained and experienced in using GAI and formulating

prompts, gives the task to the firm GAI. Within a few minutes, a draft of the mortgage is produced. The junior associate reviews the draft, makes several corrections and hands it off to the senior associate. The senior associate, too, reviews the document closely and, satisfied that there are no hallucinations, the senior associate lawyer turns it over to a proofreader. Once the proofreader has finished, the document is presented to the partner. The partner reviews it, but, perhaps, not as thoroughly as the associates because the partner knows that the associates are more than competent and because to do another detailed review would cost the client unnecessary fees. The draft is finalized, and the mortgage is signed by all the parties.

Two years later, the partner gets a call from the client. The client was served papers stating that a lien has been filed against their property by the lender. The lien has been placed on the apartment building because the property has become uninhabitable due to toxic lead paint and the client has failed to make three mortgage payments. Further, the client states that a lien has also been filed by the lender against their residence and investment accounts. The client had directed the law firm that the “deal” was to be nonrecourse, i.e. that the borrower would have no liability beyond the property subject to the mortgage. After reviewing the document, the senior partner discovers that the mortgage text uses both the phrases nonrecourse and recourse interchangeably, leading the lender to take the position that the borrower has personal liability.

For our purposes, the resolution of the mortgage dispute is irrelevant. Our concern is whether the law firm acted unethically under current law. Judging by recent cases and rulings, the answer may be “yes” because courts and commentators seem to be taking that absolutist position that, if AI is involved in an error and human lawyers did not catch it, then an ethical violation has occurred. And yet, in this hypothetical, the AI did not generate a hallucinatory case. It simply made an error just like a human lawyer might. Unfortunately, the reviewing lawyers were focused on detecting hallucinations and did not do an adequate substantive review.

Had AI not been involved and the error has been solely that of the junior lawyer and the failure of the reviewing lawyers, would judges and commentators have taken the position that an ethical breach had occurred? In other words, is making a mistake an ethical breach of competence under Rule 1.1 and/or a failure of supervision under Rule 5.3? Does it matter whether the mistake is human or machine caused? The answer should be no.

Rules 5.1 and 5.3 are concerned with office processes that generate ethical results. The rules require that lawyers adopt document production processes designed to avoid ethical violations:

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

They require reasonable efforts to assure that ethical rules, including Rule 1.1 are satisfied.

How, then, do we understand what seems to be the overwhelming focus on AI hallucinations? The answer may be that hallucinations are new and frightening. In looking at Rules 1.1, 5.1, and 5.3, we must treat hallucinations as a special kind of error, one which needs an absolutist, zero tolerance approach and a different office process than for substantive errors. As noted earlier, any time a hallucination is included in a final legal document, there has been a failure of the lawyers adequately to monitor and supervise document production. An AI-generated document should never be finalized without all the cited cases being subject to a rigorous verification process. Failure to do so is clearly a violation of Rules of Professional Conduct 5.1 and 5.3. In other words, AI hallucinations can be caught and eliminated by appropriate document production processes. It is easy to prevent hallucinations from being included in final documents. There is no excuse, as courts have pointed out, for not doing so. This does justify a zero-tolerance approach to hallucinations, as most courts have adopted.

Non-hallucinatory errors, even those by an AI, however, are not so easy to deal with. Lawyers make mistakes, and running citations through a digital database will not catch these substantive errors. The whole purpose of Rules 5.1 and 5.3 is to encourage lawyers to establish work production processes to minimize mistakes from entering final work product. In the hypothetical above, the problem is that the lawyers did not pay enough attention to each word. Three lawyers reviewing the document all missed a legally significant error in wording. One can wonder whether a focus on hallucinations left them with a false sense of comfort when the verification process showed none. It should not have. Hallucinations are one problem. Substantive errors are another. Both require lawyer attention.

A recent Alabama ethics opinion, OGC Opinion 26-01, expresses this point

well by emphasizing that ethical use of AI in document drafting requires both verification and “substantive” review of the documents, just as much as would be done in reviewing a first-year associate’s work. In effect, the introduction of AI into the law office does not change Rules 5.1 and 5.3 or substitute verification review for substantive document review. It requires **both**. Verification review does not replace substantive review. A first-year associate or AI may make substantive errors. This will not necessarily show incompetence by the lawyer. But failure to catch these errors is more likely to result in a disciplinary body finding a 5.1 or 5.3 violation. The message here is clear. Focus on hallucinations alone is an error.

OPINION

Law School Accreditation

The current administration in Washington is attempting to change the accreditation process for law schools. This has caused a tidal wave of protest by law school administrators and faculty as well as by the American Bar Association, which is currently the primary law school accreditor. Although many reasons for these changes have been proposed, one focus has been accreditation rules are viewed by the administration as unacceptably liberal, such as the rules on diversity, equity, and inclusion. Further, the current administration has had rocky relations with the ABA on such matters a judicial selection. There is an old cliché that seems applicable: "don't throw out the baby with the bath water." Accreditation is about far more than DEI. It is about assured consistency in legal education, maintenance of educational standards, and lawyer mobility.

The ABA is the primary accreditation body that works with the American Association of Law Schools (an organization of law deans and law faculty) and state accreditation bodies. The most practical aspect of the current system is that law students who attend ABA/AALS accredited law schools may take an examination to be admitted in any state bar anywhere in the United States. By contrast, law students who attend a law school without ABA/AALS accreditation but that has state accreditation may take the bar exam only in the state in which the school is accredited.

The accreditation process does more than increase lawyer mobility, though. It also works to assure that law schools meet minimum standards set by the ABA (and generally the AALS). When the accreditation machinery was first adopted, there was an immense variety of law schools—ranging from work-study law schools run by the YMCA, to practitioner-run night and weekend schools, to traditional Harvard or Columbia model schools. The quality of instruction, facilities, and graduation requirements were inconsistent and variable. Law school applicants did not have the guarantee of a minimum instructional level. Accreditation rules were aimed at improving law school instruction and assuring that every law student would receive an acceptable, minimum level of legal education to protect the public from incompetent lawyers.

The imposition of consistency and minimum standards through the accreditation process also make law firm, corporate, and judicial hiring more efficient and reliable. Law firms can hire students from any accredited law school without doing deep research into a law school's curriculum, practical training, and other factors since they knew that every accredited law school has minimum standards for graduation.

The value of a national accreditation system run by lawyers and judges far exceeds the three benefits listed above, but these should be enough to suggest that doing away with the present system of ABA/AALS accreditation is ill-considered. Regardless of how one views issues like DEI, the answer is not to dismantle the whole system. Similarly, unhappiness with other ABA activities should not motivate disruption of legal education.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles on Legal Malpractice & Ethics

1. Sierra Kayland Bernard, Note, *From Courtroom to Content: Attorneys as Social Media Influencers*, 50 J. Legal Prof. 73 (2025).

Increasingly, social media has become a source of significant celebrity –and income—for many lawyers.

2. Elizabeth R. Carter, *Joint Representation of Spouses and Romantic Partners: Ethical Considerations for Estate Planners*, 79 Ark. L. Rev. 1 (2026).

Representation of couples is a perennial problem for lawyers and requires careful navigation of ethics rules.

A BLAST FROM THE PAST

Dos Passos on Lawyers

It is a principle of universal jurisprudence, that lawyers in their dealings with their clients, and with the court, must observe the strictest rules of honor, fidelity, respect, and obedience. They are held, therefore, to a standard of morals, above and not below the average; a proof that their morale at some time, and in some way, was fixed at a level with their presumed attainments, and corresponding to their opportunities. Popularly, this is always lost sight of, when a member of the profession incurs censure.

- John Dos Passos, The American Lawyer: As He Was, As He Is, As He Can Be (1907)



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