

5-10-2024

## PRACTICING LAW IN THE AGE OF AI - Practice Guide: How to Integrate AI and Emerging Technology into Your Practice and Comply with Model Rule 3.1

Kevin Frazier

Follow this and additional works at: <https://scholarship.law.umn.edu/mjlst>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Science and Technology Law Commons](#)

---

### Recommended Citation

Kevin Frazier, *PRACTICING LAW IN THE AGE OF AI - Practice Guide: How to Integrate AI and Emerging Technology into Your Practice and Comply with Model Rule 3.1*, 25 MINN. J.L. SCI. & TECH. 67 (2024). Available at: <https://scholarship.law.umn.edu/mjlst/vol25/iss2/10>

# PRACTICING LAW IN THE AGE OF AI

## Practice Guide: How to Integrate AI and Emerging Technology into Your Practice and Comply with Model Rule 3.1

Kevin Frazier\*

### ABSTRACT

*The Model Rules of Professional Conduct often lag behind technological advances that alter the practice of the law. This pattern has played out with respect to the introduction of generative AI tools such as ChatGPT into the practice of law. Consequently, well-intentioned lawyers have found themselves on the wrong side of disciplinary decisions and judicial sanctions due to a lack of understanding of the MRPC, unfamiliarity with the limitations of AI Tools, and uncertainty as to whether and when the MRPC apply to the use of such tools. This paper fills a small gap in the ongoing effort to clarify how to use AI Tools in compliance with the MRPC; more specifically, it assesses how Model Rule 3.1 may apply to the use of AI Tools and informs practitioners of efforts by state bars to reform their state-specific rules so as to decrease the odds of practitioners running afoul of the rules and norms of the profession.*

Introduction .....	68
PART I: Practice Essentials .....	68
PART II: Rule Overview .....	70
PART III: Case Study on the Application of FRCP 11 .....	75
PART IV: General Guidance .....	80
PART V: State Specific Guidance .....	83
PART VI: Survey of States Weighing Rules Reform .....	95
Conclusion .....	103

## INTRODUCTION

This is not a traditional law review article. It is primarily intended to be read by practitioners, dog-eared by junior associates, and updated on a regular basis. Given the questions posed by AI Tools with respect to the norms and rules of the legal profession, the format of this article merits potential consideration by other legal scholars. As the American Bar Association (ABA) and state bar associations scramble to issue guidance on emerging technologies, legal scholars can and should play a role in identifying how best to integrate novel tools into a profession tied to certain traditions.

Part I of this article quickly explains when practitioners should grab this journal off the shelf and turn to these pages. Part II provides an overview of Model Rule 3.1, including the extent to which it overlaps with Federal Rule of Civil Procedure 11. Part III offers a case study of lawyers who failed to understand the limitations of an AI Tool prior to deploying it in their practice. Part IV sets forth some general practice tips to comply with Model Rule 3.1 when using AI Tools. Part V flags states with variants of Model Rule 3.1 that may require additional compliance efforts by lawyers using AI Tools. Finally, Part VI identifies for practitioners several ongoing efforts by several state bar associations to update their respective rules of professional conduct.

## PART I: PRACTICE ESSENTIALS

**When:** Take note of Model Rule of Professional Conduct (MRPC) 3.1 and corresponding state rules of professional conduct during pleadings and discovery.<sup>1</sup>

**What:** MRPC 3.1 prevents attorneys from bringing or defending a claim or issue without a basis in law and fact that is not frivolous.<sup>2</sup>

---

© 2024 Kevin Frazier

\* Author footnote.

1. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023). *See, e.g.*, *Disciplinary Couns. v. Stobbs*, 172 Ohio St. 3d 636 (2023) (upholding a state disciplinary board's decision that an attorney violated Ohio's equivalent of MRPC 3.1 by offering no legal support for arguments made in various pleadings and by speculating about the likely result of discovery).

2. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023).

- AI Nexus:** Some AI Tools<sup>3</sup> assist with identifying and drafting legal arguments.<sup>4</sup> Attorneys who fail to check the sources that allegedly support those arguments and verify the arguments are good law may violate MRPC 3.1 and Federal Rule of Civil Procedure (FRCP) Rule 11.
- Where:** Pay particular attention to the state versions of MRPC 3.1 in Montana, New Jersey, New York, Oregon, Tennessee, and Wisconsin; the respective versions of MRPC 3.1 in these jurisdictions substantively differ from the standard rule with respect to the use of AI Tools.<sup>5</sup> If you're practicing in any of these states, be sure to review the "Substantive State Variations" section below.
- How:** Comply with MRPC 3.1 by thoroughly documenting *and verifying* the legal support for your claims.<sup>6</sup>
- Why:** Avoid judicial sanctions under Federal Rule of Civil Procedure 11 and state bar disciplinary action pursuant to that state's version of MRPC 3.1.<sup>7</sup>

---

3. "AI Tools" refers to legal solutions that use AI to assist or replace lawyers in the completion of legal tasks. *See, e.g.*, Marcos Eduardo Kauffman & Marcelo Negri Soares, *AI in Legal Services: New Trends in AI-Enabled Legal Services*, 14 SERV. ORIENTED COMPUTING & APPLICATIONS 223 (2020).

4. *See, e.g.*, *Legal AI Tools and Assistants Essential for Legal Teams*, THOMSON REUTERS (Jan. 31, 2023), <https://legal.thomsonreuters.com/blog/legal-ai-tools-essential-for-attorneys>.

5. *See infra* Part V, Analyzing State Versions of MRPC 3.1.

6. *See, e.g.*, *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 457 (S.D.N.Y. 2023) (taking issue with counsel's reliance on ChatGPT to conduct legal research and draft pleadings and counsel's subsequent attempt to create "the false impression that he had done other, meaningful research on the issue and did not rely exclusively on an AI chatbot, when, in truth and in fact, it was the only source of his substantive arguments").

7. Dane S. Ciolino, *Rule 3.1. Meritorious Claims and Contentions*, LA. LEGAL ETHICS (Feb. 1, 2021), <https://lalegaethics.org/louisiana-rules-of-professional-conduct/article-3-advocate/rule-3-1-meritorious-claims-and-contentions> (collecting cases in which lawyers who violate MR 3.1 have been sanctioned by the court as well as cases in which violating lawyers have been the subject of disciplinary hearings).

## PART II: RULE OVERVIEW

## MRPC 3.1:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>8</sup>

## SELECT COMMENTS TO RULE 3.1:

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[Note that Comment 3 does not apply to the use of AI tools].

Key Aspects of MRPC 3.1

Whether an attorney complies with MRPC 3.1 depends on two inquiries:

- Have they established a basis in fact for bringing or defending a proceeding, or asserting or contesting an issue therein?
- Have they established a basis in law or identified a good faith argument that a modification or reversal of existing law provides such a basis for bringing or defending a proceeding, or asserting or contesting an issue therein?

---

8. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023).

Several states have separate provisions setting forth these bases for violating MRPC 3.1.<sup>9</sup> New York is such a state, as indicated by their version of MRPC 3.1 shown here:<sup>10</sup>

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law [or];

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another[.]

The takeaway is that attorneys should anticipate that adjudicators of a MRPC 3.1 violation will pay specific attention to how the lawyer identified and verified their legal arguments. In other words, compliance with MRPC 3.1 is not a totality of the circumstances analysis with respect to a lawyer's consideration of the facts and the law; an attorney's thoroughness in one inquiry will not affect an adjudicator's analysis of the attorney's inquiry into the other.

#### Q&A

**Question:** Can junior associates evade MRPC 3.1 sanctions by relying on guidance from their more senior colleagues?

**Answer:** Likely no, per the Supreme Court of Arizona. *In re Alexander*, 232 Ariz. 1 (2013).

**Rule:** Arizona's MRPC 3.1—identical to ABA.

---

9. Maryland is an outlier. That state's version of MRPC 3.1 does not prompt separate analyses of these inquiries. Instead, the Maryland version simply states that "[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 . . ." MD. ATT'YS RULES OF PRO. CONDUCT r. 19-303.1 (Effective July 1, 2023).

10. N.Y. RULES OF PRO. CONDUCT r. 3.1 (N.Y. ST. BAR ASS'N 2021).

**Facts:** A lawyer did not dispute that they brought a frivolous RICO lawsuit but instead maintained that they did not know it was frivolous. They insisted that they acted in good faith. In support of that claim, the lawyer argued the following:

- they followed guidance of more experienced lawyers at their firm;
  - they were unaware of other lawyers previously advising against the claim;
  - they performed a reasonable inquiry into the claims;
- and,
- they had no reason to doubt the guidance they received as well as the facts underlying the claim.

**Reasoning and Hold:** Those arguments did not sway the Supreme Court of Arizona.<sup>11</sup> The Court dismissed the idea that the participation of other lawyers in the litigation “relieve[d]” the lawyer of their independent obligation to confirm the action was supported in law and fact.<sup>12</sup> Such relief would contradict the state’s version of MRPC 3.1, which, per the comments, requires lawyers “inform themselves about . . . the applicable law and determine that they can make good faith and nonfrivolous arguments in support of their clients’ positions.”<sup>13</sup>

### Interaction Between MRPC 3.1 and FRCP 11

MRPC 3.1 and FRCP 11 address similar conduct.<sup>14</sup> Just as practitioners must “inform themselves about the facts of their clients’ cases and the applicable law” to comply with MRPC 3.1,<sup>15</sup> they must perform a similar inquiry under FRCP 11(b):<sup>16</sup>

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s

---

11. *In re Alexander*, 232 Ariz. 1, 5 (2013).

12. *Id.*

13. *Id.* (citing MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS’N 2023)).

14. Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinventing Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1604 (2001).

15. MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS’N 2023).

16. FED. R. CIV. P. 11(b).

knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Briefly, FRCP 11 directs lawyers to perform an “inquiry [into their legal and factual contentions that is] reasonable under the circumstances[.]”<sup>17</sup> Mercifully for practitioners, the similarity in duties set forth under the two rules makes FRCP 11 case law instructive with respect to complying with MRPC 3.1.<sup>18</sup> In turn, FRCP case law deserves study for our purposes because it can help lawyers avoid sanctions imposed by courts pursuant to FRCP 11 as well as sanctions imposed by disciplinary boards under either rule.<sup>19</sup>

#### **PRACTICE TIP**

Study of FRCP 11 case law may provide practitioners with an added buffer of protection against any sanctions. FRCP 11 covers a broader range of conduct compared to MRPC 3.1. In fact, FRCP 11’s broader scope matches the scope of many state versions of MRPC 3.1; in both cases, the rule addresses whether an attorney presents a pleading for improper purposes. This guide avoids further discussion of this overlap given that an attorney’s motives have little to do with their use of AI Tools.<sup>20</sup>

---

17. *Id.*

18. Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L. REV. 765, 784, 797–98 (2004).

19. *See id.* at 797–98.

20. It is possible to imagine several hypotheticals in which a lawyer used an AI Tool in a way that placed their conduct within the scope of these rules. If those hypotheticals become reality, then future editions of this guide may



What constitutes an “unreasonable” inquiry under FRCP 11?

- Failure to review publicly available sources to determine a business’s citizenship.<sup>21</sup>
- Use of boilerplate allegations—indicating a lack of careful investigation and review of claims.<sup>22</sup>
- Reliance on overturned case law.<sup>23</sup>
- Presents an irrefutable claim but abstains from conducting a reasonable inquiry.<sup>24</sup> There is no safe harbor for getting the law right.<sup>25</sup>
- Absence of any “affirmative conduct” on the part of the attorney to investigate the law underlying claims.<sup>26</sup>
- Advances a claim without any “case law or reasoning to support” the underlying legal theory.<sup>27</sup>
- Advances a claim despite “an abundance of case law prohibiting” that claim, and the court determines that “a reasonable and competent attorney would not believe in [its] merits.”<sup>28</sup>
- Generally, falling short of a “stop-and-think obligation[.]”<sup>29</sup>

---

explore this area in more detail. For now, AI Tools have yet to be used for such purposes.

21. *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 108 (3d Cir. 2015). *See also* *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1302 (Fed. Cir. 2004) (holding that a lawyer performed a reasonable inquiry by reviewing available documents and declining to fault the lawyer for not conducting a chemical analysis of the alleged infringing product).

22. *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (interpreting FRCP 11 (1987)).

23. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080–82 (7th Cir. 1987) (identifying a lack of reasonable inquiry where an attorney based their suit on *Plessy v. Ferguson*, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896)).

24. *Foster v. Michelin Tire Corp.*, 108 F.R.D. 412, 416 (C.D. Ill. 1985).

25. *Id.* (“Counsel should not confuse federal procedural Rule 11 with federal procedural Rule 12(b)(6).”); *Slater v. Skyhawk Transp., Inc.*, 187 F.R.D. 211 (D.N.J. 1999).

26. *Mohammed v. Union Carbide Corp.*, 606 F. Supp. 252, 261 (E.D. Mich. 1985).

27. *Dodd Ins. Servs., Inc. v. Royal Ins. Co.*, 935 F.2d 1152, 1157 (10th Cir. 1991).

28. *Id.*

29. *US Sprint Commc’ns Co. v. Kaczmarek*, 121 F.R.D. 414, 416 (D. Kan. 1988) (citing *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. 4, 5–6 (D.D.C. 1984)).

What are the limits of a lawyer's duties under FRCP 11?

- Attorneys do not have an obligation to “turn up every dusty statute and precedent.”<sup>30</sup>
- What constitutes “reasonable” depends on:<sup>31</sup>
  - the significance of the issue to the suit,
  - the significance of the case, and
  - the justifiability of additional investigation in light of the costs of that investigation.

**PRACTICE TIP**

If you are an attorney of record, you are the potential subject of sanctions. In brief, co-counsel should be on notice. You may be on vacation. You may be the second chair. And, you may have only digitally signed the motion. The court, nevertheless, may not care. If you are an attorney of record, expect the court to hold you accountable for the conduct of the litigation.<sup>32</sup> Note also, that “total reliance on other counsel can itself be a violation of Rule 11.”<sup>33</sup>

## PART III: CASE STUDY ON THE APPLICATION OF FRCP

## 11

*Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).<sup>34</sup>

Stage of litigation

## Pleadings

---

30. *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) (citing *FDIC v. Elefant*, 790 F.2d 661, 668 (7th Cir. 1986)) (interpreting FRCP 11 (1987)).

31. *Id.* at 932–33. *See also* *Zion v. Nassan*, 727 F. Supp. 2d 388, 411 (W.D. Pa. 2010) (listing the following as considerations for whether an inquiry was reasonable under the circumstances: “(1) the amount of time available to the signer for conducting a factual and legal investigation; (2) the necessity of relying on a client for the underlying factual information; (3) the plausibility of the legal position advocated; (4) the complexity of the legal and factual issues implicated; (5) whether the signer depended on forwarding counsel or another member of the bar; and (6) whether the signer was in a position to know or acquire the relevant factual details.”).

32. *See* *Williams v. Ests. LLC*, 663 F. Supp. 3d 466 (M.D.N.C. Mar. 23, 2023).

33. *Id.* at 478 (citing *In re Kunstler*, 914 F.2d 505, 514 (4th Cir. 1990)).

34. *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

AI Tool used  
ChatGPT

Summary

Roberto Mata hired Steven Schwartz to represent him in a suit arising from Mata allegedly having been injured aboard a flight. Schwartz filed a Verified Complaint in New York State Court.<sup>35</sup> The defendant, Avianca, removed the case to federal court based on federal question jurisdiction under the Montreal Convention.<sup>36</sup>

Removal presented two issues for Schwartz: first, he was not admitted to practice in the federal district; and, second, he lacked the background required to handle the issues now at the heart of the dispute—he admitted that his practice had “always been exclusively in state court,” and he never claimed to have any experience with the Montreal Convention.<sup>37</sup>

Nevertheless, Schwartz’s colleague of more than two decades, Peter LoDuca, agreed to assist Mata (and, by extension, Schwartz). LoDuca filed a notice of appearance with the district court on behalf of Mata; though LoDuca intended for Schwartz to handle all the substantive legal work.<sup>38</sup> Months later, Avianca filed a motion to dismiss arguing that Mata’s claims were time-barred pursuant to the Montreal Convention.<sup>39</sup> Five days later, LoDuca filed a letter signed by Schwartz in which Schwartz asked for a one-month extension to respond to the motion.<sup>40</sup> The court granted Schwartz’s request.<sup>41</sup>

A few weeks later, LoDuca filed an “Affirmation in Opposition” to Avianca’s motion.<sup>42</sup> Schwartz “researched” and authored the Affirmation.<sup>43</sup> LoDuca “reviewed” it—he checked it for style and made “sure there was nothing untoward or no large grammatical errors.”<sup>44</sup>

---

35. *Id.* at 449.

36. *Id.*

37. *Id.* at 450.

38. *Id.* at 449.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 450.

43. *Id.*

44. *Id.*

LoDuca, however, did not do the following:<sup>45</sup>

- review any of the judicial authorities cited in the affirmation,
- ask Schwartz about the nature and extent of his research, or
- determine the existence of any contrary precedent.

According to the court, “LoDuca simply relied on a belief that work produced by [Schwartz] . . . would be reliable.”<sup>46</sup> Schwartz, again, was “completely unfamiliar” with the main issues; yet, despite that lack of familiarity, he later claimed to have only attempted research into those issues.<sup>47</sup>

Avianca’s reply memorandum revealed the details of Schwartz’s attempt. The company reported the following from its review of the Affirmation: they could not locate most of the cases cited, and the cases the company could locate did not provide the support for which they were cited.<sup>48</sup> LoDuca, upon receiving the reply, claimed to have not read it and simply passed it along to Schwartz.<sup>49</sup> It turned out Schwartz relied on ChatGPT to draft the Affirmation.<sup>50</sup>

His reliance was unfounded for three reasons:

- (1) Schwartz did not understand the technology. He claims to have been “operating under the false perception that [ChatGPT] could not possibly be fabricating cases on its own.”<sup>51</sup>
- (2) Schwartz abstained from any sort of inquiry into the accuracy of the AI Tool. Rather than verify any of the cites offered by ChatGPT, Schwartz reasoned that, worst case, the cited authorities would be unpublished, have subsequent procedural history, or otherwise be hard to access.<sup>52</sup> So, he pressed on.
- (3) Schwartz assumed that what is one true of one tool is likely true of similar tools. He explained that he had heard of other online tools that could perform the tasks he demanded of ChatGPT.<sup>53</sup>

In short, Schwartz overestimated ChatGPT’s capacity to perform legal tasks.

---

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 451.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

The court opted for a different approach. Upon reading Avianca's reply, the Court launched its own investigation into the cases cited in the Affirmation.<sup>54</sup> Like Avianca, the court did not find several of the cited authorities.<sup>55</sup> In response, the court issued two orders—both of which directed LoDuca to file an affidavit that annexed different cases cited in the Affirmation.<sup>56</sup>

LoDuca asked for an extension because he was out of office.<sup>57</sup> He wasn't. But LoDuca wanted Schwartz—who was on vacation—to have enough time to produce the cases.<sup>58</sup> The court granted the extension. Two weeks later, LoDuca filed an affidavit that annexed what he claimed to be copies of all of the decisions requested by the court, with the exception of a single case he could not locate.<sup>59</sup>

In actuality, LoDuca had in no way contributed to researching or drafting the affidavit; that was Schwartz.<sup>60</sup> LoDuca's role was confined to welcoming Schwartz into his office, looking at the affidavit, and signing it.<sup>61</sup> The court noted the absence of any evidence that LoDuca asked Schwartz any questions.<sup>62</sup>

The court concluded that the affidavit did not comply with its orders.<sup>63</sup> In many instances, Schwartz attached only excerpts of several cases, and in one instance, the citation appeared to be inaccurate.<sup>64</sup> Eventually, LoDuca and Schwartz admitted that ChatGPT generated non-existent cases.<sup>65</sup>

Ultimately, the court ordered LoDuca and Schwartz to pay a penalty, inform their client of the sanctions, and inform the judges whose names they wrongfully cited of the sanctions.<sup>66</sup> Notably, the court explicitly credited the attorneys for the sincerity of their expressions of embarrassment and remorse.<sup>67</sup>

---

54. *Id.* at 450–51.

55. *Id.*

56. *Id.* at 451.

57. *Id.* at 452.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 453–55.

64. *Id.*

65. *Id.* at 456.

66. *Id.* at 466.

67. *Id.*

### Lessons

- “Early Adopters” of AI Tools may be most at risk of violating MRPC 3.1.

Schwartz’s firm lacked access to Westlaw and Lexis; instead, it used Fastcase. Given the firm’s state law-based practice, its Fastcase account did not include full access to federal cases. Schwartz, aware of those limits, went to ChatGPT. He had recently learned about the site and “falsely assumed [it] was like a super search engine.”<sup>68</sup> Schwartz did not have the background necessary to know that ChatGPT could not serve as a substitute to traditional legal research.

- Lawyers ought to receive training prior to using AI Tools to understand what additional legal research they still must perform.

Schwartz had previously never used ChatGPT; his knowledge of its purpose, capabilities, and limits came from press reports and the observations of family members.

- Lawyers increase their odds of complying with MRPC 3.1 (and FRCP 11) by underestimating the accuracy and capability of AI Tools.

Schwartz prepared his affidavit without taking any affirmative steps to confirm that the excerpts of opinions provided by ChatGPT were parts of actual opinions. Note that tech-optimism seems to pervade the profession. A survey of 800 legal professionals revealed that a majority of respondents regarded AI as “generally reliable” or “extremely reliable.”<sup>69</sup>

- Courts expect evidence of research beyond the use of AI Tools. Lawyers who lack evidence of their inquiries and, instead, ask the court to take them at their word should anticipate skepticism from the bench.

Schwartz later filed an affidavit stating that ChatGPT “supplement[ed]” the research he performed.<sup>70</sup> At a subsequent hearing, though, Schwartz admitted only having made the following inquiries:

---

68. *Id.* at 456.

69. Cheryl Miller, *California State Bar to Craft Guidance on AI in the Legal Profession*, LAW.COM (May 22, 2023), <https://www.law.com/therecorder/2023/05/22/california-state-bar-to-craft-guidance-on-ai-in-the-legal-profession> (citing a survey by Outsell).

70. *Mata*, 678 F. Supp. 3d at 457.

- (1) Initially going to Fastcase,
- (2) finding no information there,
- (3) turning to ChatGPT as his “last resort.”<sup>71</sup> His research effectively ended there.

The court concluded that he had not done “meaningful research on the issue” and that the AI Tool served as his “only source” for his main arguments.<sup>72</sup>

- Assurances by the AI Tool of its accuracy do not hold up in court and do not excuse a lack of investigation by lawyers.

Schwartz did ask ChatGPT about the reliability of its work. The Tool responded that it provided “real” authorities via Westlaw, LexisNexis, and the Federal Reporter.<sup>73</sup> Schwartz cited the Tool’s statements as evidence for his good faith belief in ChatGPT’s accuracy.

#### PART IV: GENERAL GUIDANCE

Attorneys using AI Tools to research and draft legal arguments can mitigate the risk of violating MRPC 3.1 by diligently inquiring into the legal basis of their claims. Any legal claims identified or drafted by an AI Tool must undergo attorney review. This review should include:

- (1) a cite check that encompass both the accuracy of the citation itself and the extent to which it supports the claim; and
- (2) shephardizing cases to ensure they remain good law.

---

71. *Id.*

72. *Id.*

73. *Id.* at 458.

**TOOL ANALYSIS** → *ChatGPT*Purpose and function:

ChatGPT is a generative AI model created by OpenAI. The model is trained to receive an instruction in a prompt and return a response.<sup>74</sup>

Limitations:

OpenAI has not shied away from acknowledging the limits of ChatGPT. Upon releasing the model to the public on November 30, 2022, the company specified that it was providing the public with a “research preview,” during which it expected to learn about the “strengths and weaknesses” of the tool from user feedback.<sup>75</sup> OpenAI’s product release also included a LIMITATIONS section, which acknowledged several limits, including but not limited to:

- “ChatGPT sometimes writes plausible-sounding but incorrect or nonsensical answers.”
- “ChatGPT is sensitive to tweaks to the input phrasing or attempting the same prompt multiple times.”
- “The model is often excessively verbose and overuses certain phrases, such as restating that it’s a language model trained by OpenAI.”

The tool also relies on an old set of data to generate its responses.<sup>76</sup> ChatGPT has “limited knowledge of world and [sic] events after 2021[.]”<sup>77</sup>

Finally, as Schwartz discovered, “ChatGPT will occasionally make up facts or ‘hallucinate’ outputs.”<sup>78</sup> OpenAI offers lawyers no means to prevent such hallucinations and instead instructs them to provide feedback via a Thumbs Up and Down button upon receiving an answer unrelated to their prompt.<sup>79</sup>

74. Introducing ChatGPT, OPENAI (Nov. 30, 2022), <https://openai.com/blog/chatgpt>.

75. *Id.*

76. *What is ChatGPT?*, OPENAI, <https://help.openai.com/en/articles/6783457-what-is-chatgpt> (last visited Apr. 9, 2024).

77. *Id.*

78. *Id.*

79. *See id.*



This guidance reflects the widespread interpretation that, in most states, lawyers must fulfill a duty to investigate in order to comply with MRPC 3.1. The difference between MRPC 3.1 and its predecessor supports this interpretation.

MRPC 3.1 emerged from DR 7-102 of the ABA's Model Code of Professional Responsibility. MRPC 3.1 differs from its predecessor in important ways: first, it covers less conduct; second, it does not specify a scienter standard; and third, it contains an implicit duty to investigate. By way of comparison, here is the text of DR 7-102:

- (A) In his representation of a client, a lawyer shall not:
- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
  - (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
  - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
  - (4) Knowingly use perjured testimony or false evidence.
  - (5) Knowingly make a false statement of law or fact.
  - (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
  - (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
  - (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
- (B) A lawyer who receives information clearly establishing that:
- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
  - (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.<sup>80</sup>

Just as the differences between MRPC 3.1 and DR 7-102 stress the importance of an attorney's duty to inquire into the legal basis for bringing or defending a proceeding and asserting

---

80. MODEL CODE OF PRO. RESP. DR 7-102 (AM. BAR ASS'N 1980).

and controverting an issue therein, Comment 2 to MRPC 3.1 hints at what sort of inquiry lawyers must complete.

Here is an excerpt from the Comment 2 to MR 3.1:

What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.<sup>81</sup>

Scholars have interpreted this Comment as “implicitly recogniz[ing] a duty of inquiry as a necessary means of satisfying the rule.”<sup>82</sup>

Comparison of MRPC 3.1 to other Model Rules reinforces the interpretation that MRPC 3.1 imposes a duty to inquire. In particular, a comparison of MR 3.1 to MRPC 3.8(a), the criminal parallel to MR 3.1, bolsters the duty-to-inquire interpretation of MR 3.1.<sup>83</sup> MRPC 3.8 specifically requires that prosecutors “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause,” which Professor George M. Cohen theorizes may indicate the lack of a duty of inquiry.<sup>84</sup> Put differently, the Model Rules may treat a knowledge requirement and duty of inquiry as mutually exclusive.<sup>85</sup> In the case of MRPC 3.1, that trade-off means lawyers may violate the Rule even though they did not knowingly advance a proceeding or issue based on frivolous legal grounds.

#### PART V: STATE SPECIFIC GUIDANCE

All fifty states and the District of Columbia have some version of MR 3.1 in their respective rules of professional conduct.<sup>86</sup> The vast majority of those corresponding rules mirror the text of MR 3.1.<sup>87</sup> Seven states, though, offer rules that vary

---

81. MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS'N 2023).

82. George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 136 (2018).

83. *Id.*

84. *See id.* at 135–36 (contrasting MR 3.8 with MR 3.1 and questioning whether the “knowledge requirement [in MR 3.8(a)] is supposed to indicate the lack of a duty of inquiry”).

85. *Id.* at 117.

86. This author reviewed each state's adoption or modification of MR 3.1. *Charts Comparing Professional Conduct Rules*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/policy/charts](https://www.americanbar.org/groups/professional_responsibility/policy/charts) (last visited Apr. 11, 2024); GA. RULES OF PRO. CONDUCT r. 3.1 (ST. BAR OF GA. 2024); CAL. RULES OF PRO. CONDUCT r. 3.1 (ST. BAR OF CAL. 2018).

87. Only six states have substantively different versions of MR 3.1 for the purposes of guiding the use of AI tools and other tools based on emerging

from MR 3.1 in ways that demand additional consideration from practitioners in those jurisdictions.

### Scienter Specification

#### Generally

What constitutes knowledge under the MRPC and many state equivalents is unclear.<sup>88</sup> In light of the ABA's definition of knowledge failing to clearly state whether "knowledge" means "actual knowledge" or knowledge that "may be inferred from circumstances,"<sup>89</sup> scholars, courts, and disciplinary boards have resolved that ambiguity by applying an objective standard of proof for actual knowledge.<sup>90</sup>

Under this objective standard, the rules "allow a disciplinary authority to prove actual knowledge by circumstantial evidence, rather than solely by a lawyer's admission of knowledge as part of the disciplinary proceeding[.]"<sup>91</sup> Importantly, under an objective standard, a lawyer may still violate MR 3.1 despite "sincerely contending that the lawyer did not believe that some fact was true or that some legal rule existed or would be interpreted in a certain way."<sup>92</sup>

For instance, Minnesota's Supreme Court, when interpreting their state's identical version of MRPC 3.1, noted that "the relevant standard for determining whether an argument has a good faith basis in law or fact is an objective

---

technologies. Of the remaining forty-five jurisdictions, the respective corresponding rules are either identical to MR 3.1 or vary to a minimal extent. For example, Alaska's corresponding rule differs from MR 3.1 by placing "non-frivolous" before "basis," deleting "that is not frivolous," using "including" rather than "which includes," and adding "or involuntary institutionalization" after "incarceration." ALASKA RULES OF PRO. CONDUCT r. 3.1 (ALASKA BAR ASS'N 2022). Note that some of these variations are substantive, though in different contexts. Texas's version of MR 3.1, for instance, completely omits the second sentence. TEX. RULES OF PRO. CONDUCT r. 3.1 (ST. BAR OF TEX. 2022).

88. See, e.g., Cohen, *supra* note 82, at 115–16.

89. See MODEL RULES OF PRO. CONDUCT r 1.0(f) (AM. BAR ASS'N 2023).

90. See Cohen, *supra* note 82, at 116 (referring to the use of an objective standard as a "common resolution").

91. *Id.*

92. *Id.* at 117. See also *In re Levine*, 174 Ariz. 146, 153 (1993) (regarding as objectively non-frivolous "issues raised [that] are supportable by any reasonable legal theory" and "colorable legal arguments . . . about which reasonable attorneys could differ").

standard that requires us to consider what a reasonable attorney, in light of that attorney’s professional functions, would do under the same or similar circumstances.”<sup>93</sup>

Based on *Mata v. Avianca*, though, courts may assume that lawyers know that claims and issues based solely on legal citations and arguments identified and expanded upon by ChatGPT and LLMs with similar capacities lack an adequate basis in law.

The following versions of MRPC 3.1 specify a scienter standard for determining whether a lawyer brought a proceeding or asserted an issue therein without an adequate basis in law and fact.

### OREGON

**Rule:** “In representing a client or the lawyer’s own interests, a lawyer shall not **knowingly** bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous . . . .”<sup>94</sup>

**Note on Interpretation:** A legal position “is not ‘frivolous’ within the meaning of RPC 3.1 if it is ‘plausible,’ regardless of whether the position taken ultimately is found to be correct.”<sup>95</sup>

### WISCONSIN

**Rule:** “In representing a client, a lawyer shall not . . . **knowingly** advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law[.]”<sup>96</sup>

**Note on Interpretation:** Whereas most jurisdictions rely on an objective standard to assess whether an attorney complied with their respective versions of MRPC 3.1, the Wisconsin Supreme Court has “expressly established a subjective test for an ethical

---

93. *In re Michael*, 836 N.W.2d 753, 762 (Minn. 2013) (citing *In re Panel Case No. 17289*, 669 N.W.2d 898, 905 n.3 (Minn. 2003)).

94. OR. RULES OF PRO. CONDUCT r. 3.1 (OR. ST. BAR 2024) (emphasis added).

95. *In re Conduct of Scott W. McGraw*, 362 Ore. 667, 683 (2018).

96. WIS. RULES OF PRO. CONDUCT r. 3.1 (ST. BAR OF WIS. 2023) (emphasis added).

violation.”<sup>97</sup>As a result, an adjudicator must find that the lawyer knew the claim or defense was unwarranted to conclude they violated Rule 3.1.<sup>98</sup>

**Case Studies:** Two recent cases provide examples of when that subjective standard is met: when an attorney filed a motion that restated grounds that they unsuccessfully raised in an earlier motion that the court denied,<sup>99</sup> and when an attorney filed a motion for relief several years late.<sup>100</sup>

Upshot: If cases akin to *Mata* become more common, lawyers practicing in Wisconsin may struggle to show that they had a subjective basis for relying on legal guidance provided by AI Tools. It may be especially difficult for younger lawyers and lawyers in fields related to technology to pass the Court’s subjective test.

**CAUTION**

Though lawyers are analyzed under a subjective standard in Wisconsin disciplinary proceedings, they will be evaluated under an objective standard in civil cases.<sup>101</sup>

NEW YORK

**Rule:** New York specifically defines “frivolous” and, in doing so, identifies a scienter requirement. According to New York’s version of MR 3.1, a lawyer engages in frivolous conduct when they “**knowingly** advance[] a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law[.]”<sup>102</sup>

**Case Study:** *Argentieri v. Grievance Committee of Seventh Judicial District*, 196 A.D.3d 56 (N.Y. App. Div. 2021).<sup>103</sup>

97. *Id.* at r. 3.1 Wis. comm. cmt.

98. *See In re Osicka*, 765 N.W.2d 775 (Wis. 2009).

99. *In re Katerinos*, 782 N.W.2d 398 (Wis. 2010).

100. *In re Templin*, 877 N.W.2d 107 (Wis. 2016).

101. *In re Lauer*, 324 N.W.2d 432, 438 (Wis. 1982).

102. N.Y. RULES OF PRO. CONDUCT R. 3.1 (N.Y. ST. BAR ASS’N 2021) (emphasis added).

103. *Matter of Argentieri*, 196 A.D.3d 56 (N.Y. App. Div. 2021).

A lawyer accepted an offer to represent clients in a real property dispute.<sup>104</sup> The lawyer knew his clients had been defendants in an earlier action in which plaintiffs sought the right to traverse the clients' property.<sup>105</sup>

In that earlier case, plaintiffs advanced several legal theories, including a right of access under a quit claim deed they allegedly filed with the applicable county clerk in 2013.<sup>106</sup> Then, in 2017, a trial took place in which the court approved the lawyer's motion for summary judgment on behalf of their clients.<sup>107</sup>

In response, the lawyer sent one of the plaintiffs a letter offering to abstain from filing a civil action for prosecuting a fraudulent deed if the plaintiff paid \$90,000 to their client.<sup>108</sup> The plaintiff refused the offer.<sup>109</sup> The lawyer responded by commencing a civil action against the plaintiffs—alleging several torts related to the allegation of prosecuting a fraudulent deed.<sup>110</sup> The lawyer also falsely alleged that the plaintiff who had denied the earlier offer had committed numerous felonies related to the supposedly fraudulent deed.<sup>111</sup>

When this behavior resulted in the lawyer being the subject of a grievance complaint, the lawyer then made false or misleading statements of law or fact during the grievance investigation.<sup>112</sup> Unsurprisingly, the lawyer was determined to have violated New York's version of MRPC 3.1.<sup>113</sup>

Upshot: Clear disclosures about the limits of AI Tools provide lawyers may lead a New York court to decide that lawyers have a basis to *know* that any legal guidance has some chance of being unwarranted under existing law, and to otherwise not qualify for the good faith exception for novel arguments. However, the state's "knowing" standard may afford lawyers some leeway in

---

104. *Id.* at 57.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 57–58.

109. *Id.* at 58.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 59.

relying on AI Tools for guidance given that such tools may regularly produce accurate or, minimally, useful legal guidance.

#### NEW JERSEY

**Rule:** “A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer **knows or reasonably believes** that there is a basis in law and fact for doing so that is not frivolous[.]”<sup>114</sup>

**Case Study:** *In re Harris*, 182 N.J. 594 (2005).<sup>115</sup>

The New Jersey Supreme Court upheld the state’s Discipline Review Board’s disbarment of a lawyer based, in part, on that attorney having violated the state’s version of MRPC 3.1 by failing to allege a necessary jurisdictional component of the claim at issue and by bringing a Section 1983 claim against a non-state actor.<sup>116</sup> When the trial court in the underlying case ordered the lawyer to show cause why the complaint did not merit dismissal and why they did not deserve sanctions for bringing a frivolous action, the lawyer filed an amended complaint with few to no substantive changes.<sup>117</sup> The court then dismissed the complaint and imposed sanctions.<sup>118</sup>

Upshot: “Wishful thinking” does not constitute an adequate basis to bring a proceeding or assert an issue; “sound advocacy” is the threshold.<sup>119</sup> New Jersey lawyers must actively establish and verify the legal basis for their claims. Any guidance or product provided by AI Tools that claim or are perceived to have capacity to draft accurate legal documents must undergo additional scrutiny by counsel.

---

114. N.J. RULES OF PRO. CONDUCT r. 3.1 (Effective 2020) (emphasis added).

115. *In re Harris*, 182 N.J. 594 (2005).

116. *Id.* at 606, 612.

117. *Id.* at 606–07.

118. *Id.* at 607.

119. *Id.* (quoting the state’s Disciplinary Review Board).

***HYPOTHETICAL***

You are knee deep in trial prep for the case of your career. So, of course, your mother-in-law calls you with an urgent request to help her in a real estate dispute. You, being a great spouse and an even better kid-in-law, agree to take on a limited role; you tell her that she must file her claims *in propria persona* but that you will prepare her pleadings. She is over the moon.

You take several hours off from trial prep and draft an excellent complaint. She files it and you think you are off the hook . . . at least for a couple of weeks. Instead, you get a late-night text that she now wants to amend the complaint to include a claim under an obscure federal law. You have never heard of it and you have no time to spend on what may be a made-up cause of action. You tell her to have AttyLLM—an AI Tool—draft the amendment. She listens and files what AttyLLM produced.

Sure enough, the amended complaint alleges the defendant violated a made-up federal law. A few weeks later, the state’s disciplinary board contacts your office. Did you violate that state’s version of MRPC 3.1?

**Answer:** Most likely, yes.

As summarized in an Advisory Opinion issued by the Arizona Committee on the Rules of Professional Conduct, even when an attorney engages in a limited form of representation, they still have “responsibilities to the court and to other counsel of record in the action.”<sup>120</sup> In practice, this means that “an attorney cannot prepare pleadings for [their] client, which the client is to file in propria persona, that are frivolous.”<sup>121</sup>

The Committee cited similar opinions issued by the Maine Board of Bar Overseers Professional Ethics Committee as well as guidance provided by the ABA in support of its interpretation of MRPC 3.1.<sup>122</sup>

---

120. Ariz. Comm. on the Rules of Pro. Conduct, Advisory Op. 91-03: Scope of Representation; Candor Toward Tribunal; Fairness to Opposing Party or Counsel (1991), <https://tools.azbar.org/RulesofProfessionalConduct/ViewEthicsOpinion.aspx?id=618>.

121. *Id.*

122. *Id.*



**Friends don't let friends (or mothers-in-law) exclusively rely on AI Tools for legal research.**

## **Inquiry Requirements**

### Generally

As discussed above, Comment 2 to MRPC 3.1 advises that lawyers “inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”<sup>123</sup> State courts and disciplinary bodies have not offered a precise test for what satisfies this obligation.

For instance, a Florida state court interpreting an identical rule to MRPC 3.1 noted that lawyers must “inform themselves about . . . the applicable law”<sup>124</sup> and held that a lawyer fell short of that standard where despite the applicable law being “clear and well-settled,” the lawyer advanced arguments that lacked support by the application of the law.<sup>125</sup> The court encouraged lawyers to “give thoughtful consideration as to whether there are non-frivolous grounds for [their claims]” and to refrain from making “meritless . . . arguments on the chance that they will ‘stick.’”<sup>126</sup> The Supreme Court of Colorado, also interpreting their state’s identical rule to MRPC 3.1, likewise stopped short of stating a test for whether a lawyer “inform[ed] themsel[f]” per MRPC 3.1 but did instruct lawyers to consult additional evidence and sources when presented with “credible contradictory” information.<sup>127</sup>

Other states, however, have versions of MRPC 3.1 that more specifically detail the requisite inquiry.

### TENNESSEE

**Rule:** “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless after a reasonable inquiry

---

123. MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS’N 2023).

124. *de Vaux v. Westwood Baptist Church*, 953 So.2d 677, 683–84 (Fla. Dist. Ct. App. 2007).

125. *Id.* at 684.

126. *Id.* at 685.

127. *In re Olsen*, 326 P.3d 1004, 1009 (Colo. 2014).

the lawyer has there is a basis in law and fact for doing so that is not frivolous . . . .”<sup>128</sup>

**Case Study:** *Board of Professional Responsibility of the Supreme Court of Tennessee v. Walker*, 638 S.W.3d 127 (Tenn. 2021).<sup>129</sup>

A lawyer represented to the relevant tribunal that he possessed the original assignment of a deed of trust that was statutorily required to show their client’s interest in the property at issue.<sup>130</sup> He previously submitted an assignment that they had prepared and had recorded in the local Register of Deeds office.<sup>131</sup> Based on that representation and filing, the court sided in favor of their client.<sup>132</sup> The assignment that the lawyer submitted, however, was fraudulent.<sup>133</sup> Yet, when opposing counsel challenged the validity of the assignment, the lawyer doubled down and claimed they had an embossed version of the assignment.<sup>134</sup>

The trial court did not take the lawyer at their word and accused them of “misleading and deceitful” actions.<sup>135</sup> When the lawyer came before the disciplinary board as a result of those actions, they again insisted that they had the original assignment at issue.<sup>136</sup> The board determined that he violated Tennessee’s version of MRPC 3.1 when, upon discovering they lacked the original document, they neglected to correct their statement before the trial court.<sup>137</sup>

The lawyer argued before the Supreme Court of Tennessee that their failure to provide the original assignment did not merit disciplinary action because they later produced a

---

128. TENN. RULES OF PRO. CONDUCT rR. 3.1 (TENN. ADMIN. OFF. OF THE CTS. 2011). Note that despite this specific language that varies from MRPC 3.1, the relevant comment to this rule closely tracks those that follow MRPC 3.1. More specifically, Comment 2 to Tennessee’s version of MRPC 3.1 also instructs lawyers to *reasonably* “inform themselves about . . . the law applicable to the case and then act reasonably in determining that they can make good faith arguments in support of their client’s position.” *Id.* at cmt. 2.

129. *Bd. of Pro. Resp. of the Supreme Ct. of Tenn. v. Walker*, 638 S.W.3d 127 (Tenn. 2021).

130. *Id.* at 130.

131. *Id.* at 131–32.

132. *Id.* at 132.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 133.

substitute version.<sup>138</sup> However, as pointed out by the Court, the real issue was the lawyer's failure to correct their false statement to the trial court—a representation that was determinative in resolving the issue.<sup>139</sup> Consequently, the Court upheld the board's determination that the lawyer violated the state's version of MRPC 3.1 because “without the original assignment . . . [the lawyer] could not have made reasonable inquiry about whether the redemption proceeding had a factual or lawful basis . . . ”<sup>140</sup>

**Upshot:** Unless and until AI Tools provide lawyers with verified legal documents, such as opinions, Tennessee courts may expect lawyers to seek out alternative sources to confirm the veracity of legal claims.

### MONTANA

**Rule:** “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein: (1) without having first determined through **diligent investigation** that there is a bona fide basis in law and fact for the position to be advocated . . . ”<sup>141</sup>

**Case Study:** *State v. Sanchez*, 2008 MT 27.<sup>142</sup>

The majority of the Montana Supreme Court held that a prosecutor did not violate the state's version of MRPC 3.1 despite a defendant's allegations that the prosecutor “engaged in misconduct by repeatedly misstating the law,” which purportedly denied the defendant their right to a fair trial.<sup>143</sup> The defendant took issue with the prosecutor's closing statement to the jury, which included the assertion that to convict the defendant of mitigated deliberate homicide they would have to find that the defendant had a reasonable response to extreme emotional distress; the law instead states that the jury must find that reasonable explanation existed for the defendant's emotional distress.<sup>144</sup>

---

138. *Id.*

139. *Id.*

140. *Id.* at 134.

141. MONT. RULES OF PRO. CONDUCT r. 3.1(a) (ST. BAR OF MONT. 2020) (emphasis added).

142. *State v. Sanchez*, 2008 MT 27.

143. *Id.* at ¶ 50.

144. *Id.* at ¶ 52.

The State countered the defendant’s argument by pointing to other instances in which the prosecutor accurately discussed the law.<sup>145</sup> The State also argued that “improvising” during closing arguments often produces “imperfect syntax and less than crystal clear meaning.”<sup>146</sup>

The Court first assessed the ambiguity of the law. Upon finding it unambiguous, the Court agreed with the defendant that the prosecutor misstated the law.<sup>147</sup> The Court did not lend weight to the State’s characterization of closing statements frequently resulting in slight and unintentional misstatements. Moreover, the Court observed that in this case the comments “demonstrate[d] a blatant misstatement of the law, not mere inadvertence.”<sup>148</sup> Indeed, the Court stated that the closing argument “went far beyond appropriate ad-libbing and tested the boundaries of professional ethics.”<sup>149</sup> Still, the majority did not conclude that the prosecutor violated the state’s version of MRPC 3.1.

One justice, however, dissented. Though the justice grounded their dissent in the important and distinct role of prosecutors, the dissent still contained generally applicable guidance on what may constitute a violation of MRPC 3.1. The dissent concluded that the “ad-libbing” lamented by the majority likely constituted much more deliberate misstatements of the law as evidenced by the prosecutor repeatedly mischaracterizing the law, even once having been informed of their inaccurate summation.<sup>150</sup> The dissent viewed this conduct as a violation of Montana’s MRPC 3.1. The prosecutor’s misstatements did not amount to “mere inadvertence” and were “patently false.”<sup>151</sup>

Upshot: Montana courts may expect that lawyers will not leave the question of whether their arguments have a basis in law to chance. Perhaps more so than other state courts, Montana lawyers will likely face sanctions if they refrain from actively editing and verifying suggested legal guidance from AI Tools.

---

145. *Id.* at ¶ 53.

146. *Id.* at ¶ 54.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at ¶¶ 86–87.

151. *Id.* at ¶ 88.

**GUIDANCE SUMMARY**

- Use of AI Tools to conduct legal research may expose an attorney to sanctions by the presiding court or the relevant disciplinary board under MRPC 3.1 (and FRCP 11).
- AI Tools are not a substitute for a lawyer's duty to inquire into the legal basis for bringing a proceeding or asserting an issue therein.
- An attorney who relies on AI Tools to supplement their legal research should be aware that such tools may produce inaccurate, outdated, and underinclusive analysis.

**How to Comply with MRPC 3.1 in the Age of AI****Regardless of the jurisdiction:**

If you use an AI tool to assist with legal research and drafting:

1. Research the disclosed limitations and stated functions of any AI Tool;
2. Based on that research, adjust your use of that AI Tool to limit the likelihood of relying on inaccurate or misleading legal analysis by that Tool;
3. Document legal research conducted in addition to research efforts through an AI Tool; and
4. Demonstrate your efforts to verify any excerpts of laws and opinions as well as citations offered by the AI Tool.

**In Oregon, Wisconsin, New York, and New Jersey:**

Beware of their respective scienter standards. In a jurisdiction such as New York—in which an attorney has been sanctioned for not knowing the limitations of ChatGPT—this standard may place a greater onus on lawyers to refrain from relying on AI Tools for substantive analysis. However, in a state like Wisconsin, a lawyer may evade sanctions under the state's MRPC 3.1 if they can demonstrate their intent to avoid bringing a claim without a basis in law.

**In Tennessee and Montana:**

Collect evidence of additional verification of the legal claims made by any AI Tool to comply with more specific investigation requirements. Lawyers in these states may, for instance, want to do more than take the AI Tool owner at their word with respect to the limits of the tool and instead look for independent analysis of those Tools.

PART VI: SURVEY OF STATES WEIGHING RULES  
REFORM

- **States to Watch**
  - Potential new rules of professional conduct in California, New York, Minnesota, and Texas. The ABA may also amend the MRPC.
  - Pending judicial action to govern the use of AI Tools in proceedings before certain courts in Texas and Illinois.
- **Trends**
  - Early differences in the respective state efforts to draft rules regarding the use of AI Tools indicates a potential divergence:
    - Bar associations in some states, such as Minnesota, apply an access to justice approach to the use of AI Tools and, in doing so, encourage the use of such tools to reduce barriers facing pro se litigants.
    - Yet, bar associations in other states, namely California, perceive AI Tools as a threat to the legitimacy and accuracy of litigation and, as a result, intend to place severe restrictions on the use of such tools.
  - In the short run, judge-by-judge, district-by-district rules may dictate when and how attorneys use AI Tools in litigation. Judges in Texas and Illinois have instituted specific requirements regarding the use of AI Tools. It is likely many of their colleagues will follow suit.
- **Compliance Recommendations**
  - **Be proactive:** Follow state bar blogs and newsletters and, in particular, work done by Committees for Professional Responsibility and Conduct. By reading minutes and even social media posts, you may hear of a nascent effort by the state bar to regulate AI Tools.
  - **Assume restrictions:** Though only a few courts have explicitly adopted disclosure requirements related to the use of AI Tools to conduct legal research and drafting, assume that all judges have considered such proposals and likely share a desire to limit the use or, at a minimum, the undisclosed use of AI Tools.

### Overview of Potential Rules Reforms

State bar associations around the United States have noted an increased use of AI Tools by practitioners and, in some cases, initiated regulatory efforts to respond to that use. The formality of those responses, however, varies significantly. Each of these efforts, nevertheless, merits study by practitioners in the respective jurisdictions. Though some efforts appear informal, they contain specific guidance that disciplinary boards may expect practitioners to, minimally, know of and, likely, comply with. Practitioners should also keep an eye out for developments in other jurisdictions between publication of versions of this practice guide. Given concerns among practitioners that the MRPC do not adequately address the use of AI Tools,<sup>152</sup> it is likely that more state bars will continue to take on this topic in more detail.

The following provides a summary of notable developments in the regulation of AI Tools by the ABA, state bar associations, and trial courts. This is not a comprehensive list. The featured states were selected based on the size of their respective bars and the extent to which their guidance demonstrates general trends among state bars. Myriad legal actors, including attorneys general in several states, are exploring how best to regulate AI generally as well as the use of AI Tools by lawyers.<sup>153</sup> The intended outcome of such efforts remains up in the air—as evidenced in more detail below and as indicated by the fact that current and future members of the legal profession have yet to determine the proper uses of AI Tools.<sup>154</sup>

---

152. See, e.g., COPRAC, ST. BAR OF CAL., GENERATIVE AI THOUGHT EXCHANGE: RESULTS at 6 (2023) [hereinafter, CA Bar Survey], <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000031268.pdf> (reporting that a mere twenty-three percent of respondents to a survey of state bar members agreed that the California’s Rules of Professional Conduct “sufficiently address the use of generative AI in the law”).

153. See Press Release, Jonathan Skrmetti Att’y Gen. & Rep., Attorney General Skrmetti Urges Federal Agency to Prioritize Transparent, Risk-Based Approach to AI Governance (June 13, 2023), <https://www.tn.gov/attorneygeneral/news/2023/6/13/ma23-34.html> (summarizing a letter authored by nearly two-dozen attorneys general calling on federal regulators to govern AI).

154. See Lauren Coffey, *Law Schools Split on ChatGPT in Admissions Essays*, INSIDE HIGHER ED (Aug. 4, 2023), <https://www.insidehighered.com/news/tech-innovation/artificial-intelligence/2023/08/04/law-schools-split-using-chatgpt-admissions> (pointing out that some law schools permit applicants to use ChatGPT when completing their applications, while others have banned such use).

ABA

**Action:** The House of Delegates passed a resolution related to the development and use of AI Tools.<sup>155</sup> The Resolution urged developers of AI systems to: (1) ensure that their AI models are “subject to human authority, oversight, and control”; (2) take “reasonable measures to mitigate against . . . harm or injury” caused by their AI products or otherwise be held accountable for deleterious consequences; and (3) design “transparen[t] and traceab[le]” AI products.<sup>156</sup>

**Timeline and Next Steps:** The Resolution called on Congress and state legislatures to adopt the ABA’s guidelines via legislation and standards.<sup>157</sup>

**Additional Details:** The action by the House of Delegates may suggest that the ABA intends to actively monitor the development and deployment of different AI Tools. By focusing on the actions that AI developers should take, the Delegates may have indicated an expectation that the makers rather than the users of AI Tools should face more responsibility for any socially undesirable outcomes.

Note there are some signs that the ABA is unsure of how best, as well as how forcefully, to push for compliance with these guidelines. After issuing an op-ed that urged the creation of new regulations of legal service providers,<sup>158</sup> the organization later “scrapped” it.<sup>159</sup>

**Action:** The ABA formed the Task Force on Law and Artificial Intelligence in late August.<sup>160</sup> Three goals make up the Task

155. ABA House of Dels., Resolution 604 (2023). *See also* Lynn White, *ABA Adopts Guidelines for Artificial Intelligence*, THE FEDERALIST SOC’Y (July 10, 2023), <https://fedsoc.org/commentary/fedsoc-blog/aba-adopts-guidelines-for-artificial-intelligence>.

156. ABA House of Dels., Resolution 604 (2023).

157. *Id.* Though it is unclear whether any states have explicitly considered the ABA’s guidelines, several have explored legislation regulating AI research, development, and deployment. John Frank, *State Lawmakers Want Tougher Regulation of AI Technology*, AXIOS (Aug. 16, 2023), <https://www.axios.com/local/denver/2023/08/16/state-lawmakers-regulate-ai-artificial-intelligence>.

158. Maya Markovich & Tom Gordon, *Opinion: DoNotPay Controversy Illuminates Urgent Need for Regulatory Reform*, LAWNEXT (Aug. 2, 2023), <https://directory.lawnext.com/library/opinion-do-not-pay-controversy-illuminates-urgent-need-for-regulatory-reform>.

159. Chris Opfer et al., *Wake Up Call: ABA Walks Back AI-Based Regulatory Reform Call*, BLOOMBERG L. (Aug. 7, 2023), <https://news.bloomberglaw.com/business-and-practice/wake-up-call-aba-walks-ai-based-back-regulatory-reform-call-9>.

160. Sam Skolnik, *WilmerHale’s Waxman, Ex-PTO Head Lee to Advise AI Task Force*, BLOOMBERG L. (Aug. 28, 2023),



Force's mission: "(1) address the impact of AI on the legal profession and the practice of law, and related ethical implications; (2) provide insights on developing and using AI in a trustworthy and responsible manner; and (3) identify ways to address AI risks."<sup>161</sup>

**Timeline and Next Steps:** The ABA plans to make the Task Force's final report available in July of 2024. Earlier drafts as well as webinars to solicit public comment will occur in the interim.<sup>162</sup>

**Rules Implicated:** TBD.

**Additional Details:** Though the Task Force has not specified which rules it will target, the ABA's website on the Task Force makes clear that the ethical considerations raised by the use of AI tools will lie at the center of the group's work.<sup>163</sup>

### CALIFORNIA

**Action:** Committee of Professional Responsibility & Conduct working on a recommendation for the Board of Trustees as to regulating the use of AI by the legal profession.<sup>164</sup>

**Timeline and Next Steps:** Recommendations completed by November. Board action possible soon after.

**Rules Likely Implicated:** 1.1, 1.3, 3.1, 5.1–5.5, and 8.4.

**Additional Details:** The Committee completed a survey of members of the Bar. The results suggest that the Committee's recommendations may focus on Rules 5.1–5.5,<sup>165</sup> which generally pertain to a lawyer's responsibilities within law firms.<sup>166</sup> Several respondents also indicated

---

<https://news.bloomberglaw.com/business-and-practice/wilmerhales-waxman-ex-pto-head-lee-to-advise-ai-task-force>.

161. *Task Force on Law and Artificial Intelligence*, AM. BAR ASS'N [hereinafter ABA AI Task Force], [https://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/artificial-intelligence](https://www.americanbar.org/groups/leadership/office_of_the_president/artificial-intelligence) (last visited Apr. 12, 2024).

162. Skolnik, *supra* note 160.

163. ABA AI Task Force, *supra* note 161.

164. Cheryl Miller, *California State Bar to Craft Guidance on AI in the Legal Profession*, THE RECORDER (May 22, 2023), <https://www.law.com/therecorder/2023/05/22/california-state-bar-to-craft-guidance-on-ai-in-the-legal-profession>.

165. *See* CA Bar Survey, *supra* note 152, at 8 (disclosing "highly ranked thoughts" of respondents including a demand for greater awareness of a lawyer's duties to check the work of AI Tools per Rules 5.1–5.5).

166. Chapter 5 of the California Rules of Professional Conduct includes the following relevant rules: Rule 5.1: Responsibilities of Managerial and Supervisory Lawyers; Rule 5.2: Responsibilities of a Subordinate Lawyer; Rule 5.3: Responsibilities Regarding Nonlawyer Assistants; Rule 5.4: Financial and Similar Arrangements with Nonlawyers; Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law. CAL. RULES OF PRO. CONDUCT r. 5.1–5.5 (ST. BAR OF CAL. 2018).

concerns related to competency (Rule 1.1), diligence (Rule 1.3), and meritorious claims (Rule 3.1).<sup>167</sup>

If the Committee and, in time, the Board takes seriously the popular views of respondents, then a new or amended rule may explicitly define the failure to review content drafted by AI Tools as misconduct.<sup>168</sup> Likewise, adherence to respondents' views may result in AI Tools being labeled as a "nonlawyer," per Rule 5.3.<sup>169</sup> Finally, following respondents' advice could result in explicit guidance for when use of AI Tools is appropriate; respondents supported the idea that AI Tools should not inform a lawyer's decisions on strategy nor constitute the basis of legal advice to a client.<sup>170</sup>

**Significance:** Any action taken by the California State Bar—given the state's reputation for leading in the creation and adoption of technology as well as the size of the legal practice in the state—may influence actions taken by state bars in other jurisdictions.

### NEW YORK

**Action:** Task Force created to "address AI's potential to streamline how daily business is conducted" following several reports of professionals improperly relying on ChatGPT results.<sup>171</sup>

**Timeline and Next Steps:** The launch of the task force did not include a timeline for any specific work product.

**Rules Likely Implicated:** TBD.

**Additional Details:** Compared to the messaging produced and actions taken by the State Bar of California, the New York State Bar Association seems more receptive to the possibility of AI Tools assisting lawyers *and* nonlawyers.<sup>172</sup> With respect to the latter, the President of the NYSBA noted a focus on assessing how AI may aid "those who interact with the legal system,"<sup>173</sup> a broader set of folks than clients.

### MINNESOTA

---

167. CA Bar Survey, *supra* note 152, at 9–10.

168. *See id.* at 9.

169. *See id.*

170. *See id.* at 11.

171. David Alexander, *New York State Bar Association Task Force to Address Emerging Policy Challenges Related to Artificial Intelligence*, N.Y. ST. BAR ASS'N (July 17, 2023), <https://nysba.org/new-york-state-bar-association-task-force-to-address-emerging-policy-challenges-related-to-artificial-intelligence>.

172. *See id.*

173. *Id.*

**Action:** Unauthorized Practice of Law and Artificial Intelligence Working Group launched to determine the likely effect of AI Tools on the legal profession.<sup>174</sup>

**Timeline and Next Steps:** At an unspecified time, make recommendations to the State Bar with the goal of protecting “the public while also fulfilling the profession’s goal of access to justice for everyone.”<sup>175</sup>

**Rules Likely Implicated:** TBD.

**Additional Details:** Not traditionally thought of as a leader in technology, the efforts underway in Minnesota make clear that state bar associations around the country have the regulation of attorney use of AI Tools on their agenda. This serves as a warning to attorneys practicing in any state that the applicable state bar may release guidance or rules in the near future.

### TEXAS

**Action:** Judge Brantley Starr of the U.S. District Court for the Northern District of Texas issued a judge-specific requirement that all attorneys and pro se litigants appearing before his court must file a certificate confirming that “not portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reported or traditional legal databases, by a human being.”<sup>176</sup>

**Timeline and Next Steps:** Other judges may soon follow Judge Starr’s lead; in fact, as discussed in the Illinois note below, one judge already has! How Judge Starr and others will monitor and enforce compliance with such certifications remains to be seen.

**Rules Likely Implicated:** TBD.

**Action:** The State Bar of Texas formed a Workgroup and then Taskforce on Artificial Intelligence to “investigate how legal practitioners can leverage AI responsibly to enhance equitable delivery of legal representation in Texas while upholding the integrity of the legal system, and . . . make recommendations to

---

174. Todd Nelson, *Breaking the Ice: Attorney Brings Tech Background to AI Group*, MINN. LAW. (Apr. 13, 2023), <https://minnlawyer.com/2023/04/13/attorney-brings-tech-background-to-ai-group>.

175. *Id.* (citing the Minnesota State Bar website).

176. *Judge Brantley Starr*, NORTHERN DIST. OF TEX., <https://www.txnd.uscourts.gov/judge/judge-brantley-starr> (last visited Apr. 12, 2024).

the Bar’s Board of Directors consistent with this goal.”<sup>177</sup> The group, as of August 2023, has seven members from around the state, including Judge Xavier Rodriguez.<sup>178</sup>

**Timeline and Next Steps:** Given that the President of the State Bar disclosed that their knowledge of AI started and ended with knowing how to spell artificial intelligence,<sup>179</sup> this Workgroup may have a lot of work ahead. Nevertheless, observers expect recommendations from the Workgroup within the year.<sup>180</sup>

**Rules Likely Implicated:** TBD.

**Additional Details:** Following Judge Starr’s action (described above), the Texas State Bar did not announce any indication of its approach toward the use of AI.<sup>181</sup> Nevertheless, like California, the size of the Texas bar as well as its political and cultural sway makes this effort one worthy of attention.

## ILLINOIS

**Action:** In the days following Judge Starr’s actions, Magistrate Judge Gabriel Fuentes of the Northern District of Illinois took a similar action—he issued a standing order mandating that all parties disclose *any* use of AI Tools.<sup>182</sup> In practice that means that Judge Fuentes requires parties disclose their use of AI Tools to conduct legal research.<sup>183</sup>

**Timeline and Next Steps:** Judge Fuentes rapidly following the lead of Judge Starr suggests other judges may soon join their ranks.<sup>184</sup>

**Rules Likely Implicated:** N/A.

177. ST. BAR OF TEX., TASKFORCE FOR RESPONSIBLE AI IN THE LAW (TRAIL) 1 (2023).

178. *Id.* at 3.

179. Legal Talk Network, *New Leadership: Cindy Tisdale and Laura Pratt (State Bar of Texas Annual Meeting 2023)*, ST. BAR OF TEX. PODCAST (July 13, 2023), <https://legaltalknetwork.com/podcasts/state-bar-texas/2023/07/new-leadership-cindy-tisdale-and-laura-pratt-state-bar-of-texas-annual-meeting-2023>.

180. Nicole Black, *Never Fear, AI Guidance for Lawyers is Near*, THE DAILY RECORD (Aug. 11, 2023), <https://nydailyrecord.com/2023/08/11/never-fear-ai-guidance-for-lawyers-is-near>.

181. Alexis Keenan, *Does AI Belong in the Courtroom? A Texas Judge Doesn’t Think So*, YAHOO FINANCE (June 4, 2023), <https://finance.yahoo.com/news/does-ai-belong-in-the-courtroom-a-texas-judge-doesnt-think-so-134225614.html>.

182. N.D. Ill. S.O. For Civil Cases Before Magistrate Judge Fuentes (May 3, 2023).

183. *Id.*

184. Matthew Christoff & Danny Riley, *Federal Judges Revise Court Rules to Require Certification Regarding the Use of A.I.*, JDSUPRA (June 6, 2023), <https://www.jdsupra.com/legalnews/federal-judges-revise-court-rules-to-7170412> (“While federal courts in Texas and Illinois were first to the punch, we don’t expect other jurisdictions to be far behind with court orders mirroring those of Judge Starr and Judge Fuentes.”).

### OVERVIEW OF INFORMAL ACTIVITY BY STATE BAR ASSOCIATIONS

The following state bar associations have, compared to the states above, yet to launch formal efforts to investigate amendments to their respective rules of professional conduct. Nevertheless, these blog posts, guidance documents, and webinars demonstrate the increasing and widespread attention being paid to AI Tools by state bars. Practitioners in the states below may also want to keep a close eye on the announcement of additional inquiries and task forces given that these state bars have indicated their attention to the use of AI Tools.

#### CONNECTICUT

The Connecticut Bar Association and Connecticut Legal Conference held a webinar titled, “Artificial Intelligence: How Will It Affect Your Practice?” in September of 2020.<sup>185</sup> A representative of the ABA Center for Professional Responsibility delivered a presentation that flagged MRPC 1.1, 1.4, 1.6, and 5.3 as being implicated by the use of AI Tools.<sup>186</sup>

#### DISTRICT OF COLUMBIA

The District of Columbia Bar invited a legal ethicist to deliver a presentation on ethical issues raised by attorneys’ use of AI Tools, among other tools related to emerging technologies.<sup>187</sup> Based on the D.C.’s Bar distinct versions of MRPC 5.4(a)(4) and 5.4(b),<sup>188</sup> the ethicist encouraged law firms in the District to consider hiring technologists to assist with the adoption and ethical use of AI Tools.<sup>189</sup>

#### UTAH

---

185. *Artificial Intelligence: How it is Going to Change How You Practice Law*, CONN. BAR ASS’N (Sept. 15, 2020), <https://www.ctbar.org/docs/default-source/education/clc/2020-materials/tuesday-september-15-morning-sessions/lt03-artificial-intelligence-how-it-is-going-to-change-how-you-practice-law.pdf>.

186. *Id.*

187. John Murph, *Lawyers Face New Challenges in Navigating Legal Jungle of Emerging Technologies*, DULY NOTED: THE D.C. BAR BLOG (July 28, 2023), <https://www.dcbbar.org/News-Events/Publications/D-C-Bar-Blog/Lawyers-Face-New-Challenges-in-Navigating-Legal-Ju>.

188. MODEL RULES OF PRO. CONDUCT r. 5.4(b) (AM. BAR ASS’N 2023) (MRPC 5.4(b) explicitly prevents a lawyer from forming “a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law”).

189. Murph, *supra* note 187.

The Utah State Bar published an article specifically addressing ethical considerations brought on by the use of ChatGPT.<sup>190</sup> Though the article mentioned MRPC 1.1, 1.2, 1.4, 1.5, 1.6, and 5.3, it did not provide any formal guidance on how to comply with those rules but instead offered “some things to keep in mind as you explore this new technology.”<sup>191</sup>

#### VIRGINIA

A Special Committee of the Virginia State Bar issued a broad report on the impact of technology on the practice of law.<sup>192</sup> A brief section of that report provided an overview of ethical questions raised by those tools; in particular, the report reminded lawyers of their duty to supervise any person or tool doing work on their behalf under MRPC 5.1, 5.2, and 5.3.<sup>193</sup>

### CONCLUSION

AI Tools, when used properly and pursuant to the ethics that guide the legal profession, have the potential to increase access to high-quality legal representation. Lawyers, though, have received minimal guidance on how to use these new tools. In time, the ABA and state bar associations will promulgate rules to fill that gap. Legal scholars should lend their expertise to help the profession employ new tools in a way that aligns with the interests of their clients and, more generally, of the public. As instructed by the Model Rules, all lawyers have a “special responsibility for the quality of justice.”<sup>194</sup> That responsibility requires action when the quality of justice is in serious question, as it is today.

Given the rapid pace of AI innovation and its effect on every part of the practice of law, this action should take the form of practical and clear guidance issued by scholars from all legal fields. Note that such scholarship would differ from the modern trend of authors erring on the side of publishing lengthy,

---

190. *Using ChatGPT in Our Practices: Ethical Considerations*, UTAH ST. BAR, <https://www.utahbar.org/wp-content/uploads/2023/05/ChatGPT-article.pdf> (last visited Apr. 12, 2024).

191. *Id.*

192. VA. ST. BAR, *THE FUTURE OF LAW PRACTICE* (2022), <https://www.vsb.org/common/Uploaded%20files/docs/pub-future-law-report-2022.pdf>.

193. *Id.* at 34.

194. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2023).

theoretical articles that go unread by most practitioners.<sup>195</sup> If ever there were a time for a pivot, it is now.

---

195. Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 48 (2015) (“[T]o the extent that constituents other than law professors benefit in practical ways from legal scholarship, those benefits are largely the product of happenstance and individual preferences, rather than an intended byproduct of the existing structured system of incentives and disincentives that sustains most of the tenured law professoriate.”).





\*\*\*