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Is your firm prepared?



IN THIS ISSUE:

- ♦ **iLawyer: The Ethical Use of Technology in Your Practice**
- ♦ **FAQs on ChatGPT for Solo and Small Law Firms**
- ♦ **Summer Ally Tip Jar: Billing Software**



iLAWYER:

The Ethical Use of Technology in Your Practice

By: Kate Gould, Esq.

The pandemic forced those lawyers who may have been reluctant to implement new technology into their practices to download the Zoom app and get comfortable working remotely, rather than mere steps from their assistant. The practice of law was reinvented and traditional face-to-face procedures, such as hearings, were conducted by videoconference. Although we have resurfaced from the days of quarantine, the ease of using modern technology has encouraged some judges to continue to utilize these procedures today.

So how do we balance these advancements with traditional values and methods that still play a role in practicing law? I would attest that most lawyers still see the value in being in a courtroom where a judge can swiftly administer justice and the benefit of face-to-face negotiations to parley a prickly deal. The modern lawyer must now strike the balance between keeping up with technological advances as required by the Rules of Professional Conduct and maintaining that important facetime with their clients – whether in the office or courtroom.

Staying on top of technological developments is not only vital to delivering top notch legal services to your clients, it is also one component of your ethical duty of competence. A lawyer's duty to provide competent representation now includes an ethical obligation with respect to technology. In 2012, the ABA added Comment 8 to Rule 1.1 of its Model Rules requiring lawyers to stay current with relevant technology. Specifically, the Comment states:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of 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.¹

So rather than merely downloading Zoom, or doing the bare minimum in terms of embracing

technology in your practice, consider this obligation an opportunity to expand your knowledge and implementation of technology to better serve your clients. This could mean anything from setting up an online payment system for your clients' convenience to attending a technology seminar – even if you still prefer to take notes on a legal pad.

Recent State Law Developments

With the majority of the states adopting some form of a technology component in their competency rule, chances are you practice in a jurisdiction with such requirements. Here are just a few states that have directed lawyers to expand their knowledge or use of technology in their practices:

Florida

As part of its continuing legal education (CLE) requirements, Florida implemented a mandatory technology requirement, specifically three hours of technology CLE every three years. The Board of Governors for the Florida State Bar also has a Technology Committee to ensure that technology tools and educational assistance related to practice management are readily available to Florida lawyers. The Board describes its primary purpose as taking a proactive, forward looking review of technologies that are currently and may soon be impacting the practice of law.

Illinois

The University of Illinois College of Law is equipping its future lawyers for the impact that technology may have on their practices. "Technical Literacy for Lawyers" is a course examining various technology concepts including privacy and security, artificial intelligence, net neutrality, and other current event topics related to technology.

Once you pass the Illinois bar exam, you may look for more guidance concerning the use of technology

continued on next page

Kate is a Risk Management Consultant at AttPro. When she isn't offering risk management guidance on the AttPro Risk Management Hotline, she is planning her next summer concert experience.



from the Illinois State Bar Association (“ISBA”) Advisory Opinions. The ISBA recently considered the use of cloud-based services in the delivery of legal services. It issued an opinion confirming that a lawyer may utilize “the Cloud” but must take reasonable measures to ensure the confidentiality of client information and cannot solely rely on the service provider.²

New Hampshire

New Hampshire has been at the forefront of the use of technology in the courtroom. In 2021, it became the second state after Arizona to adopt Case Center, a cloud-based court exhibit presentation platform, statewide. In line with New Hampshire’s e-Court Program Initiative, the goal is for state superior courts to improve case processing and streamline hearings with the platform.

California

The State Bar of California has issued a formal ethics opinion which mirrors ABA Model Rule 1.1 Comment 8. Interestingly, the opinion also addresses the use of e-discovery and requires attorneys, who are otherwise experienced but lack a basic understanding of e-discovery, to either: (1) acquire sufficient knowledge and skill before taking on the representation; (2) associate with or consult technical consultants or competent counsel; or (3) decline the representation. The state bar has seemingly taken this position because, in its opinion, the lack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney’s duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.

If your state isn’t listed here, be sure to check your jurisdiction for recent changes in the law as it relates to technology requirements. For example, Colorado, the District of Columbia, Idaho, Indiana, Nevada, Utah, Virginia, and Washington have recently pushed the traditional bounds of estate planning by enacting laws related to the electronic signature of wills, remote witnessing or notarization of wills, or procedures for electronic execution of self-proving affidavits.

Best Tech Practices

But what about the practical, day-to-day impact emerging technology may have on your practice? While the size of your firm may dictate the extent to which certain technological advances may benefit your practice, there are a few tips that will likely serve all lawyers in the digital age:

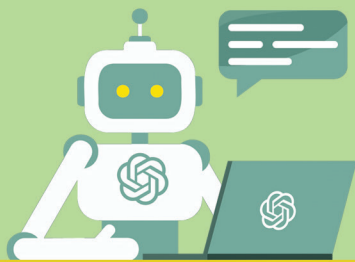
- **Client communications** – Although lawyers are permitted to routinely communicate with clients via unencrypted email correspondence, be sure to mark your emails as “confidential.” If you are regularly sending emails or attachments with sensitive information including bank account or Social Security numbers, consult with an IT professional about using an encryption service that will easily interface with your office email.

- **Storage of confidential data** – Given the impracticality of retaining every piece of paper in a physical file, consider reducing your paper files in a way that works for your firm. While you should, of course, maintain all original documents, other file materials, along with copies of the originals, can be saved electronically. By creating searchable PDFs or utilizing software that can search image-only PDFs, you can save yourself valuable file room space. And while you may initially fear losing access to electronic files, rest assured that sophisticated backup systems and cloud servers make this highly unlikely.
- **Retainer agreements** – Consider including a provision in your retainer agreement or engagement letter providing for the client’s authorization of the backup and storage of electronic files, including on cloud-based servers. Be sure to customize and update your engagement letter with technology updates at your firm as they are implemented.
- **Case management software** – By taking the time to learn how updated case management software could help streamline time entry and billing, as well as integrate with your email inbox, you will gain time (and peace of mind) by easily accessing your calendar, time, and electronic files in one place.
- **E-filing** – Although most of us rely heavily on a legal assistant to handle all e-filing, consider learning the process yourself. Not only may this be an invaluable tool if you have to file something after business hours, it may increase your efficiency in the drafting stage if you have a better understanding of the e-filing requirements.
- **Legal research** – Take your legal research tool provider up on that free lunch and learn how to use its latest features. As these companies make great strides in their own technology, you may become more efficient in your research by learning a new search option or how to add a quick case citation to your brief.

Without question, technology is changing at an unprecedented pace. However, our profession is unique in that a meeting in your office or court appearance can make the difference in the client relationship or outcome of the hearing. As lawyers, we can value both the “old ways” of practicing law and utilizing new technologies to support our practices. And should you find yourself feeling frustrated by having to add another app to your home screen or answer a web security question, remember that keeping up with emerging technology is part of your duty of competence, **technically speaking.**

¹ https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/

² <https://www.isba.org/sites/default/files/ethicsopinions/16-06.pdf>



FAQs on ChatGPT for Solo and Small Law Firms

By: Carolyn Elefant, Esq.

In the three months since ChatGPT's November 30, 2022 release, inaccuracies about the product have been swirling throughout the solo and small law firm community. Common misconceptions include the mistaken belief that ChatGPT scrapes web content, and that OpenAI, ChatGPT's parent owns all copyright to user input and resulting output. Many of these myths arise from reliance on outdated material as the tech is changing so quickly that a month old article about ChatGPT may already be stale. And most lawyers are often too busy to poke around for the most up-to-date information.

In the hopes of setting the record straight, here is a series of FAQs on ChatGPT for solo and small law firms that address some of solo and small firm lawyers' most common questions about the technology.

FAQ: Will I be liable for plagiarism or copyright infringement by using ChatGPT since it scrapes content from other websites and public documents?

This question reflects a profound misunderstanding of how ChatGPT works. ChatGPT is known as a large language model tool which means that it is trained and powered by mountains of data and computing techniques to make predictions to string words together in a meaningful way. Because ChatGPT does not scrape or copy content but instead relies on multiple sources, the resulting output is unlikely to carbon-copy any single existing work. As such, a copyright infringement on a prior work would most likely not occur and if asserted, would be extremely difficult to prove.

For lawyers seeking more assurance against infringement, there are a several solutions. First, you could run your ChatGPT results through a web search engine or plagiarism detector to see whether it is dangerously similar to prior works. Second, instead of relying on a "cut and paste" of ChatGPT output, put your own spin on it to make it even more original thereby helping to insulate you from copyright infringement claims.

FAQ: Can I prevent others from copying ChatGPT output that I use for my blog posts or marketing content?

That is a topic still in flux. The U.S. Copyright Office

recently reaffirmed a longstanding policy that "to qualify as a work of 'authorship' a work must be created by a human being" and that it "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author." That means that an article generated by a generalized ChatGPT prompt of "draft an article about five things not to do during a traffic stop" probably wouldn't qualify for copyright protection.

But, the new Guidance acknowledges that "the Office will consider whether the AI contributions are the result of 'mechanical reproduction' or an author's 'own original mental conception, to which [the author] gave visible form.'"² The answer will depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work. Under this emerging case-by-case inquiry, output produced by a cleverly worded prompt, or series of iterative prompts, could theoretically qualify for coverage (though of course, you would need to show proof of the creative process).

If you want to be assured of copyright protection, it is best to avoid cutting and pasting ChatGPT content and instead, adding your own personal spin to any ChatGPT output.

FAQ: Do ChatGPT's terms of service assert copyright in all output and forbid users from referencing ChatGPT as a source?

ChatGPT use is governed by the terms of service for OpenAI, the company that developed ChatGPT. An older version of OpenAI's terms of service included more restrictive provisions, including a claim of copyright entitlement to the output. The updated terms assign any copyrights that OpenAI may have to the user. The new terms also warn users that non-API content provided can be used to train ChatGPT and allows for an opt-out. Keep in mind that terms of service for new products are always in flux or subject to change, so always check with the source (i.e., the actual terms) to make sure you're dealing with the current version.

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In 2002, Carolyn created the blog *MyShingle.com*, the longest-running blog on solo and small law firm practice. Carolyn writes and speaks on topics including starting a modern law firm in the digital age and how small firms can leverage technology to compete with large firms. In her free time, Carolyn likes to travel light and cheap, consume Audible books, and dance like no one is watching.



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FAQ: Does using ChatGPT violate client confidentiality?

As noted above, OpenAI does not use API content for training ChatGPT and allows an opt-out for non-API content. This means that wide circulation of your input won't be incorporated into future output. Even so, it is prudent to treat ChatGPT as you would when seeking advice on a listserv or in a Facebook group. Generally speaking, an online inquiry about a case that doesn't reveal any details about a client (such as asking about remedies for a parent who violates terms of a custody agreement by taking the child out of state) doesn't breach attorney-client privilege. By contrast, posting your client's social security number in an online forum and asking if anyone can run a credit check is a hard no. In short, if there are details that you're forbidden from posting online or sharing outside of the attorney-client relationship, don't input them into ChatGPT. As with all new technology, common sense still applies.

FAQ: Can I use the results of ChatGPT and court filings?

You can, but if you don't exercise some due diligence, you put yourself at risk. While a strong starting point for research and issue-spotting, ChatGPT results may not always be accurate enough to plop right into a brief without doing some follow up research. But realize, this isn't a flaw that is unique to ChatGPT. After all, you

wouldn't string cite case annotations from the most reputable legal treatise without first reading the cases, so why would you simply cut and paste ChatGPT output into a legal brief or memo? If there is one thing that law school actually did teach us, it's that it is never a sound practice to use any secondary legal authority, no matter the source, without additional research or review.

FAQ: Do ethics rules foreclose use of ChatGPT?

No. In fact, ethics provide some rough guidance on responsible use of new technologies like ChatGPT. Under ABA Model Rule 1.1 and in the states that have adopted the Rule, lawyers have an ethical obligation to stay abreast of the risks and benefits of emerging technology. That means that lawyers should take proactive steps to learn about new tools like ChatGPT that can help clients. ABA Ethics Opinion 08-451 also allows lawyers to outsource work to non-lawyers (including automated or tech solutions) provided that they adequately supervise the work and protect confidential information.

As a solo or small firm practitioner, consider the emergence and evolution of ChatGPT as an opportunity to embrace technology in your practice and better serve your clients.

¹ Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 37 CFR Part 202, 2023-05321.pdf (federalregister.gov).

² Ibid.

Summer Ally Tip Jar BILLING SOFTWARE

Good billing and collection practices are the lifeblood of a law firm of any size or specialty. What you charge for your time and how you collect your fees also carry certain ethical obligations. Along with addressing duties regarding communicating the basis or rate of fees and expenses with the client, MRPC 1.5 provides guidance on the reasonableness of fees. A reasonable fee is an honest one. So, before sending that bill, consider whether legal software that can accurately capture your time and properly generate your bills may be right for your firm.

Law firms differ from other businesses because they must track hours, apply retainer funds, and comply with state rules for IOLTA accounts. As such, sophisticated billing software is essential to accurately record time and create bills, so you can get paid. If you aren't using billing software or are thinking about upgrading your current billing system, consider these options:

For the small firm – Small firms are watching their wallet. Lawyers at small firms are also on the road a lot. So a cost-effective option with the ability to track time through an app when away from the office is important. TimeSolv, Smokeball, and CASEpeer are some good options for a small firm.

For the growing firm – For the firm focused on growing its book of business, software with client tools can be a great resource. Clio offers a client intake tool allowing its user to schedule client consultations and perform conflict checks. CARET Legal has a client portal making communicating with clients easy and secure.

For the firm using QuickBooks – If your firm uses QuickBooks, consider software that integrates well to streamline your billing processes. MyCase, Filevine, and SmartAdvocate allow you to track time and invoice clients, so they can pay online.



Interested in more billing tips? Register for AttPro's August webinar, **Paid in Full: Tips for Ethical Billing & Avoiding Fee Disputes with Clients**, at <https://attorneyprotective.com/august-2023-webinar>. Join speakers Erin McCartney, J.D. and Erik Crep, J.D. as they discuss legal billing tips that can help your firm establish more efficient billing processes to help you get paid and avoid potential fee disputes down the road.



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