The Ethics of Using Generative AI In Environmental Law

By **Ahlia Bethea and Pamela Esterman** (August 28, 2024)

The rapid emergence of generative artificial intelligence tools is challenging environmental lawyers, consultants and government agencies to determine when and how these tools can be responsibly integrated into their practices.

Generative AI can produce new content — including text, images, audio, video and software code — in response to user prompts and questions.[1] But to maintain high ethical standards, it is necessary for lawyers to understand the nuances of this evolving technology.

The American Bar Association's Formal Opinion 512, issued in July, underscores this necessity by providing guidance on how to navigate the ethical responsibilities associated with using AI tools.[2]

This article examines the ethical implications of generative AI in the practice of environmental law, and explores both the challenges and opportunities it presents.

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Overview

Recent developments, including the 2022 release of OpenAI's generative AI software, ChatGPT, have enhanced AI's capabilities.[3] The ABA has recognized that "2023 represented a tectonic shift in the use of Artificial Intelligence in all facets of life, including legal practice."[4]

In response, bar associations, including those of New York, Texas, Illinois, Florida and California, as well as judges,[5] have begun addressing the ethical implications of AI through the issuance of formal opinions and guidance.[6]

The ABA's Formal Opinion 512, in particular, provides crucial insight to the ethical use of AI, reinforcing the need for legal professionals to navigate these tools responsibly.

Legal service providers have started to leverage generative AI in enhancing their platforms. For example, one generative AI platform integrates AI into Microsoft Word, allowing practitioners to access publicly available agreements filed with the U.S. Securities and Exchange Commission, as well as internal databases.[7]

Some providers allow lawyers to customize software to mimic their own writing style and learn from documents.[8] Others help lawyers predict case outcomes and streamline legal research,[9] conduct diligence reviews of contracts,[10] provide a virtual receptionist,[11] and even assist with client intake and document automation.[12]

Environmental lawyers can train large language models, or LLMs — a category of generative AI capable of understanding and generating natural language — from scratch. Though this requires massive amounts of high-quality data,[13] it improves user security compared to online generative AI software.[14]

This improved security is prominently advertised by companies that build custom LLMs to

support the legal industry.[15] With LLMs and online generative AI, lawyers can more efficiently prepare reports, summarize documents, perform legal research, and draft and review contracts.[16]

Furthermore, predictive analytics helps lawyers forecast litigation outcomes and aids in their decision-making processes.[17]

Similarly, environmental consultants, retained by environmental lawyers, use generative AI for predictive analysis in environmental impact assessments, compliance monitoring and geospatial analysis.[18] With generative AI, environmental consultants can develop internal documents, perform data gap analysis and automate routine tasks.[19]

Generative AI assists environmental consultants with, among other things, predictive modeling, project management,[20] field sampling, spatial analysis[21] and regulatory compliance. Generative AI is also used by consultants to track climate change-related impacts and sustainability objectives.[22]

Due to its ability to quickly and accurately analyze vast amounts of data, generative AI can serve as a catalyst in helping environmental consultants achieve environmental, social and governance objectives.[23] Generative AI has also been effective in helping regulators like the U.S. Environmental Protection Agency forecast facilities likely to be violating environmental regulations. [24]

Considering the above, lawyers must contemplate informed consent and due diligence when accepting consultant work product generated by AI.

Lawyers must question the scientific accuracy of AI-based work from consultants. Questions should also be asked of consultants as to the source of data underlying their work, and the existence of any potential biases.

With the unyielding growth of AI, ethical and privacy concerns surrounding its use by environmental lawyers and consultants continue to multiply. This being the case, environmental practitioners must do all they can to ensure responsible generative AI utilization.

This includes paying careful attention to data quality, carefully guarding client information and keeping up to date with emerging guidance.

Duty of Competence

Lawyers must develop technological competence in this evolving landscape. ABA Model Rule 1.1 necessitates that lawyers "provide competent representation to a client,"[25] including consideration of "the benefits and risks associated with relevant technology."[26]

Must lawyers only be aware of such technologies, or is there an obligation to actively use them? At a minimum, the duty of competence should obligate practitioners to possess a basic understanding of generative AI tools.[27]

Competence with generative AI extends beyond merely knowing how to use it. It includes understanding the underlying principles, algorithms and data systems that fuel AI predictive decision making.

Furthermore, practitioners should be able to read and understand the terms of service and

conditions of use of any technology they employ, while staying current with vendor updates.[28]

ABA Formal Opinion 512 emphasizes that staying abreast of AI developments is not merely advisable, but necessary to satisfy the standards of competent representation.[29] The opinion recommends that lawyers attend continuing legal education programs on generative AI tools, reinforcing the idea that technological competence extends beyond basic familiarity with AI.

Generative AI and the Lawyer-Client Relationship

Generative AI has the potential to revolutionize the lawyer-client relationship by efficiently identifying client needs.[30] As the technology becomes more integrated into legal practice, practitioners must remain mindful of their ethical obligations.

ABA Model Rule 1.2 requires lawyers to maintain the integrity of the lawyer-client relationship, stating "a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."[31]

Practitioners are advised to obtain a client's informed consent for the use of AI at the outset, clearly explaining its role in the client's case.[32] However, informed consent may not be necessary when AI is used for general legal questions or drafting with anonymous data.

Consultants are similarly advised to obtain informed consent before inputting confidential client information.[33]

Lawyers and consultants must also supervise the use of generative AI in their practice. ABA Model Rule 5.3 requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[34]

This extends to generative AI, requiring practitioners to verify outputs to ensure they meet professional standards. Are lawyers and consultants obligated to review the work of chatbots in the same way they would associates or assistants? Model Rule 5.1[35] and the 2012 amendment to Model Rule 5.3,[36] extending its reach to nonhuman assistance, suggests that supervision should be comparable.

Confidentiality, Data Security and Generative AI

Confidentiality and data security are paramount concerns when it comes to generative AI. Pursuant to ABA Model Rule 1.6, lawyers owe clients a duty of confidentiality: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."[37]

Model Rule 1.6(c) further states that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[38]

Inputting client data into generative AI software exposes information to the threat of use in the software's evolution, helping companies train models to "become better at answering questions and helping users."[39] Formal Opinion 512 supports the view that lawyers

cannot input a client's confidential information into a generative AI platform without informed consent.[40]

The opinion explicitly warns against unauthorized and uninformed uses of client data, advising lawyers to evaluate the risks that the information will be disclosed or accessed by outsiders.[41]

Candor Toward the Tribunal and Generative AI

Lawyers must be wary of "hallucinating" generative AI, where citations and unverified facts are presented as credible sources.[42] ABA Model Rule 3.3 states that lawyers "must not allow the tribunal to be misled by false statements of law or fact."[43] In observance of this, lawyers across the country have been disciplined for using ChatGPT to assist in preparing legal papers filed with a court containing fictitious citations.[44]

The use of generative AI also raises plagiarism concerns. While generative AI develops at a word-by-word level, portions of an existing source could appear in a response.[45]

An important use of generative AI in the legal world is predicative analysis, which directly influences what advice lawyers give their clients. The risk of solely relying on AI for predictions is that the program may produce false results, necessitating precautions to prevent these inaccuracies.

Formal Opinion 512 warns that misleading the tribunal with inaccuracies, even unintentionally, undermines the integrity of legal proceedings.[46] Such misstatements can involve a misrepresentation under 8.4(c), which provides that a lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation."[47]

Moreover, AI bias can affect the outcome of legal analyses and decisions, challenging the impartiality of legal proceedings.[48] Lawyers and consultants should be aware of possible biases and the risks they may create when using generative AI. Since any bias in the data used to train the AI systems can inadvertently be replicated, firms using such tools must establish policies and mechanisms to address potential AI biases.[49]

ABA Model Rule 8.4(g) was adopted in 2016, prohibiting harassment and discrimination by lawyers against protected classes.[50] If AI is predisposed to certain biases, its use can affect the outcome of legal analyses and decisions, and have an impact on the fairness of the judicial system, potentially in violation of Model Rule 8.4(g).[51]

Lawyer Fees and AI

Overuse of AI can compromise the law's integrity, though failing to take advantage of generative AI could call into question the quality of a lawyer's service. As such, generative AI's use presents ethical questions regarding lawyer billing practices.

Model Rule 1.5 states that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[52] Due to improved efficiency with the assistance of generative AI, lawyers may have an ethical obligation to adjust fees in certain circumstances.

Solutions and Best Practices

Environmental lawyers and consultants should adopt a proactive approach to integrating

generative AI ethically and effectively into their practice. Lawyers need to ensure supervision of the use of generative AI by junior lawyers and outside consultants.

Lawyers should consult with cybersecurity or IT professionals to ensure the security of any generative AI system being used. Continuous education and training in generative AI technologies is crucial for practitioners to keep abreast of the evolving technology.

AI advisory groups are already being established by several groups to develop guidelines on security, ethics and education.[53] Additionally, practitioners should conduct regular audits and updates of generative AI systems.

Practitioners should also utilize ethics hotlines, bar association opinions and ethics committees to familiarize themselves with generative AI's ethical implications.[54]

Conclusion

Generative AI can significantly enhance the capabilities of environmental lawyers and consultants by streamlining research, predictive analytics and regulatory compliance. However, it is imperative for lawyers to implement generative AI tools responsibly, to ensure that such tools augment rather than undermine the quality and integrity of legal services.

Lawyers must critically assess generative AI outputs, safeguard client confidentiality and remain accountable for decisions influenced by generative AI to uphold the profession's ethical standards.

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