

## Practice Resource

# Guidance on Professional Responsibility and Generative AI

## Introduction

Over the last few months, news stories and articles have speculated on the potential for artificial intelligence (AI) tools to change how we practice law. Generative AI, including those powered by large language models (LLMs) such as ChatGPT-4 or Google’s Bard, create new content or data based off of the data it was trained on.

As new tools and software programs are developed, it is anticipated that in the near future more legal professionals and members of the public will gain access to generative AI resources that could assist in the delivery of legal services.

You may already be familiar with, or even be using, AI-powered tools in your practice, such as e-discovery software. You also may be considering whether your firm should be investing in emerging resources, such as generative AI designed specifically for legal practice.

The Law Society of British Columbia cannot endorse any product or tool; however, we can provide information that can help in your consideration of whether or not you want to use generative AI-powered tools in your legal practice and, if so, some professional responsibility considerations. The information provided in this guide is focused on the use of generative AI tools powered by LLMs.

## Key Definitions

**Artificial intelligence (AI):** The capacity of computers or other machines to exhibit or simulate intelligent behaviour; the field of study concerned with this. Abbreviated AI.<sup>1</sup>

**Generative AI:** A type of artificial intelligence that is capable of generating new content, such as images or text, in response to a submitted prompt by learning from a large reference database of examples.<sup>2</sup> Large language models are one form of generative AI.

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<sup>1</sup> *Oxford English Dictionary* sub verbo “artificial intelligence”, online: <[artificial intelligence - Quick search results | Oxford English Dictionary \(oed.com\)](#)>.

<sup>2</sup> *Merriam-Webster Dictionary* sub verbo “generative AI”, online: <[generative AI Definition & Meaning - Merriam-Webster](#)>.

**Large language model (LLM):** A form of generative AI that involves a computer program that uses very large collections of language data in order to understand and produce text in a way that is similar to the way humans do.<sup>3</sup> LLMs are a category of generative AI tools, as not all generative AI tools are built using LLMs. Examples include ChaptGPT-4 and Google’s Bard.

## Professional Responsibility Considerations

### Competence

Before using generative AI in your client work, it is prudent to seek out more information and training on how to use the tool.<sup>4</sup> [Code rule 3.1-2](#) requires that lawyers must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer. [Code rule 3.1-1](#) defines what it means to be a competent lawyer, including:

- considering possible options and developing and advising the client on appropriate courses of action (Code rule 3.3-1(a));
- implementing as each matter requires, the chosen course of action through the application of appropriate skills, including legal research, analysis, and problem solving (Code rule 3.3-1(c)(i), (ii), and (viii));
- communicating at all relevant stages of a matter in a timely and effective manner (Code rule 3.3-1(d));
- performing all functions conscientiously, diligently and in a timely and cost-effective manner (Code rule 3.3-1(e));
- applying intellectual capacity, judgment and deliberation to all functions (Code rule 3.3-1(f));
- pursuing appropriate professional development to maintain and enhance legal knowledge and skills (Code rule 3.3-1(j)); and
- otherwise adapting to changing professional requirements, standards, techniques and practices (Code rule 3.3-1(k)).

If your legal services will include using generative AI to perform tasks, then you will need to be knowledgeable in the application of the technology.<sup>5</sup>

### Confidentiality

Lawyers have a duty to maintain strict client confidentiality with very limited exceptions ([Code](#)

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<sup>3</sup> *Oxford Learner’s Dictionaries* sub verbo “LLM”, online: < [llm noun - Definition, pictures, pronunciation and usage notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.com](#)>.

<sup>4</sup> For a practical guide on how lawyers can use generative AI, see: Daniel Schwarcz and Jonathan H. Choi, “AI Tools for Lawyers: A Practical Guide” (2023) 108 *Minnesota Law Review* Headnotes 1, online: <<https://ssrn.com/abstract=4404017>>.

<sup>5</sup> For more information on the ethical duties that may arise when a lawyer uses AI, see: Amy Salyzyn, “AI and Legal Ethics” in Florian Martin-Bariteau & Teresa Scassa, eds, *Artificial Intelligence and the Law in Canada* (Toronto: LexisNexis Canada, 2021), online: <<https://ssrn.com/abstract=3733952>>.

[rule 3.3-1](#)). Consider carefully what information needs to be supplied to the generative AI tool with a particular attention to client confidential information. Ideally, client confidential information, including any information identifying the client, would be omitted from anything that was supplied to the generative AI tool to maintain client confidentiality.<sup>6</sup>

If redacting the data is not possible, then you could explore whether client consent to use the tool with such information is viable. Any consent obtained from the client must be fully informed and voluntary consent after disclosure in writing or orally with a written record of the communication. [Code rule 1.1-1](#) provides the important definitions for “consent” and “disclosure.” As the lawyer, you will need to be aware of the potential risks to using generative AI tools, and have the ability to assess and properly explain those risks to your client. You need to be confident in your understanding of the generative AI tool to ensure that you have accurately assessed the risks, and that your explanation to the client is sufficient. Among the risks to consider would be whether using a generative AI tool could, in any way, put privilege at risk, including giving rise to potential arguments regarding waiver. The law of privilege in respect of generative AI tools is in an early stage, and is likely to emerge over time. Moreover, as generative AI tools (especially those powered by LLMs) rely on previously inputted information to learn how to produce more accurate answers in the future, the generative AI tool may reuse the confidential information you supply for other purposes over which you may have no control.

If, after careful deliberation, you think it is advisable to seek your client’s consent, you should first disclose to your client all information relevant to your client’s decision in using the generative AI tool, including the potential risks, in sufficient time for your client to make a genuine and independent decision on its use. You should also undertake reasonable steps to ensure that your client understands what you have disclosed.

Issues with maintaining client confidentiality, especially when using publicly accessible and free generative AI tools, may lead your firm to create or purchase its own bespoke AI solutions. A private tool that only uses information provided by the firm might help avoid some of the confidentiality concerns noted above.

### **Honesty and candour**

Similar to a lawyer’s duty to maintain client confidentiality, a lawyer must be honest and candid with their client and must inform the client of all information known to the lawyer that may affect their client’s interests ([Code rule 3.2-2](#)). With this obligation in mind, it is prudent to make your client aware of how you plan to use generative AI tools in your practice, generally, and on their specific file(s). Clients will likely be intrigued and even pleased with the efficiencies that using these tools may provide, but may also have concerns that should be addressed. Again,

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<sup>6</sup> The MIT Computational Law Report suggests a list of principles for lawyers to apply when using generative AI, including the duty of confidentiality. For more information, see: “Task Force on Responsible Use of Generative AI for Law” (2 June 2023), online: *MIT Computational Law Report* <<https://law.mit.edu/ai>>.

consistent with the comprehensive definitions of “disclosure” and “consent”, you should be prepared to explain and answer any questions that your client may have about the use of the generative AI as part of their legal services.

## **Responsibility**

Generative AI tools have been marketed as helpful assistants that can perform tasks on your behalf. Lawyers are required to supervise staff and assistants to whom the lawyer delegates particular tasks and functions ([Code rule 6.1-1](#)). This Code rule also requires a lawyer to review the non-lawyer’s work at sufficiently frequent intervals and to ensure its proper completion. Although [Code rule 6.1-1](#) was intended to cover human-to-human supervision, it provides an important reminder that lawyers are ultimately responsible for all work product they oversee, whether it be produced by non-lawyer staff or technology-based solutions. Generative AI tools can create work product that appears very polished, but be careful to not lose sight of your responsibility to review the content carefully and ensure its accuracy.

## **Information security<sup>7</sup>**

You will also need to be aware of how the information is stored and secured, including any privacy or cybersecurity concerns that arise when selecting a generative AI tool. Using generative AI requires you to consider issues beyond professional responsibility, including any privacy law implications. AI products need to be considered with the same thoroughness that is required when a lawyer chooses other technology or software, including complying with Law Society Rules [10-3 \(Records\)](#) and [10-4 \(Security of records\)](#). Law Society Rule [10-3\(4\)](#) sets out the requirements for when a lawyer uses a storage provider for their records, including that the lawyer must ensure that the storage provider maintains the records securely without accessing or copying the records (except as is necessary to provide the service obtained by the lawyer), allowing unauthorized access to or copying or acquisition of the records, or failing to destroy the records completely and permanently on instructions from the lawyer. Law Society Rule [10-4](#) requires a lawyer to protect all records related to the lawyer's practice and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure, and to notify the Law Society’s Executive Director immediately if the lawyer believes that there has been a loss of control, or improper access of the lawyer’s records, or failure of the third party provider to destroy the records at the lawyer’s instructions.

As discussed in the Confidentiality section, above, some firms might consider whether a private system could help to address some of these information storage and security obligations.

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<sup>7</sup> The Law Society’s Advice Decision-Making Assistant’s page on [lawyer technology](#) compiles several helpful resources on the information security and storage for lawyers and law firms, including the Law Society’s [Cloud Computing Checklist](#).

## Requirements of courts or other decision-makers

Courts in some jurisdictions in Canada, as well as some US states, require lawyers to disclose when generative AI was used to prepare their submissions. Some courts even require not just disclosure that generative AI was used, but how it was used. If you are thinking about using generative AI in your practice, you should check with the court, tribunal, or other relevant decision-maker to verify whether you are required to attribute, and to what degree, your use of generative AI.

## Reasonable fees and disbursements

As a lawyer, you must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion ([Code rule 3.6-1](#)). What is a fair and reasonable fee for work completed by a generative AI tool? If generative AI allows for legal work to be completed in a fraction of the time it would take a lawyer or supervised staff member, what impact will that have on your firm's current billing model?<sup>8</sup> If you want to use generative AI as part of your legal practice, you may want to reflect on how you will bill for its use in accordance with [Code rule 3.6-1](#).

## Plagiarism and copyright

Since generative AI tools are built using data inputs and continue to learn as more information is entered, some commentators have raised concern over copyright infringement of those data sources.<sup>9</sup> These issues fall outside matters upon which Practice Advisors can opine.

## Fraud and deep fakes

Like any other technology, there are data security risks when using generative AI tools. In addition to the common cybersecurity concerns, such as hacking and phishing attempts, there is also the potential use of generative AI to create deep fakes, and the fraud risks posed by the use of the technology in that manner. As a lawyer, you must be on guard against becoming the tool or dupe of an unscrupulous client, or of others ([Code rule 3.2-7](#), commentary [1]), who may use deep fakes to circumvent initial security screenings. You may want to review the [Lawyers Indemnity Fund's steps](#) on how to protect yourself and your firm from cybercrimes including fraud.

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<sup>8</sup> For further discussion on the productivity potential of generative AI, see: Fabrizio Dell'Acqua et al, "Navigating the Jagged Technological Frontier: Field Experimental Evidence of the Effects of AI on Knowledge Worker Productivity and Quality" (2023) Harvard Business School Technology & Operations Mgt. Unit Working Paper No. 24-013, online: <<https://ssrn.com/abstract=4573321>>.

<sup>9</sup> For example, see: Gil Appel, Juliana Neelbauer, and David A Schweidel, "Generative AI has an Intellectual Property Problem" (7 April 2023), online: *Harvard Business Review* <[Generative AI Has an Intellectual Property Problem \(hbr.org\)](#)> or Dylan Walsh, "The legal issues presented by generative AI", (28 August 2023) online: *MIT Management Sloan School* <<https://mitsloan.mit.edu/ideas-made-to-matter/legal-issues-presented-generative-ai>>.

## Bias

Since LLMs are built to predict the next best possible word through the use of large data sets, there is a risk of bias in the results produced by tools such as ChatGPT-4 due to the inherent bias in the data. You should scrutinize any results from generative AI for potential bias in the text it provides you. For example, if you ask a generative AI tool to draft sentencing submissions based on the history of how the sentences in a category of cases has been determined, the generative AI may provide an answer that includes the bias inherent in the case law or data that the generative AI tool was built on.<sup>10</sup>

## Conclusion

The adoption of generative AI tools like ChatGPT-4 presents lawyers with exciting opportunities for efficiency and productivity. However, it also introduces ethical challenges that demand vigilance and adherence to professional responsibilities. By understanding and addressing these challenges, lawyers can harness the power of generative AI in a responsible and ethical manner while upholding the integrity of the legal profession. Staying informed, maintaining transparency, and putting clients' interests first are key to successfully navigating the ethical landscape of generative AI in the practice of law.<sup>11</sup>

## Questions

If you would like to discuss a specific professional responsibility issue regarding generative AI tools, feel welcome to [contact a practice advisor](#).

*Lawyers must exercise their professional judgment respecting the correctness and applicability of the material. The Law Society accepts no responsibility for any errors or omissions and expressly disclaims any such responsibility.*

This resource was prepared in October 2023. The Practice Advice team extends special thanks to Cary Ann Moore, articulated student, for her extensive efforts in the preparation of this resource.

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<sup>10</sup> In preparation of this Practice Resource, Law Society staff asked ChatGPT to draft a resource listing the legal ethical considerations of using a generative AI tool. The response from ChatGPT acknowledged the bias and included the following tips:

“Bias and Fairness:

- Educate lawyers about the potential biases in AI models and the importance of ensuring fairness in legal decision-making.
- Encourage attorneys to be aware of and address any bias that may arise in AI-generated content.”

<sup>11</sup> The text provided in the conclusion to this Practice Resource was generated by ChatGPT on October 12, 2023, and reviewed by Law Society for inclusion in this resource.

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