Generative AI: Your professional obligations

Artificial intelligence (AI) has transformed the way lawyers and paralegals operate their practices and deliver legal services. While AI adoption is not recent, its ongoing impact on the legal profession remains dynamic providing more and more opportunities to streamline complex processes and enhance decision-making. Within this evolving landscape, generative AI has taken centre stage, offering innovative approaches and tools for licensees to deliver efficient legal services.

As licensees embrace this powerful technology, they must fully comprehend how generative AI intersects with their professional obligations to ensure compliance. This resource provides a summary of six key obligations licensees must consider when utilizing generative AI, along with practical steps to support adherence with these standards.

1. Duty of competence
2. Duty of confidentiality
3. Duty of honesty and candour
4. Duty to supervise
5. Duty to charge reasonable fees and disbursements
6. Duty not to mislead the tribunal

1. Duty of competence

- Section 3.1 of the *Rules of Professional Conduct*
- Rule 3.01 of the *Paralegal Rules of Professional Conduct*
- Guideline 6 of the *Paralegal Professional Conduct Guidelines*

What does the duty require?

Licensees must perform any legal services for a client to the standard of a competent licensee as defined in the above Law Society rules. To maintain this standard, licensees should understand and be able to use technology that is relevant to the nature and area of the licensee's practice and responsibilities. Licensees should also understand the benefits and risks associated with any relevant technology integrated or used in their practice.

The required level of technological competence will depend on whether the:

- use or understanding of technology is necessary to the nature and area of the licensee's practice and responsibilities, and
- relevant technology is reasonably available to the licensee considering such factors as the licensee's or firm's practice areas, the geographic location of the licensee's or firm's practice, and clients' requirements.

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How does using generative AI impact this duty?

Before using generative AI, licensees should familiarize themselves with its usage, understand its capabilities and limitations, and identify the potential risks associated with its application.

One of the unique powers of generative AI is that it can create new content from scratch, whether it be words, images, or sounds. If a generative AI tool does not have sufficient data to answer a prompt, it may fabricate or hallucinate information. This means that AI-generated content may not be true or reliable. Licensees must, therefore, take steps to ensure the accuracy of AI-generated information to maintain the required standard of competence.

Practice tips

1. Recognize that generative AI is a valuable tool but is not a substitute for exercising your own professional judgement. Ensure you take the steps necessary to critically analyze and understand the unique complexities of your client's matter and provide tailored strategic advice.

2. Take the time to understand how generative AI works, including its capabilities, limitations, and any standards or applicable terms of use. For example, OpenAI's Usage Policies explicitly note that users should not provide tailored legal advice without review by a qualified professional and disclosure of the use of AI assistance and its potential limitations.

3. **Always** independently verify any information produced by generative AI that you intend to rely on. The verification process should be completed by a human being, not the AI system itself.

4. To help build, maintain, or enhance your technological competence, consider reviewing the free information, training videos, and tools on the Law Society's Technology Resource Centre.

2. Duty of confidentiality

- Section 3.3 of the *Rules of Professional Conduct*
- Rule 3.03 of the *Paralegal Rules of Professional Conduct*
- Guideline 8 of the *Paralegal Professional Conduct Guidelines*

What does the duty require?

Licensees must hold in strict confidence all information concerning the business and affairs of their clients, including privileged communications. Licensees also have legal obligations to protect their clients' privacy rights and must adhere to provincial and federal privacy laws and regulations.

How does using generative AI impact this duty?

Licensees must be mindful of what information they input or upload into a generative AI system. Depending on the AI tool used, this information can easily find its way into the public domain resulting in a potential breach of the licensee's duty of confidentiality. For example, uploading a factum for refinement or an agreement for proofreading into ChatGPT means the content of that document is now information available for the AI engine which could be used to train that engine for other purposes.

Practice tips

1. Review the terms of use for the generative AI technology you wish to employ. Ensure you understand the risks of using this technology and determine how it utilizes inputs. Many AI systems use these inputs to train or improve the AI tool.

2. Where the generative AI system lacks appropriate confidentiality, security, and retention safeguards, **do not** input confidential, privileged, proprietary, or potentially identifying client information in the system.

3. Carefully consider what information needs to be provided in the generative AI system and redact any identifying, sensitive, or confidential information. If confidentiality or privilege cannot be adequately protected by anonymizing client information, explain the potential risks to your client and obtain your client's informed consent **before** using the tool.

3. Duty of honesty and candour

- Rule 3.2-2 of the *Rules of Professional Conduct*
- Rule 3.02 of the *Paralegal Rules of Professional Conduct*
- Sections 1 to 3 of Guideline 7 of the *Paralegal Professional Conduct Guidelines*

What does the duty require?

Licensees have a duty of honesty and candour to all clients on matters relevant to their retainer. This duty requires that licensees inform clients of information known to them that may impact the client's interests in the matter.

How does using generative AI impact this duty?

With respect to the integration or use of generative AI, compliance with this duty will depend on several factors including:

- The generative AI technology used and the specific terms of use
- How and for what purpose the generative AI technology will be used in a client matter
- Whether the generative AI technology could impact the provision of legal services or outcomes
- Whether the generative AI technology will impact the cost of legal services provided
- The protocols and procedures put in place by the generative AI vendor and the law or legal services firm to minimize risk and ensure compliance with the Law Society's rules and by-laws.

Where the generative AI technology is relevant to the legal services provided and may impact the client's interests or outcome of the matter, or where there is concern about the risks associated with the generative AI technology, licensees should inform clients about the use of such technology. In these situations, licensees should be prepared to explain to clients how they use the technology in their matter, any risks associated with same, and what steps the licensee is taking to mitigate same.

Practice tips

1. Review the list of factors above and the circumstances of each client matter and consider if you should disclose the use of generative AI to clients where you intend to use such technology to provide legal services in their matter.

2. Where disclosure is necessary, licensees should be prepared to provide information to clients about the benefits and risks of using generative AI technology, including any risks related to breaches of confidentiality.

3. If using generative AI chatbots, licensees should work with the AI vendor and IT specialists to ensure appropriate safeguards have been employed to avoid misunderstandings, misinformation, and miscommunications with clients.

4. Duty to supervise

- Sections 6.1 and 6.2 of the *Rules of Professional Conduct*
- Rule 3.02 of the *Paralegal Rules of Professional Conduct*
- Sections 1 to 3 of Guideline 7 of the *Paralegal Professional Conduct Guidelines*

What does the duty require?

Licensees may delegate certain tasks to students, law clerks, junior licensees, and non-licensee employees to optimize their time and enhance the delivery of legal services. Where tasks are delegated, licensees remain responsible for all services rendered and all communications by and prepared by their employees. The extent of supervision required will depend on the task and the experience of the employee.

How does using generative AI impact this duty?

Using generative AI tools is akin to receiving assistance from a non-licensee employee. As with other non-licensee employees, licensees must properly delegate tasks and functions to the AI tool and should validate or confirm the accuracy and reliability of AI-generated information. In addition, licensees should provide clear guidelines to all employees on how generative AI is to be used in the workplace. This may include:

- Providing relevant training to employees on the use of any generative technology, including its limitations, potential biases, and ethical pitfalls.
- Specifying the permissible contexts for using generative AI and identifying what information should and should not be inputted into a generative AI system.

Practice tips

1. Generative AI should not be relied on to perform duties only a licensee can perform.
2. If you have employees (licensees or non-licensees) you should develop firm policies on the appropriate use of generative AI. For example, you may ask any students or junior associates to put an AI watermark on AI-generated material they submit to you for feedback.
3. Regularly review AI-generated content used in materials produced by employees by implementing a process to verify accuracy and compliance with firm policies and your professional obligations.
4. Inform employees on how the generative AI system processes sensitive information, stressing the need to protect client confidentiality and privileged communications.

5. Duty to charge reasonable fees and disbursements

- Section 3.6 of the *Rules of Professional Conduct*
- Rule 5.01 of the *Paralegal Rules of Professional Conduct*
- Guideline 13 of the *Paralegal Professional Conduct Guidelines*

What does the duty require?

Licensees can charge clients for legal fees and disbursements provided the amount charged is fair, reasonable, and has been disclosed to the client in a timely manner. What is fair and reasonable will depend on several factors identified in the above Law Society rules and guidelines.

How does using generative AI impact this duty?

Leveraging generative AI for legal services may yield long-term cost savings for both clients and licensees. However, whether a licensee can pass on the cost of using generative AI or other technology to a client as a disbursement depends on the specific circumstances. An individualized assessment should be conducted to determine the feasibility and appropriateness of allocating such costs.

Licensees are prohibited from charging hidden fees. Accordingly, licensees who elect to pass on generative AI usage costs to clients as disbursements must also ensure the disbursement is:

- fair and reasonable in the circumstances
- disclosed to the client in a timely fashion, and
- billed at its actual cost rather than an estimated cost.

Before charging clients for generative AI usage, consider the following questions in the context of your fiduciary relationship and professional obligations:

- Will you charge clients for time spent reviewing and validating AI-generated content? If so, consider how this impacts fee estimates and the overall cost of legal services. Are these charges fair and reasonable in the specific context?

- Does your response to the previous question require that you inform the client about your or your firm's usage of generative AI technology, including the associated risks and costs?

Practice tips

1. Ensure that any disbursement charged is clearly and openly disclosed to the client in a timely manner.

2. Provide itemized statements of account that break down all fees and charges, including AI-related costs. You should also be ready to explain the basis of any AI-related disbursements charged to the client particularly if the client might not reasonably be expected to anticipate such charges.

3. If something unusual or unforeseen occurs that substantially affects the amounts charged, you should provide the client with an immediate explanation. This may include, for example, if a generative AI tool produces an incorrect or faulty result that you relied upon, leading to additional work.

6. Duty not to mislead the tribunal

- Section 5.1 of the *Rules of Professional Conduct*
- Rule 4.01 of the *Paralegal Rules of Professional Conduct*
- Guideline 12 of the *Paralegal Professional Conduct Guidelines*

What does the duty require?

When acting as an advocate, licensees have a duty not to mislead the tribunal. Licensees must not knowingly attempt to deceive the tribunal or influence the course of justice by offering false evidence, misstate facts or law, or otherwise assist in any illegal conduct. Licensees are also prohibited from misstating the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or other legal authority.

How does using generative AI impact this duty?

Licensees should be aware of the increasing integration of generative AI within the Ontario court system and familiarize themselves with any official court notices or guidelines concerning the utilization of generative AI in proceedings. Staying proactive in monitoring these directives ensures you are well-equipped to adapt to the changing dynamics and leverage generative AI tools responsibly in your practice.

a. Ontario Court

As of the date of this resource, no Ontario courts or tribunals have issued guidance on the use of generative AI in proceedings. There have, however, been a few notable cases identifying some of the benefits and risks associated with licensees relying on generative AI technology to advocate for their clients. These cases shed light on both the potential advantages and pitfalls of which licensees must be aware.

- *Floryan v. Luke et. al.* (2023 ONSC 5108)
- *Cass v. 1410088 Ontario Inc.* (2019 ONSC 6959)
- *Drummond v. The Cadillac Fairview Corp. Ltd.* (2018 ONSC 5350)

b. Federal Court

On December 20, 2023, the Federal Court of Canada issued the below guidelines and notice on the use of AI by both the court and parties. Among other things, the Federal Court notice requires litigants to inform the court and other parties if they have used AI to create or generate new content in preparing a document filed with the court. This information must be shared in writing in the first paragraph of each such document submitted. The Federal Court also urges caution when submitting documents that contain legal references or analytics that were generated by AI, noting it is crucial to use only well-recognized and reliable sources.

- Interim Principles and Guidelines on the Court's Use of Artificial Intelligence
- Notice to the Parties and the Profession: The Use of Artificial Intelligence in Court Proceedings

Practice tips

1. Comply with any tribunal guidelines or notices requiring the disclosure of generative AI use in court proceedings. Ensure all staff are aware of this information and are properly trained on when to use and not to use generative AI for litigation matters, and what steps they need to take to ensure compliance with court directives.

2. Thoroughly validate any content generated by AI systems before presenting it to the tribunal to ensure that AI-generated evidence, cases, or arguments are accurate and reliable. Keep a record of the steps you took to confirm the accuracy of this information.

3. Maintain detailed records of prompts, data sources, and any assumptions you made when using generative AI as evidence of your commitment to transparency and compliance with your obligations.