# ARTIFICIAL INTELLIGENCE AND CIVIL LITIGATION

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It is often said that change is the only constant. That adage certainly holds true for the practice of law, particularly in the realm of technology. Artificial intelligence (AI), including publicly available large language models (LLMs), has sent lawyers and courts scrambling to understand just how to address these tools that are now being used throughout the legal industry. These efforts are continually being challenged due to the rapid rate of change and advancement in what these products can do, and where and how they can be applied.

In the few iterations that occurred between the introduction of ChatGPT in 2022[1] and early 2023, the model "learned" enough not only to pass the Uniform Bar Exam but to score in the top ten percent.[2] This sent shockwaves through the legal profession, causing many to realize that AI was something that can—and will—be used in the legal world. But no one quite knew how to address this novel technology. Questions surrounding the use of AI arose more quickly than they could be addressed. How can lawyers satisfy their professional conduct requirements for competency and confidentiality? How does AI affect discovery? How much lawyer oversight is required? Does the use of AI change what is considered a reasonable fee for services?

Rule 1.1 of the Virginia Rules of Professional Conduct requires "[a] lawyer [to] provide competent representation to a client," which includes "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[3] Beginning in 2016, this has included the requirement that Virginia lawyers pay attention "to the benefits and risks associated with relevant technology."[4] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing to how to use email or

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[1] Bernard Marr, *A Short History of ChatGPT: How We Got to Where We Are Today*, Forbes (May 19, 2023), https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/.

[2] Kevin Roose, *GPT-4 Is Exciting and Scary*, N.Y. Times (Mar. 15, 2023), https://www.nytimes.com/2023/03/15/technology/gpt-4-artificial-intelligence-openai.html.

[3] Va. R. Prof'l Conduct R. 1.1; *see also* Model Rules of Prof'l Conduct R. 1.1.

[4] Va. R. Prof'l Conduct R. 1.1, cmt. 6 (amended Mar. 1, 2016); *see also* Model Rules of Prof'l Conduct R. 1.1, cmt. 8.

create an electronic document."[5] Now, that issue arguably extends to AI—even if lawyers elect to avoid its use in their practice.[6]

While ranging from the comical[7] to the concerning,[8] the use of AI and LLMs in the practice of law is undoubtedly here to stay, and lawyers have the duty to educate themselves accordingly. "Perhaps the most fundamental skill" for Virginia lawyers "consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."[9] "Although there is no single right way to keep up with [AI] developments,"[10] this article aims to create a better understanding of how AI (and in particular, LLMs) can and should be used in the practice of law in Virginia.

## I.   What Is AI?

There is no single definition of artificial intelligence.[11] The term *generative AI* is often used as catch-all to describe all forms of AI available today. However, what most lawyers refer to as generative AI are large language models, or LLMs, and understanding the basic differences between the two is a critical starting point. This article is not designed to be an in-depth analysis of the various forms of generative AI and machine learning, their coding, or how they learn. But it does aim at clarifying proper terminology and some emerging issues in the programming that lawyers use in practice.

"Generative AI is a form of artificial intelligence that creates new text, images, video, audio, or other content based on the vast amounts of data that the generative model was trained on."[12] Generative AI is any type of AI that can generate digital content.[13] LLMs, on the other hand, "are a form of AI that focuses on understanding text inputs … and creating human-like text based on a given

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[5] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 3 (2017).

[6] ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 512, at 3 (2024) [hereinafter ABA Formal Op. 512] ("But even in the absence of an expectation for lawyers to use [AI] tools as a matter of course, lawyers should become aware of the [AI] tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.").

[7] Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. Times (Feb. 9, 2021), https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.

[8] *See, e.g.*, Bob Ambrogi, *Not Again! Two More Cases, Just This Week, of Hallucinated Citations in Court Filings Leading to Sanctions*, LawSites (Feb. 22, 2024), https://www.lawnext.com/2024/02/not-again-two-more-cases-just-this-week-of-hallucinated-citations-in-court-filings-leading-to-sanctions.html; Bernie Pazanowski, *Morgan & Morgan Lawyers Fined for 'Hallucinated' AI Citations*, Bloomberg Law (Feb. 25, 2025), https://news.bloomberglaw.com/litigation/morgan-morgan-lawyers-fined-for-hallucinated-ai-citations.

[9] Va. R. Prof'l Conduct 1.1, cmt. 2.

[10] ABA Formal Op. 512, at 3.

[11] Brittanica, https://www.britannica.com/technology/artificial-intelligence (last visited Apr. 28, 2025).

[12] Elizabeth Bell, *Generative AI vs. Large Language Models (LLMs): What's the Difference?*, Appian (Sept. 19, 2024), https://appian.com/blog/acp/process-automation/generative-ai-vs-large-language-models.

[13] Helen Toner, *What Are Generative AI, Large Language Models, and Foundation Models?*, Georgetown Ctr. for Security & Emerging Techn. (May 12, 2023), https://cset.georgetown.edu/article/what-are-generative-ai-large-language-models-and-foundation-models/ ("Typical examples of generative AI systems include image

input."[14] Put simply, LLMs are a type of generative AI, but not all generative AI is an LLM.

LLMs are built on machine learning, specifically a process called "deep learning." This means that a computer is fed a large amount of data so it can identify key features of that data without human input.[15] LLMs are built on "neural networks" called transformer models that can learn context, including how sentences and paragraphs work together and relate to one another.[16] This is why LLMs can respond to questions put to them. These models typically learn both from data provided by the developers and from data provided by users.

Because of the way these models receive and process information, "LLMs can only be as reliable as the data they ingest."[17] If fed unreliable or inaccurate information, or if the model misunderstands contexts or patterns, it can then result in "hallucinated" outputs.[18] And, because many LLMs use the inputs they receive to learn more and respond to other inquiries, those LLMs "are not designed to be secure vaults; they may expose confidential data in response to queries from other users."[19] Thus, while using generative AI and LLMs in civil litigation can be incredibly beneficial, lawyers must educate themselves about what they are using and how they are using it in order to comply with counsel's ethical obligations.

## II. Considerations for Using AI in Civil Litigation

In July 2024, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512, regarding generative AI tools.[20] This was the American Bar Association's first formal opinion regarding AI and discusses how the "model rules related to competency, informed consent, confidentiality, and fees principally apply."[21] It states in no uncertain terms that "lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected."[22]

As of the date of this publication, Virginia has not yet released any formal ethics opinions or other guidance related to the substantive use of AI in the legal

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generators … , large language models … , code generation tools … , or audio generation tools … ."); *see also* 15 U.S.C. 9401(3) (defining *artificial intelligence*).

[14] Bell, *supra* note 12.

[15] CloudFare, *What Is a Large Language Model (LLM)?*, https://www.cloudflare.com/learning/ai/what-is-large-language-model/ (last visited Apr. 27, 2025).

[16] *Id.*

[17] *Id*

[18] CloudFare, *What Are Artificial Intelligence (AI) Hallucinations?*, https://www.cloudflare.com/learning/ai/what-are-ai-hallucinations/ (last visited Apr. 27, 2025).

[19] CloudFare, *What Is a Large Language Model (LLM)?*, *supra* note 15.

[20] *See generally* ABA Formal Op. 512.

[21] Am. Bar Ass'n, *ABA Issues First Ethics Guidance on a Lawyer's Use of AI Tools* (July 29, 2024), https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/.

[22] ABA Formal Op. 512, at 15.

profession;[23] however, an opinion on AI and legal fees is forthcoming. Based upon the framework elucidated by the American Bar Association, Virginia's current Rules of Professional Conduct can provide a functional framework for the use of AI by Virginia lawyers until more formal guidance is published.

### A.    CONFIDENTIALITY

Rule 1:6 of the Virginia Rules of Professional Conduct prohibits a lawyer from "reveal[ing] information protected by the attorney-client privilege … or other information gained in the professional relationship that the client" requests be kept confidential or that would cause harm to the client if disclosed.[24] A Virginia lawyer must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule."[25] While the Rule acknowledges that "[p]erfect … data protection is not attainable,"[26] it is important to note that these comments to the Rule are made in the context of data breaches from third parties and inadvertent disclosure, not the knowing use of confidential data by the lawyers on third party platforms. The comments go on to state that "[l]awyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data."[27] This necessarily includes identification of which steps lawyers should take to comply with the Rule when voluntarily inputting confidential information into an AI platform.

Litigators understand some of the most time-consuming—and often tedious—parts of the job are sifting through case-related documents and identifying key records. Writing deposition summaries runs a close second. This is particularly true in complex cases that involve voluminous business or medical records, numerous e-mails exchanged between the parties, or lengthy testimony. These tasks are typically handed off to junior associates and paralegals, who then spend hours manually reviewing each page of the file and reading each deposition to identify what, if anything, is relevant to the matter. This process can take days, or even weeks, and is rarely completely accurate. Now, lawyers use AI-powered document review platforms and technology-assisted review to search for almost any detail they want to know (key words, names, dates), how often that information occurs, and in what context. AI scales to any volume of data. It can read depositions and provide summaries with page and line citations. It can minimize human error because it does not get tired and does not "glaze over" after reviewing hundreds of pages with hundreds more to go. While the benefits are obvious, lawyers must

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[23] *See* Va. State Bar Standing Committee on Ethics, *Draft Legal Ethics Opinion 1901: Reasonable Fees and the Use of Generative Artificial Intelligence* (Mar 20, 2025), https://vsb.org/common/Uploaded%20files/docs/032725-prop-leo-1901.pdf [hereinafter Proposed LEO 1901].

[24] Va. R. Prof'l Conduct 1:6(a); *see also* Model R. Prof'l Conduct 1.6.

[25] Va. R. Prof'l Conduct 1.6(d).

[26] Va. R. Prof'l Conduct 1.6(d), cmt. 20.

[27] *Id.*

be cognizant of what using AI in a document review or discovery process may entail.

When inputting client information into an AI platform, a lawyer must take care to ensure adequate privacy and confidentiality protection for that data. Reading Rules of Professional Conduct 1.1 and 1.6 together, there is no question that Virginia lawyers must adequately inform themselves about the methods their chosen platform uses to maintain confidentiality of the clients' information. AI and, in particular, LLMs have evolved significantly such that they can be set up as closed or private AI platforms that prevent confidential information from being shared outside that system. Therefore it cannot be used to train anything else and cannot come up in other public AI platforms (or the Internet generally) when prompted.[28] As explained by the American Bar Association, "[b]efore lawyers input information relating to the representation of a client into a[n] [AI] tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm."[29]

"Private AI refers to the practice of training algorithms on data specific to one user or organization … [and] is used only for your organization … ."[30] Put more simply, in a private AI system, the data remain the lawyer's, and the system generally gives the lawyer control over how the data are used. But care should still be taken to ensure that there is no inadvertent disclosure to lawyers in a firm who should be denied access to the information (due to conflicts or other reasons) or to the public.[31] On the other hand, "[p]ublic AI refers to any kind of publicly available artificial intelligence algorithm that trains on a wide set of data, typically pulled from users or customers."[32] A commonly known public AI is ChatGPT, which is continually being trained with publicly available data.[33] For lawyers' purposes, it is important to know that "[p]ublic AI can also refer to any algorithm that uses datasets that are not private to a specific user or organization."[34] A lawyer who enters data in a public system may find that the data are neither private nor confidential and may be used to improve AI algorithms elsewhere.[35] While these forms of AI can still be used in the legal setting, care should be taken to ensure that no confidential or privileged information is entered into such a system. This is because "AI models can regurgitate the same material that was used to train

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[28] *See, e.g.*, Matt Burgess & Reece Rogers, *How to Stop Your Data from Being Used to Train AI*, WIRED (Oct. 12, 2024), https://www.wired.com/story/how-to-stop-your-data-from-being-used-to-train-ai.

[29] ABA Formal Op. 512, at 6.

[30] Dan O'Keefe, *Private AI v. Public AI: 4 Key Facts*, APPIAN (June 5, 2023), https://appian.com/blog/acp/process-automation/private-ai-vs-public-ai-explained.

[31] *See generally* ABA Formal Op. 512, at 6.

[32] O'Keefe, *supra* note 30.

[33] *Id.*

[34] *Id.*

[35] *Id.*

them—including sensitive personal data" or information that is not otherwise subject to disclosure.[36]

Some legal AI platforms' web sites may state that they will not sell data or use inputs to further train their modules, but lawyers should ensure that the terms of service, data usage policies, and data privacy policies adequately protect any information entered into the system. The American Bar Association advises that "[a]s a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any [AI] tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies."[37] For most lawyers, these technological nuances are not within their areas of expertise. Pursuant to Comment 20 to Rule of Professional Conduct 1.6, "a lawyer does not need to have all the required technological competencies" and "can and more likely must turn to the expertise of staff or an outside technology professional."[38] Asking for professional guidance in this new and evolving area is not only encouraged, but expected, for all Virginia lawyers.

This is particularly important when lawyers use AI tools to summarize or review clients' protected health information (PHI) covered by HIPAA. Under HIPAA, law firms may be treated as business associates, and as a result, must comply with its requirements. Currently, individuals cannot enter PHI into a public AI platform unless it has been stripped of all personal identifiers (as defined by 45 C.F.R. 164.514(b)(2)), so that it complies with HIPAA's privacy rule and the security rule. Given the considerations outlined above, these limitations seem logical: if there is a chance that PHI may be disclosed or restated to an unknown third party because the AI has been trained on that input, then there is risk of violation of the required privacy of the information.

However, using AI to sift through complicated, lengthy, and sometimes repetitive, medical records can be especially useful to lawyers preparing medical record summaries. Lawyers can also use AI to identify and mark documents containing PHI so that the documents can be properly protected. As with any technology, user education and human oversight are critical to ensuring the continued confidentiality of PHI (and other sensitive information), as well as the accuracy of any final product. However, it is important to note that when medical professionals themselves use AI to generate the medical records, there are more potential problems. Patients' reporting can be misconstrued by the platform, details can be missed, and as with any AI, the platform can in some cases create information wholesale to fill in the gaps. Because of this, there may be a need

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[36] Lauren Leffer, *Your Personal Information Is Probably Being Used to Train Generative AI Models*, SCIENTIFIC AMERICAN (Oct. 19, 2023), https://www.scientificamerican.com/article/your-personal-information-is-probably-being-used-to-train-generative-ai-models/.

[37] ABA Formal Op. 512, at 7.

[38] VA. RULE PROF'L CONDUCT 1:6(d), cmt. 20.

for "additional foundation before admitting AI-transcribed records" in court and adaptation of the evidence rules.[39]

While it may seem as if using AI for confidential material is *never* a good idea, that is simply untrue. Lawyers have always had to take measures to keep their clients' confidential information confidential, both in terms of documents and in terms of attorney-client communications. Indeed, the Rules of Professional Conduct already address what care a lawyer should take when "discussing a client's case with another attorney from whom advice is sought," including "whether the communication risks a waiver of the attorney-client privilege or other applicable protections," and a "lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms."[40] The same requirement for a lawyer to make "reasonable efforts" to maintain confidentiality apply.[41] While using AI may be a different aspect of keeping a client's protected and confidential information inviolate, it should not be seen as something above and beyond what lawyers already must do on a daily basis. A disclosure or communication is just that, whether it is made to a human being or an AI platform, and lawyers should maintain the same confidentiality considerations.

## B. DISCOVERY

Using AI platforms may also implicate what courts may consider proportional in discovery, and particularly in e-discovery matters. Rule 4:1(b)(1) of the Rules of the Supreme Court of Virginia permits "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." A court may limit discovery if it is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," or if it is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."[42] Under the Federal Rules, discovery is limited to things "relevant to any party's claim or defense and proportional to the needs of the case."[43] When deciding whether a request is proportional, federal courts consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[44]

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[39] Hon Scott Schlegel, *Medical Records Meet AI: A Looming Challenge for Courts*, [SCH]LEGAL TECH (Oct. 28, 20240, https://judgeschlegel.substack.com/p/medical-records-meet-ai-a-looming.

[40] VA. RULE PROF'L CONDUCT 1:6(b), cmt. 5a.

[41] VA. RULE PROF'L CONDUCT 1:6(d) & cmt. 19 (listing factors to consider when determining whether a lawyer has made reasonable efforts to maintain confidentiality).

[42] VA. SUP. CT. R. 4:1(b)(1).

[43] FED. R. CIV. P. 26(b)(1).

[44] *Id.*

"Today, with the evolution of various forms of electronic communications, including text messaging, instant messaging, social media, digital phone calls, and numerous other platforms, parties are obligated to conduct e-discovery on *any* platform in *any* format that has relevant content," not just e-mail accounts.[45] The types of locations of stored data are endless, and sometimes include web-based applications.[46] "Because of the ease [with] which e-discovery enables innumerable documents to be stored, organized, and searched, the amounts of documents requested and produced have increased exponentially."[47] "Although artificial intelligence programs are constantly being developed to combat this expense through time-saving mechanisms such as predictive analysis, the sheer volume of information will continue to make this a balancing act rather than a complete solution."[48]

For example, when lawyers must review and analyze stacks of handwritten documents, optical character recognition (OCR) can be a helpful tool in searching the content of these files. While OCR has been in use for quite some time, AI has the potential to enhance its effectiveness. "Large-language models have the power to predict the next likely word in context or carry on a sequence of text or characters, which can help fill gaps and clarify hard-to-read scanned documents and images."[49] Again, confidentiality must be maintained when using these enhancements, but they can save significant time when reviewing challenging files. AI can also create document summaries and chronologies that enable lawyers to know what is being found and assist them with prioritizing data.[50] It can minimize human error; it does not get tired and does not become stupefied after hours of review.

However, another consideration for the use of AI in discovery is that an AI platform's output is only as good as its user, the user's input, and its infrastructure, which is where Rule of Professional Conduct 1.1 particularly comes into play.[51] For example, if prompted to look for only certain terms, a platform may miss key documents that, when read in context, imply something that might otherwise be missed. As stated in the 2023 Year-End Report on the Federal Judiciary, when it comes to the use of AI, "[n]uance matters."[52] Over the years, the use of search terms in discovery of electronic files has become commonplace. Crafting the search

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[45] Rispoli, S.L., Wren, J.E, and McDonagh, D., *When to Leave the Stones Unturned: Using Proportionality to Navigate Discovery Efficiently, Effectively, and Ethically*, 107 Marq. L. Rev. 487, 492 (citation omitted) (emphasis in original).

[46] *Id.*

[47] *Id.*

[48] *Id.*, at n.28 (citation omitted).

[49] Jon Chan, *Measure Twice, Cut Once: Generative AI for E-Discovery in Public Sector Disputes*, FTI Consulting, https://www.ftitechnology.com/resources/blog/measure-twice-cut-once-generative-ai-for-e-discovery-in-public-sector-disputes.

[50] *Id.*

[51] *See also* ABA Formal Op. 512, at 3.

[52] Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (Dec. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

terms to *include* what is truly relevant but to *exclude* what is not can be a process of trial and error; the lawyer's oversight of hits and changes to those terms being a key part of the process. A lawyer can understand nuance and read between the lines in ways that no platform will ever be able to do.[53] The necessity of lawyer oversight in discovery remains critical, both for the substantive document review and for maintaining necessary confidentiality of a client's information. While AI can be a useful discovery tool, lawyers must still be involved in the process and provide the necessary oversight.

### C.  COURT FILINGS

AI is also a powerful tool for legal research, but lawyers must use caution when relying on its findings. As explained by the American Bar Association, AI tools are "subject to mistakes," and "lawyers' uncritical reliance on content created by [AI] tool[s] can result in … misleading representations to courts and third parties."[54] The American Bar Association concluded that "a lawyer's reliance on, or submission of, a[n] [AI] tool's output—without an appropriate degree of independent verification or review of its output—could violate the duty to provided competent representation as required by Model Rule 1.1."[55] Indeed, the Virginia Rules of Professional Conduct state that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, *and use of methods and procedures meeting the standards of competent practitioners*."[56] This can easily be read to include AI and other efficiency-promoting technology.

Virginia's standards for lawyers with regard to candor to the court are well known.[57] Pursuant to Rule 3.1 of the Virginia Rules of Professional Conduct, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[58] This goes hand in hand with Rule 3.3, which provides that "[a] lawyer shall not knowingly … make a false statement of fact or law to a tribunal."[59] Lastly, under Virginia law, a lawyer's signature certifies that the lawyer has "read the pleading, motion, or other paper," and "to the best of his knowledge, information and

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[53] *See, e.g.*, W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 Okla. L. Rev. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI); ABA Formal Op. 512, at 3.

[54] ABA Formal Op. 512, at 3.

[55] *Id.* at 3–4 (citing ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[56] Va. R. Prof'l Conduct 1.1, cmt. 5 (emphasis added).

[57] *See also* ABA Formal Op. 512, at 9–10 (discussing application of the Model Rules of Professional Conduct to this area of AI).

[58] Va. R. Prof'l Conduct 3.1.

[59] Va. R. Prof'l Conduct 3.3(a)(1).

belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," and not submitted "for any improper purpose … ."[60] AI platforms conducting legal research and drafting legal documents, however, do not inherently have this same high bar.

While AI can help lawyers serve their clients, it "cannot replace the judgment and experience necessary for lawyers to advise clients about their legal matters or to craft the legal documents or arguments required to carry out representation."[61] Simply put, lawyers "may not abdicate their responsibilities by relying solely on a[n] [AI] tool to perform tasks that call for the exercise of professional judgment."[62] And, lawyers remains responsible for all work product, regardless of its provenance. However, "the use of generative AI by lawyers for myriad tasks, including case analysis and brief writing, is the new normal,"[63] and lawyers must stay informed.

The news is replete with instances of lawyers being admonished for submission of hallucinated cases, citations, and quotations. In 2023, a lawyer submitted a ten-page brief to the in the U.S. District Court for the Southern District of New York that cited a number of purportedly relevant cases—which, upon further review, were determined to have been created by ChatGPT.[64] The lawyer stated that he had never used ChatGPT before and "was unaware of the possibility that its content could be false."[65] This situation underscores the critical importance of lawyers being fully informed when using AI and LLMs as a starting point when conducting legal research.  Ignorance is no excuse for submitting filings that have been neither read nor reviewed for accuracy, whether using AI or not.

In March 2024, the U.S. District Court for the Middle District of Florida suspended a lawyer for violations of Florida's Rules of Professional Conduct when he filed pleadings containing frivolous arguments based upon nonexistent case law.[66] More recently, in February 2025, three attorneys from a national law firm were sanctioned by the U.S. District Court for the District of Wyoming when they filed a motion with eight hallucinated case cites that the court determined

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[60] Va. Code Ann. § 8.01-271.1(B).

[61] ABA Formal Op. 512, at 4.

[62] *Id.*

[63] Hr'g Tr. at 6:24–7:1, Iovino v. Michael Stapleton Assocs, Ltd., No. 5:21-cv-00064-TTC-JCH (W.D. Va. Oct. 30, 2024), ECF No. 204 [hereinafter *Iovino* Hr'g Tr.].

[64] *See* Benjamin Weiser, *Here's What HappensWhen Your Lawyer Uses ChatGPT*, N.Y. Times (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html (referencing *Mata v. Avaniaca, Inc.*, Case No. 1:2022-cv-01461 (S.D.N.Y)); Molly Bohannan, *Lawyer Used ChatGPT in Court—And Cited Fake Cases. A Judge Is Considering Serious Sanctions*, Forbes (June 8, 2023), https://www.forbes.com/sites/mollybohannon/2023/06/08/lawyer-used-chatgpt-in-court-and-cited-fake-cases-a-judge-is-considering-sanctions/ (same).

[65] Weiser, *supra* note 64.

[66] Bob Ambrogi, *Federal Court Suspends Florida Attorney over Filing Fabricated Cases Hallucinated by AI*, LawSites (Mar. 14, 2024), https://www.lawnext.com/2024/03/federal-court-suspends-florida-attorney-over-filing-fabricated-cases-hallucinated-by-ai.html.

were nonexistent.[67] Ignorance of the way an AI platform works is no excuse when carrying out one's ethical duties.

Virginia has not avoided this situation. In October 2024, in the Western District of Virginia declined to impose sanctions on a lawyer who submitted a brief that included AI-fabricated case citations after that lawyer acknowledged the error and sought to correct it, and clearly did not intend to mislead the court.[68] Judge Cullen stated that while the use of AI has become a "widely accepted practice, … there are inherent limitations and failings attendant to generative AI, including the known tendencies of the technology to conflate existing case law and extrapolate and make inferences based on existing law that may not be supposed by a plain reading of the authorities."[69] And, lawyers "who use generative AI to prepare pleadings and briefs must still adhere to the basic tenets of conduct, including taking reasonable measures to ensure what they do file in court, including cases cited to bolster legal arguments, is true and accurate to the best of their ability."[70] "At a minimum, this ethical obligation that [lawyers] have, whether [they] use generative AI or not, requires litigants to do more than blindly rely on generative AI to churn out final work product … ."[71] While mistakes happen, lawyers should take measures to ensure that what they cite and what they argue to a court is, in fact, correct and accurate.

Had any of these lawyers used a captive research AI platform (like Lexis' Protégé or Westlaw's CoCounsel), they may have avoided such an outcome. The difference lies in whether the platform is searching the entire Internet and all data entered into it or searching through a confined database for its responses. Lexis and Westlaw use "retrieval augmented generation" technology that prompts the platforms to search only within their respective databases for the relevant legal resources, and then feeds that information and the prompt into a LLM to generate a written response.[72] While this model significantly reduces the risk of hallucinated cases, there is still no perfect platform,[73] and lawyers must be diligent in cite checking and confirming that the citation, quotes, or summary generated by *any* platform accurately represents the case—and that the case exists.

It is known within the industry that generative LLMs are programmed to generate words that make sense together based on statistical models within

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[67] Pazanowski, *supra* note 8; *see also* Order, Wadsworth v. Walmart Inc., No. 2:23-cv-118-KHR (D. Wyo. Feb. 24, 2025), ECF No. 181.

[68] *Iovino* Hr'g Tr. at 8:18–11:23; 15:6–18:8; *see also* Order, Iovino v. Michael Stapleton Assocs, Ltd., No. 5:21-cv-00064-TTC-JCH (W.D. Va. Oct. 10, 2024), ECF No. 200.

[69] *Iovino* Hr'g Tr. at 7:11, 21–8:1.

[70] *Iovino* Hr'g Tr. at 7:13–17.

[71] *Iovino* Hr'g Tr. at 8:8

[72] *See* Daniel Schawrcz, et al., *AI-Powered Lawyering: AI Reasoning Models, Retrieval Augmented Generation, and the Future of Legal Practice*, MINN. L. STUDIES RESEARCH PAPER No. 25-16 (Mar. 2, 2025), *available at* https://ssrn.com/abstract=5162111.

[73] Bob Ambrogi, *In Redo of Its Study, Stanford Finds Westlaw's AI Hallucinates as Double the Rate of LexisNexis*, LAWSITES (June 4, 2024), https://www.lawnext.com/2024/06/in-redo-of-its-study-stanford-finds-westlaws-ai-hallucinates-at-double-the-rate-of-lexisnexis.html.

their datasets, *not* on factual accuracy.[74] Counsel must ensure that the universe of information that an AI platform uses contains only facts that actually exist. This is the first step in guaranteeing that the information the platform produces is likewise factually accurate. Again, lawyers have always had to ensure that their citations are correct and the propositions of law are accurate. Applying that same process to AI research is nothing new in terms of substance and is only another method of conducting research that must still be checked before it is submitted. Put simply, making a "[l]egal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal" under the Virginia Rules of Professional Conduct.[75] If a lawyer elects to use AI platforms to assist in practice, then it is incumbent upon that lawyer to ensure that the final product is accurate, just as it is when using any other research method.

To moderate the problems created by the use of AI in legal research and composition of legal pleadings, some judges now require lawyers to disclose if they have used AI when generating a signed submission; but the requirement is not universal across state and federal courts in the Commonwealth. Between 2024 and 2025, several judges in the Eastern District of Virginia began to include a requirement in their pretrial schedule orders for parties to disclose the parties' use of AI in preparing any filings and to provide a certification that the party has reviewed all included citations for accuracy.[76] Neither Virginia's state nor federal courts have ever made statements requiring (or forbidding) lawyers from carrying out their obligations in the manner they choose, so long as lawyers abide by the necessary Rules.[77] So, too, here.

### d.    attorneys' fees

Rule 1.5 of the Virginia Rules of Professional Conduct places two requirements on a lawyers' fees: first, the fee must be reasonable, and second, the fee must be "adequately explained to the client," which includes the "basis … of the fee."[78] There is no doubt that AI can make a lawyer's job more efficient. Because of this, in March 2025, the Virginia State Bar sought public comment on Proposed Legal Ethics Opinion 1901, addressing what is considered a reasonable fee when lawyers use AI in their practices.[79]

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[74] Matthew Burtell & Helen Toner, *The Surprising Power of Next Word Prediction: Large Language Models Explained, Part 1*, Georgetown Ctr. for Security & Emerging Tech. (Mar. 8, 2024), https://cset.georgetown.edu/article/the-surprising-power-of-next-word-prediction-large-language-models-explained-part-1.

[75] Va. R. Prof'l Conduct 3.3, cmt. 4.

[76] Ropes & Gray, *Artificial Intelligence Court Order Tracker: Virginia*, https://www.ropesgray.com/en/sites/Artificial-Intelligence-Court-Order-Tracker/states/virginia (last visited Apr. 27, 2025).

[77] *Iovino* Hr'g Tr. at 7:1–5 ("[T]his Court has neither the authority nor the inclination to curb [the use of AI]. If [the Court] did that, [it] would justifiably be perceived by some as overstepping and unwisely decreeing that litigations can't use this groundbreaking technology in a court of law.").

[78] Va. R. Prof'l Conduct 1.5.

[79] *See generally* Proposed LEO 1901.

Pursuant to Rule 1.5 of the Rules of Professional Conduct, when determining whether a fee is reasonable, a lawyer must take into account "the time and labor required," "the skill requisite to perform the legal service properly," and the lawyer's "experience, reputation, and ability … [when] performing the services," among other factors.[80] The Proposed Opinion advises that "[w]hile generative AI can dramatically reduce the 'time and labor required' for certain tasks … it would not be reasonable to conclude that a lawyer is ethically required to reduce or limit the fee based solely on that factor."[81]

Indeed, the Proposed Opinion goes on to state that the "'skill requisite to perform the legal service properly' might actually *increase*, as effective AI use could require specialized knowledge to prompt, verify, supplement, and integrate AI outputs into competent legal work product."[82] As discussed above, a lawyer must exercise significant "judgment in determining when and how to deploy AI tools," and the in-person "expertise needed to critically evaluate AI-generated content[] represent[s] valuable services for which the lawyer reasonably can be compensated."[83] Simply because a lawyer may be able to conduct research for a brief or document review faster when using AI does not automatically mean that the lawyer's time is somehow less valuable—in fact, the opposite may be true. Nonetheless, even if a lawyer is more efficient than expected, it is still impermissible "to charge the client for more hours than were reasonably expended on the matter," because "[t]he client should only be charged a reasonable fee for the legal services performed."[84]

Part of a lawyer's experience that should be considered when determining a reasonable fee includes the ability of that lawyer to understand and properly integrate AI into practice. This experience undoubtedly adds significant value. As discussed herein, lawyers must be able to satisfactorily understand the shortcomings of AI tools and be able to accurately identify (and remedy) errors when they use AI in their practices. Lawyers must also be able to use AI adequately when beneficial to their clients. In all, lawyers must spend a significant amount of time to comply with their ethical obligations of competency as stated in Rule 1.1, regardless if they elect to use or do without AI.

Lawyers have always been expected to expend the time necessary to check their work product for accuracy, and that has not changed simply because AI may have a hand in creating what is checked. As explained in the Proposed Opinion, "[a] lawyer's unique value proposition might involve their ability to frame legal problems in ways technology can address while knowing when human judgment must predominate, which provides a sound basis for maintaining value-based fees even as raw production time decreases."[85] Because of this, "[i]f AI assists a lawyer

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[80] Va. R. Prof'l Conduct 1.5(a)(1), (7).

[81] Proposed LEO 1901, at 2.

[82] *Id.* (emphasis added).

[83] *Id.*

[84] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993).

[85] Proposed LEO 1901, at 2.

to achieve superior results more efficiently, [then] the client benefits from both the improved outcome and potentially reduced total costs compared to a lawyer using traditional methods."[86]

This framework does not translate as cleanly to lawyers using fixed-fee billing models but can still apply. The "goal should be solely to compensate the lawyer fully for time reasonably expended."[87] "If using a[n] [AI] tool enables a lawyer to complete tasks much more quickly than without the tool, [then] it *may* be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the [AI] tool as when not using it."[88] The distinction lies in the use of the word *may*. As stated in the Proposed Opinion, "it is not per se unreasonable for a lawyer to charge the same [fixed] fee for work done with the assistance of AI," and a Virginia lawyer's fee, whether fixed-fee or hourly, "must be reasonable considering all the factors identified in [Virginia Rule of Professional Conduct] 1.5(a)," and is not solely contingent on "the time spent on a task or the use of certain research or drafting tools."[89]

For example, if a project takes a lawyer ten hours without the use of AI, but with AI now takes only three, then it may be unreasonable to charge the same fixed fee for that task, but neither does it mean that the fixed fee must be reduced seventy percent. On the other hand, the fee conversation must also consider when a lawyer can, but chooses not to, use AI to represent a client more efficiently. Should a client be charged for ten hours of a lawyer's time when the task could reasonably and properly have been completed in three? Does it matter if the lawyer uses AI or has training in it? When a lawyer has been trained and does use AI, is each hour more valuable because more work is completed in that time?[90] What change in fee (if any) would be necessary is fact-specific and must take into account not only the elements listed in Rule 1.5 of the Rules of Professional Conduct, but also what the lawyer had to learn and do in order to become more efficient.

This underscores the necessity of communicating with a client about the basis for the lawyer's fee and what that fee entails.[91] This is especially true if a lawyer's time is "substantially reduced due to the use the productivity-enhancing tool … ."[92] Explaining a lawyer's various resources that they can use to represent that client, including those that make processes more efficient, must be adequately expressed to a client when determining a fee. It may also be that clients do *not* want their lawyers using AI in their cases, which further proves the necessity of the disclosure to the clients. Furthermore, the types of AI tools can vary significantly: from spell checking integrated into a word-processing program to services that

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[86] *Id.*

[87] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993).

[88] ABA Formal Op. 512, at 12 (emphasis added); Proposed LEO 1901, at 2–3.

[89] Proposed LEO 1901, at 3.

[90] *See generally* ABA Formal Op. 512, at 14.

[91] Va. R. Prof'l Conduct 1.5(b).

[92] Proposed LEO 1901, at 3.

review thousands of documents per hour. When, if ever, can the cost of using AI be considered part of the overhead expense of practicing law versus an expense that is passed on to the client remains an open question.[93]

### E. USE BY PRO SE INDIVIDUALS

While lawyers must remain informed about AI and its potential disadvantages, there are no such express professional requirements for the public. Virginia Code section 8.01-271.1 provides that the signature of a pro se party "constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after a reasonable inquiry, it is well grounded in fact and is warranted by existing law… and (iii) it is not interposed for any improper purpose … ."[94] Rule 11 of the Federal Rules of Civil Procedure provides the federal analogue.[95] So what happens when a pro se party submits a brief containing hallucinated case cites after that party used AI to write a response? Can a pro se party be found to have conducted a "reasonable inquiry" into the cases cited by an AI model when the public does not generally have access to databases like Westlaw and Lexis? Lawyers are expected to know that we cannot blindly rely upon AI-generated citations, but should a nonlawyer?

Based upon the cases interpreting the Virginia Code and Rule 11, a pro se party *should* be held to the same standard as a lawyer when it comes to abiding by the court's rules and expectations of candor and accuracy in submissions and statements. For example, in *Gail v. Commonwealth*, the Virginia Court of Appeals held that "[a] *pro se* litigant 'is no less bound by the rules of procedure and substantive law than a defendant represented by counsel.'"[96] And, in *Sanders v. Farina*, the U.S. District Court for the Eastern District of Virginia expressly held that "Rule 11 applies both to *pro se* parties and parties represented by counsel."[97] Thus, if a pro se party elects to use AI, then that party must ensure that the submission is correct. AI can be a particularly useful tool for individuals trying to represent themselves, but courts should require those parties to meet the same standards as attorneys when it comes to citing and referencing accurate law.

There are also novel uses of AI in litigation that must be addressed, particularly when it comes to unrepresented parties. In April 2025, a pro se party attempted to use an AI-generated video featuring an avatar to make his arguments for him before the New York State Supreme Court Appellate Division's First Judicial

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[93] *See generally* ABA Formal Op. 512, at 13 (discussing prior ethics opinions).

[94] Va. Code Ann. § 8.01-271.1(B).

[95] Fed. R. Civ. P. 11(b).

[96] *See, e.g.*, Gail v. Commonwealth, 2022 Va. App. Lexis 506, at *18 (Ct. App. Oct. 11, 2022) (citing Townes v. Commonwealth, 234 Va. 307, 319, 362 S.E.2d 650 (1987); Francis v. Francis, 30 Va. App. 584, 591, 518 S.E.2d 842 (1999) ("Even *pro se* litigants must comply with the rules of court.")).

[97] *See, e.g.*, Sanders v. Farina, 197 F. Supp. 3d 892, 900 (E.D. Va. 2016) (citing Fed. R. Civ. P. 11 advisory committee's note, stating the "standard is the same for unrepresented parties … .").

Department.[98] While the party had asked for permission to submit a video, he did not disclose that he would not be speaking on the recording. The court immediately stopped the proceedings and the case remains pending. This raises interesting questions surrounding the implications of AI for pro se parties and the possible unauthorized practice of law by the platform—particularly if the generated avatars hold themselves out as counsel for the pro se party and to represent that party.

## III. CONCLUSION

The speed with which AI systems have advanced in the legal world is remarkable, but the technology still requires significant human oversight when used in the legal world. It has infiltrated nearly every aspect of lawyers' jobs, sometimes without their being aware of it. This integration of AI technology into litigation offers untold opportunities to improve and streamline work product but also increases risk to those who are not well versed in the technology they use.

Virginia has attempted to regulate the use of AI, but to date, it has been unsuccessful. On February 20, 2025, the Virginia legislature passed House Bill 2094, the High-Risk Artificial Intelligence Developer and Deployer Act (the "Act"). Governor Glenn Youngkin vetoed the Bill in April 2025;[99] however, the content of the Act may signal where regulation on AI in Virginia is heading in the years to come.

The Act was aimed at regulating private-sector use of certain AI tools, aimed at preventing algorithmic discrimination for "high-risk artificial intelligence systems" that are "specifically intended to autonomously make, or be a substantial factor in making, a consequential decision."[100] These consequential decisions include "material legal, or similarly significant effect[s] on the provision or denial of any consumer of … legal service[s]," among other things.[101] While not entirely clear, the Act could have been read to include Virginia lawyers in the definition of *deployers* to whom the Act applies, who are "any person[s] doing business in the Commonwealth that deploy[] or use[] a high-risk artificial intelligence system to make a consequential decision in the Commonwealth."[102] Specifically excluded from the definition of *high-risk artificial intelligence systems*, however, were databases, data storage, and "[t]echnology that communicates with consumers in natural language for the purpose of providing users with information, making

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[98] Larry Neumeister, *An AI Avatar Tried to Argue a Case Before a New York Court. The Judges Weren't Having It.*, AP NEWS (Apr. 5, 2025), https://apnews.com/article/artificial-intelligence-ai-courts-nyc-5c97cba3f3757d9ab3c2e5840127f765.

[99] Governor's Veto of H.B. 2094, 2025 Reg. Session (Va. 2025), *available at* https://lis.virginia.gov/bill-details/20251/HB2094/text/HB2094VG

[100] H.B. 2094, 2025 Reg. Session (Va. 2025), *available at* https://lis.virginia.gov/bill-details/20251/HB2094/text/HB2094.

[101] *Id.*

[102] *Id.*

referrals or recommendations, and answering questions."[103] Whether these types of requirements will ever apply to the practice of law remains to be seen.

Make no mistake, AI is here to stay. And because it is, Virginia lawyers have a duty to be competent in the technology they are using. This requires constant monitoring of the evolving nature of the tools and how they are applied in practice. Virginia lawyers should also be acutely aware of concerns about confidentiality and accuracy when using AI platforms. Lawyers should also review their fee structures to ensure that the use of AI is properly represented.

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[103] *Id.*