Must a Lawyer Disclose Generative AI Use to Their Client? It Depends, but the Answer is Getting Clearer.

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In a recently published ABA ethics opinion, the American Bar Association 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." This "facts and circumstances" approach is a moderate and neutral stance taken by the ABA, especially in light of the fact that there is somewhat of a split in authority on this issue among state rules. Some states have taken the stance that as long as a lawyer is not disclosing confidential information, they are "not required to obtain a client's informed consent." Whereas other states have staked out a much more cautious approach, stating that "[t]he lawyer should consider disclosure to their client that they intend to use generative AI." Many states have not weighed in on this issue.

At first glance this split in authority across jurisdictions appears inconsistent and disorganized. So does this mean that if a lawyer is licensed in California and Florida and practices in both places that the lawyer must disclose GAI use to clients in one jurisdiction but not the other? But when this wrinkle in legal ethics is considered in the grand scheme of the history of technological development, this outcome is not surprising. Whereas in 2024 a lawyer would not even consider consulting with a client prior to using Microsoft Word or e-mail, there probably was a time in the early adoption of these technologies where lawyers would have done so. As GAI becomes more ubiquitous in the practice of law, its use will become like that of Microsoft Word or e-mail, and such considerations about whether to disclose its use will fall away as the ethics opinions adapt to this reality.

That will happen relatively quickly compared to past waves of technological advancement. ChatGPT is widely recognized as the fastest-growing consumer internet app of all time after its launch, reaching an impressive 100 million monthly users in just two months. GAI's use in law will be predictably slower, with one judge having observed that the intersection of GAI and the law, and questions about how lawyers adapt, is "very hard when the target is moving so quickly," and with "old, slow people making the decisions." But still, it is becoming so widespread in its use that even risk averse and cautious lawyers cannot avoid GAI for long.

In the meantime, the ABA ethics opinion provides some more nuance, and some clarity, in certain situations, by explaining:

- “Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client’s outside counsel guidelines.”
- “There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client. For example, as discussed in the previous section, clients would need to be informed in advance and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool. Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer’s fee.”

Ultimately, the ABA “facts and circumstances” approach is not an absolute rule, and it even acknowledges that “[i]t is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI.”

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