

LEGAL ETHICS AND THE BOUNDARIES OF AI USE

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QUICK INTRODUCTION

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- LAW FIRM: FOSTER, SWIFT, COLLINS & SMITH, P.C. IN LANSING, MICHIGAN
- MY BACKGROUND: GENERAL BUSINESS; INTELLECTUAL PROPERTY LAW; AND TECHNOLOGY, CYBERSECURITY, & DATA PRIVACY LAW



BACKGROUND ON OUR PROFESSIONAL ETHICS

THE BALANCE BETWEEN AI AND ETHICS

OUTLINE OF PRESENTATION

Ethical Duties Related to Generative AI Use Under the Michigan Rules of Professional Conduct

- **Duty of Competence**
- **Duty of Diligence**
- **Duty of Communication**
- **Duty of Reasonable Fees**
- **Duty of Confidentiality**
- **Candor to the Tribunal**
- **Duty of Supervision**

Duty of Competence

MICHIGAN RULES OF PROFESSIONAL CONDUCT § 1.1:

A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT. A LAWYER SHALL NOT: (A) HANDLE A LEGAL MATTER WHICH THE LAWYER KNOWS OR SHOULD KNOW THAT THE LAWYER IS NOT COMPETENT TO HANDLE, WITHOUT ASSOCIATING WITH A LAWYER WHO IS COMPETENT TO HANDLE IT; (B) HANDLE A LEGAL MATTER WITHOUT PREPARATION ADEQUATE IN THE CIRCUMSTANCES; OR (C) NEGLECT A LEGAL MATTER ENTRUSTED TO THE LAWYER.

Duty of Competence

We have an ethical duty to understand technology that is out there and accessible.

We also have a responsibility to assess if the tool is necessary to effectively and proficiently represent our clients, as well as determine how that use would impact, improve, or harm the service we intend to provide to our clients.

Duty of Diligence

MICHIGAN RULES OF PROFESSIONAL CONDUCT

§ 1.3:

A LAWYER SHALL ACT WITH
REASONABLE DILIGENCE AND
PROMPTNESS IN REPRESENTING
A CLIENT.



Duty of Diligence

Though AI has the ability to make some workflows in the legal profession more efficient, it does not mean AI is not flawed.

Artificial intelligence is susceptible to errors, bias, hallucinations, and being unable to consider a prompt from end-users in a specialized context.

We have a duty to ensure we independently verify resources and authorities cited by AI tools.



Duty of Communication

MICHIGAN RULES OF PROFESSIONAL CONDUCT § 1.4:

(A) A LAWYER SHALL KEEP A CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND COMPLY PROMPTLY WITH REASONABLE REQUESTS FOR INFORMATION. A LAWYER SHALL NOTIFY THE CLIENT PROMPTLY OF ALL SETTLEMENT OFFERS, CASE EVALUATIONS, AND PROPOSED PLEA BARGAINS.

(B) A LAWYER SHALL EXPLAIN A MATTER TO THE EXTENT REASONABLY NECESSARY TO PERMIT THE CLIENT TO MAKE INFORMED DECISIONS REGARDING THE REPRESENTATION.

Duty of Communication


While inquiry and disclosure related to AI utilization is not always mandated, for folks with adverse interests to AI, nondisclosure could erode trust, while inquiry or disclosure could also raise concerns about strategy or judgment. This balance demands situation-specific ethical reasoning, even though disclosure and inquiry are not always mandated.

Duty of Reasonable Fees

MICHIGAN RULES OF PROFESSIONAL CONDUCT § 1.5:

(A) A LAWYER SHALL NOT ENTER INTO AN AGREEMENT FOR, CHARGE, OR COLLECT AN ILLEGAL OR CLEARLY EXCESSIVE FEE. A FEE IS CLEARLY EXCESSIVE WHEN, AFTER A REVIEW OF THE FACTS, A LAWYER OF ORDINARY PRUDENCE WOULD BE LEFT WITH A DEFINITE AND FIRM CONVICTION THAT THE FEE IS IN EXCESS OF A REASONABLE FEE...

(B) WHEN THE LAWYER HAS NOT REGULARLY REPRESENTED THE CLIENT, THE BASIS OR RATE OF THE FEE SHALL BE COMMUNICATED TO THE CLIENT, PREFERABLY IN WRITING, BEFORE OR WITHIN A REASONABLE TIME AFTER COMMENCING THE REPRESENTATION.”



The ethical duty to charge reasonable fees requires attorneys to reflect the cost-saving efficiencies of AI in their billing while avoiding overcharging for work that AI makes faster or less expensive.

Conversely, choosing not to use AI for personal or client-related reasons must also be justified as reasonable if fees escalate, and consistently ignoring AI's benefits could violate professional conduct rules.



Duty of Reasonable Fees

Duty of Confidentiality

MICHIGAN RULES OF PROFESSIONAL CONDUCT § 1.6:

(B) EXCEPT WHEN PERMITTED UNDER [SECTION 1.6(C)], A LAWYER SHALL NOT KNOWINGLY: (1) REVEAL A CONFIDENCE OR SECRET OF A CLIENT; (2) USE A CONFIDENCE OR SECRET OF A CLIENT TO THE DISADVANTAGE OF THE CLIENT; OR (3) USE A CONFIDENCE OR SECRET OF A CLIENT FOR THE ADVANTAGE OF THE LAWYER OR OF A THIRD PERSON, UNLESS THE CLIENT CONSENTS AFTER FULL DISCLOSURE...

(D) A LAWYER SHALL EXERCISE REASONABLE CARE TO PREVENT EMPLOYEES, ASSOCIATES, AND OTHERS WHOSE SERVICES ARE UTILIZED BY THE LAWYER FROM DISCLOSING OR USING CONFIDENCES OR SECRETS OF A CLIENT...

Duty of Confidentiality

The duty of confidentiality poses perhaps the most direct and pressing challenge in the age of AI. Lawyers must protect client information, but using large language models or AI tools with opaque data practices significantly risks inadvertent disclosure and potential ethical violations.

Carefully vetting AI tools, limiting the disclosure of sensitive information, and using secure, controlled systems rather than public platforms is paramount.

Duty of Confidentiality After *United States v. Heppner*

United States v. Heppner

- The U.S. District Court, Southern District of New York, held that documents created through a publicly available generative AI platform were not protected by attorney-client privilege or the work product doctrine, prompting questions regarding confidentiality
- Communications between the defendant and a third-party public AI tool were not directed to be generated by counsel, and therefore not deemed “confidential” in nature



Key Takeaways Post-Heppner

Be extra thoughtful *post-Heppner* about: (a) AI note-takers in attorney & client strategy calls; (b) auto-generated meeting summaries for board meetings; and (c) notifying clients about the risks of using public AI chatbots

Duty of Candor to the Tribunal

MICHIGAN RULES OF PROFESSIONAL CONDUCT § 3.3(a):

A LAWYER SHALL NOT KNOWINGLY: (1) MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A TRIBUNAL OR FAIL TO CORRECT A FALSE STATEMENT OF MATERIAL FACT OR LAW PREVIOUSLY MADE TO THE TRIBUNAL BY THE LAWYER; (2) FAIL TO DISCLOSE TO A TRIBUNAL CONTROLLING LEGAL AUTHORITY IN THE JURISDICTION KNOWN TO THE LAWYER TO BE DIRECTLY ADVERSE TO THE POSITION OF THE CLIENT AND NOT DISCLOSED BY OPPOSING COUNSEL; OR (3) OFFER EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE. IF A LAWYER HAS OFFERED MATERIAL EVIDENCE AND COMES TO KNOW OF ITS FALSITY, THE LAWYER SHALL TAKE REASONABLE REMEDIAL MEASURES, INCLUDING, IF NECESSARY, DISCLOSURE TO THE TRIBUNAL.



Duty of Candor to the Tribunal



This obligation underscores the fact that no matter how advanced AI becomes, ultimate responsibility lies with the lawyer. Recent sanctions imposed on attorneys who submitted fabricated AI-generated citations serve as a cautionary reminder.



Duty of Supervision

MICHIGAN RULES OF PROFESSIONAL CONDUCT § 5.1(b):

A LAWYER HAVING DIRECT SUPERVISORY AUTHORITY OVER ANOTHER LAWYER SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE OTHER LAWYER CONFORMS TO THE RULES OF PROFESSIONAL CONDUCT.

MICHIGAN RULES OF PROFESSIONAL CONDUCT § 5.3(b):

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.



Duty of Supervision

Lawyers have a duty to supervise not only human staff but also the use of AI tools, treating these technologies as fallible members of the legal team.

This means attorneys must carefully review and verify all AI-generated work, just as they would work produced by junior lawyers or support staff.

Our ethics must guide
our principles in the
age of AI – not
necessarily enthusiasm
for innovation

TAKEAWAY

The image features a vibrant blue background with a subtle, repeating pattern of circuit board traces and circular nodes. In the center, a solid black rectangular box with rounded corners contains the text "THANK YOU!" in a large, bold, white, sans-serif font. The text is centered both horizontally and vertically within the black box.

THANK YOU!