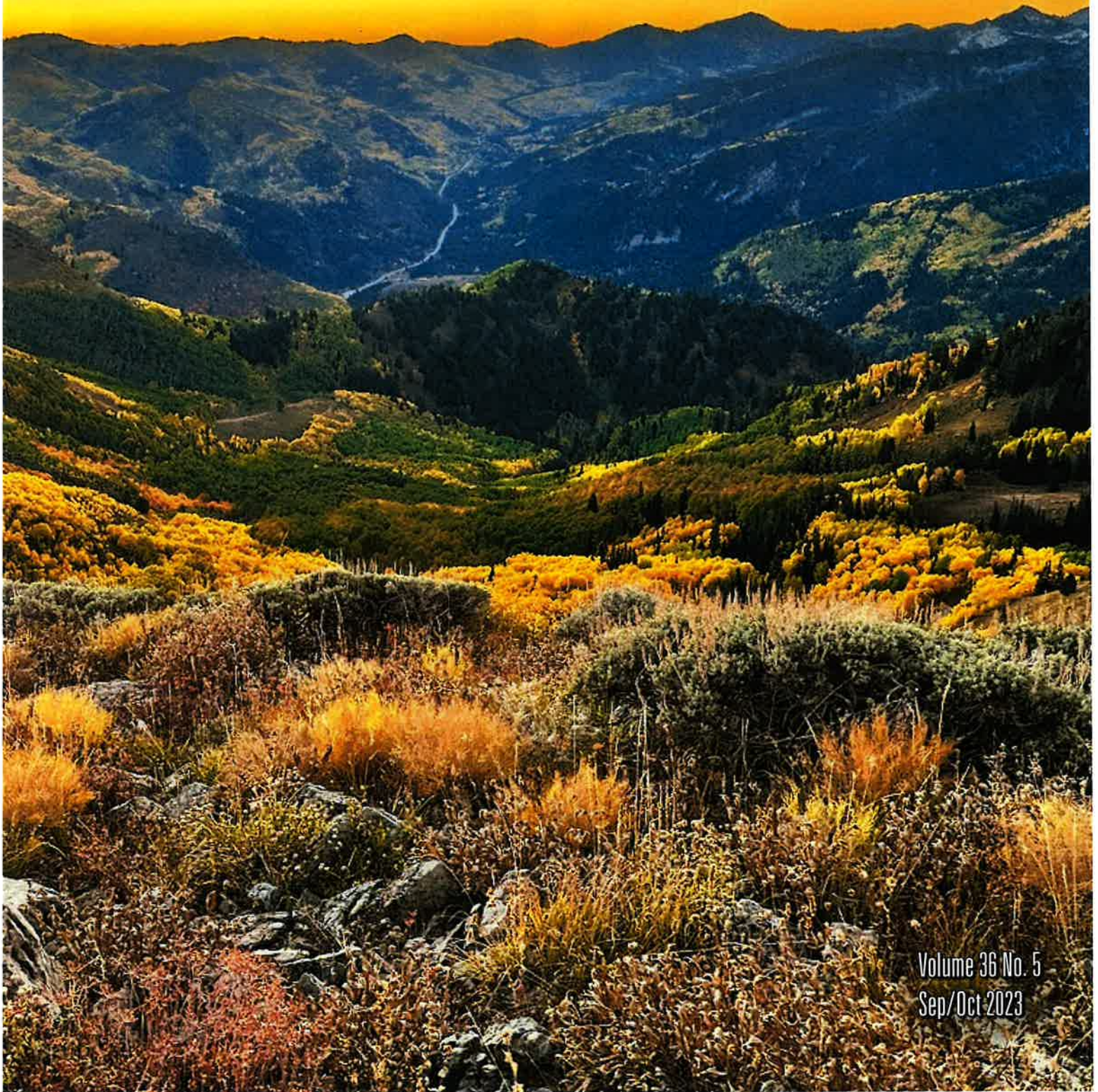


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Artificial Intelligence Applications and the Rules of Professional Conduct

by Romaine C. Marshall and Gregory Cohen

Last November's arrival of generative artificial intelligence (AI) via ChatGPT and the multiple chatbots that followed has ushered in a global tidal wave of proposed laws and regulations focused on safety, reliability, and other risks. In addition, endless blueprints, white papers, and "studies" from the private sector have ensued, many predicting the myriad ways AI will accelerate digital transformation for industries that collect, maintain, and store data, especially personally identifiable and sensitive information.

Readiness for AI's promise or peril will be challenging. Utah is more ready than the majority of other states given its progressive stance on data innovation, privacy, and security legislation. Within the last five years, Utah has enacted the Electronic Information or Data Privacy Act (2019), the Cybersecurity Affirmative Defense Act (2021), the Consumer Privacy Act (2022), and Decentralized Autonomous Organization Act (2023). It stands to reason that AI legislation is on Utah's horizon.

The Utah State Bar has issued guidance for the use of AI. See Beth Kennedy, *Using ChatGPT in Our Practices: Ethical Considerations*, UTAHBAR, <https://www.utahbar.org/bar-issues-ethics-guidance-on-chatgpt-and-artificial-intelligence/> (May 31, 2023). Indeed, we have a responsibility to adhere to the Utah Rules of Professional Conduct (Rules) that govern the practice of law and interaction with clients. The burgeoning use of AI intersects with and implicates the Rules in a variety of ways. This article will discuss several issues that attorneys need to be cognizant of as they consider integrating AI applications into their practice.

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A Cautionary Tale

Attorney Steven Schwartz was handling a tort claim on behalf of a passenger allegedly injured on an Avianca Airlines flight to Kennedy Airport in New York. Schwartz initially filed the complaint in state court, and Avianca removed it to federal court and sought dismissal based on the statute of limitations. Because Avianca had previously filed for bankruptcy, Schwartz attempted to demonstrate that under the Montreal Convention, which governs international flights, the bankruptcy stayed the running of the statute of limitations.

Schwartz used ChatGPT to draft his brief in opposition to Avianca's motion to dismiss. Unbeknownst to Schwartz at the time, ChatGPT fabricated fictitious cases that it cited in the draft brief that it had written for Schwartz. Schwartz filed the brief without verifying the case law or the citations. Avianca's counsel responded that it was unable to locate the cases and expressed concern that the cited case law was not real. Instead of verifying the previously cited case law using more traditional methods, Schwartz went back to ChatGPT and asked it if the cases were real and to provide copies of them and ChatGPT obliged with fictitious snippets of the purported cases that it had previously cited.

Ultimately, following an Order to Show Cause, Schwartz was forced to admit to the court that he used ChatGPT to draft the brief, that he hadn't verified the case law cited in the brief, that the cases cited in the brief did not actually exist, and that he was unable to cite any case law that supported his motion to oppose dismissal.

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Schwartz initially acknowledged that he had “consulted” with ChatGPT for research without acknowledging that it was his only source of research but he later admitted that it was his sole source of “research” and that he was completely unaware that ChatGPT could completely make up and fabricate the content that it generates.

Schwartz and his firm were fined \$5,000 by the judge handling the case. As their situation unfolded, it made national news and they were the subject of much derision in the legal press and on social media. The significant professional and personal embarrassment that Schwartz, his colleagues, and his firm experienced over the matter was likely significantly worse than the sanctions imposed by the court.

What Are Generative AI Applications?

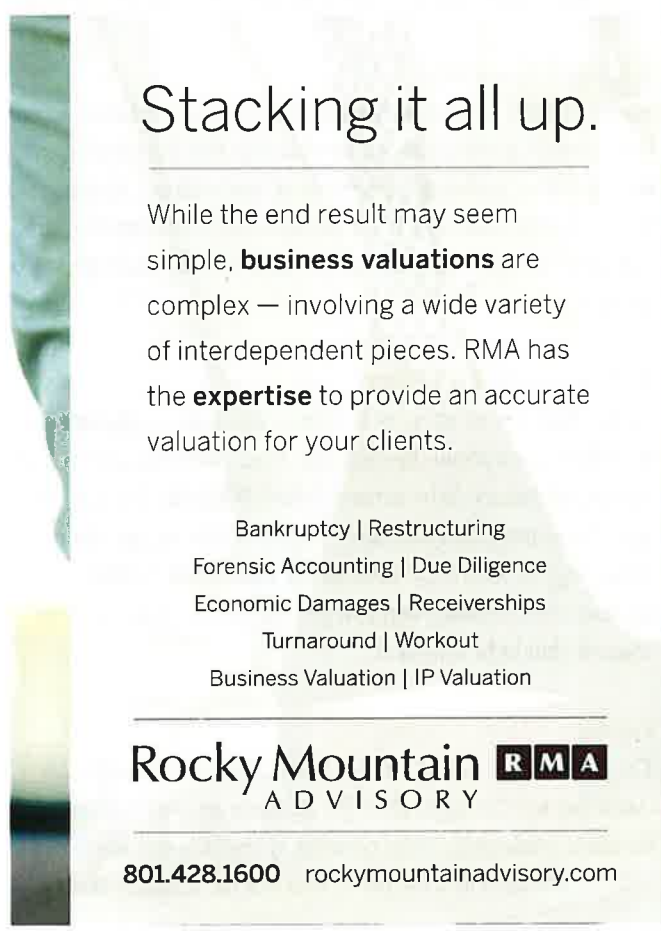
Generative AI applications are a type of artificial intelligence system designed to generate new content, such as text, images, audio, or video, in response to prompts submitted by the user. Unlike other AI systems that may focus on pattern recognition or classification, generative AI applications have the capability to create new and original content that closely resembles human-created content remarkably closely.

Generative AI applications utilize deep learning models to generate content that closely matches the patterns and styles observed in the vast pools of training data on which they’ve been trained. These applications have remarkable abilities to generate content that appears authentic, authoritative, and accurate. Generative AI models, however, lack actual cognitive understanding and the ability to accurately assess the accuracy of their content. As a result, the content may not be correct or even factual. They can also produce content that is biased or inappropriate.

Companies have begun introducing AI applications to be used by attorneys. While these applications may perform many of the same functions and have similar features as generative AI applications, these products are specifically geared towards attorneys’ needs and are outside of the scope of this article.

Utah Rules of Professional Conduct

While the Rules do not specifically address, restrict, or prohibit the use of any specific technology in the practice of law, the use of generative AI applications intersects and implicates several attorney obligations under the Rules in ways that attorneys may not expect.




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Client Confidentiality

Attorneys have an obligation to maintain client confidentiality under Rule 1.6 of the Rules. Rule 1.6 emphasizes the duty of attorneys to protect client confidences and secrets, which encompasses any information related to the representation, regardless of the source or nature of the information.

Generative AI applications require users to submit prompts that the application responds to in order to generate content. Generative AI applications generally store and retain the prompts entered by users and utilize those prompts to further refine their algorithms and for potential use in generating future content. This raises several issues for attorneys related to client confidentiality such as:

Inappropriate Disclosure

Attorneys should never provide details about a client or the firm when crafting and submitting prompts in order to avoid inadvertently disclosing confidential client information. There is no privilege or other confidentiality that arises between the attorney and the generative AI application, so there is no protection provided to or for client information disclosed as part of a prompt. The generative AI application has no further duty to protect the information disclosed to it in the prompts it receives, so any information disclosed to it may constitute an inappropriate disclosure under Rule 1.6.

Data Breaches

Generative AI applications are at risk of data breaches to the same extent as any other software. Any information submitted to a generative AI application is subject to such risks, including the risk that any confidential client information submitted as a prompt could potentially be disclosed in a data breach.

With these concerns in mind, attorneys should never include any sensitive, privileged, or client confidential information as a prompt submitted to a generative AI application.

Competence

Attorneys have an obligation under Rule 1.1 of the Rules to provide competent representation with the “knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” While generative AI applications can provide valuable assistance with research and drafting, an attorney’s obligation under Rule 1.1 requires that attorneys be aware of the following issues and concerns:

Familiarity with AI Limitations

Attorneys should have a clear understanding of the capabilities and limitations of generative AI applications. For instance, AI models are trained on large datasets, which may not be current.

As a result, the content generated by a generative AI application may not be up-to-date or accurate. Additionally, lacking true cognition or comprehension, a generative AI application may not generate a complete or comprehensive response that addresses all of the salient issues. Finally, as the story above demonstrates, a generative AI application has a propensity to manufacture information in responding to the prompt it receives, especially if it does not have any authentic or accurate data to include in the response. Called “hallucinations,” the fabricated information is often responsive to the question that was asked and authoritative sounding, so it may be difficult to recognize that the information in the response may be entirely made up without understanding that this is a recognized and acknowledged limitation of generative AI applications generally.

Verification and Research

Attorneys have a duty to verify the accuracy and relevancy of the generative AI application generated content. This includes conducting additional research using credible and reliable legal sources to verify the accuracy of all cited cases, that the cited cases support the proposition for which they’ve been cited, and that the cited cases remain good law. While attorneys may use a generative AI application as a tool to expedite or enhance their drafting, they should never exclusively rely on the drafting generated by a generative AI application for any purpose.

Technical Knowledge

Attorneys must be knowledgeable about and remain current on the technical capabilities of all technology that they employ in their practice, including generative AI applications. Attorneys have a fundamental duty to ensure that the technology they are using can competently perform the functions for which they are using it.

Client Communication

Under Rule 1.4, an attorney is obligated to reasonably consult with their client about the means by which the objectives of the representation are to be accomplished. While the Rules do not specifically mention generative AI applications or any other technology or tool, they establish the framework for the attorney-client relationship and provide guidance when client consent should be obtained.

Fulfilling Client Expectations

The attorney’s obligation under Rule 1.4 includes reasonably consulting with the client about the means to be used to accomplish the client’s objectives. Some clients may be completely comfortable with the use of AI as a means or tool that the attorney uses to

provide the representation. Other clients may have mistrust or discomfort with AI as a tool. Rule 1.4 requires that an attorney provide sufficient information regarding the representation to fulfill reasonable client expectations for information.

Supervising Other Attorneys

Rule 5.1 states that supervising attorneys have a responsibility to adequately supervise attorneys and non-lawyer personnel for which they are responsible to ensure their compliance with the Rules and other ethical obligations. This duty extends to the use of generative AI applications in the practice of law.

Supervising attorneys must exercise reasonable measures to monitor and oversee the use of generative AI applications by attorneys and staff under their supervision and ensure that it is used in a manner consistent with the Rules and their obligations to their clients.

Sufficient Supervision

To fulfill their supervisory duty, attorneys should provide guidance and training to the attorneys and staff under their supervision regarding the appropriate and responsible use of generative AI applications. This includes providing training regarding the limitations, potential risks, and ethical considerations surrounding the use of generative AI applications. Supervising attorneys should also establish internal procedures and protocols to review and verify the accuracy, relevance, and reliability of the content from generative AI applications to ensure that it is accurate, appropriate, and comprehensive.

Remaining Current with Technology

Supervising attorneys should stay informed regarding the advancements and developments in AI technology and its impact on the practice of law including both generative AI applications and specialized AI applications developed specifically for attorneys. This will enable attorneys to effectively supervise and provide necessary guidance to the attorneys and non-attorney staff under their supervision and properly manage the use of generative AI applications within their office.

Conclusion

AI already shows tremendous promise for use in research, drafting, and performing other tasks that attorneys engage in while practicing law. It is important, however, that attorneys understand the technology they are using, its implications, and its limitations to comply with, and avoid violating, the Rules and their ethical obligations to their clients. Just as ethics and professionalism are valued and emphasized as continuing legal education requirements, one can foresee these expanding to ensure attorneys understand the implications and duties associated with generative AI applications.

***AUTHOR'S NOTE:** The material provided in this article is general in nature and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. This article does not establish an attorney-client relationship.*

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