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ABA Addresses Lawyer Generative AI Use: Key Takeaways from ABA's Latest Ethics Opinion

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The American Bar Association ("ABA") recently issued Formal Opinion 512, providing essential guidance for lawyers and law firms using Generative AI ("GAI") tools. As we have written about previously, when lawyers employ GAI tools we must do so with ethics at the forefront. As technology continues to evolve, it is crucial for legal professionals to understand and comply with their ethical obligations so the ABA has spoken on the issues that it highlights for consideration.

Competence and Understanding

The ABA emphasizes that lawyers must maintain a "reasonable understanding" of the capabilities and limitations of GAI tools when they are used. This includes staying informed about technological advancements and seeking expert advice when necessary. Regular training and education are vital to ensure competence in using these tools effectively. The opinion shows a preference for legal specific GAI tools over general GAI tools, and regardless, encourages lawyers to read and understand the terms of use, privacy policies, and related contractual terms of any GAI that they use.

Confidentiality and Data Security

Lawyers know that protecting client information is paramount, and this opinion reminds lawyers that this should be top of mind when employing GAI tools. Lawyers must ensure that GAI tools have robust security measures and comply with data protection standards. It is essential to vet service providers and establish clear policies for handling sensitive information within GAI platforms. The opinion highlights that self-learning GAI tools may disclose information relating to the representation to persons outside the firm who are using the same GAI tool.

Client Communication and Consent

The ABA takes the position that a lawyer "must consider" whether they have a duty to disclose GAI use to their client, and concludes that lawyers "may tell clients how they employ GAI tools." The opinion acknowledges that "[t]he facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool." The opinion explains that there are some instances when disclosing GAI use and obtaining informed consent are required.

Professional Judgment and Supervision

Lawyers cannot rely solely on GAI for professional judgment tasks. They must critically assess AI-generated content and verify its accuracy. Supervision of non-lawyer staff using GAI tools is also essential to ensure compliance with ethical standards.

Candor Toward the Tribunal

Lawyers must make true representations to courts. While judges' AI governance can vary judge-by-judge, lawyers must make appropriate disclosures when required.

Fee Arrangements

When using GAI tools, lawyers must charge reasonable fees consistent with the time spent and the value provided. Transparency in billing practices related to the use of these tools is crucial.

The ABA opinion recognizes that GAI tools offer significant benefits, but they also pose ethical challenges. This tension is unavoidable unless lawyers ignore GAI altogether, but that itself would eventually present an ethical conundrum. Lawyers must navigate these challenges by staying informed, protecting client information, communicating transparently, and exercising professional judgment. By doing so, they can leverage GAI tools effectively while upholding their ethical responsibilities.

For more detailed information, you can refer to the full ABA Formal Opinion 512 here.

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