

Q&A

LAWYER LIABILITY AND ETHICS



ABA Weighs in with First Opinion on Generative AI



Joseph Brophy

AI has officially arrived in the legal profession. For about a year now, there has been a string of stories about every two months where a court has sanctioned lawyers for the use of generative artificial intelligence (GAI), usually ChatGPT, that resulted in briefing to the court that contained bogus case citations and nonsensical argument. Meanwhile, both Lexis and Westlaw are in rolling out their GAI programs, respectively called Lexis+AI and Co-Counsel.

The ABA defines GAI as AI that can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. When presenting their GAI programs to prospective customers, both Lexis and Westlaw are quick to make clear their products do not carry the same risks as ChatGPT because their source material is taken from their existing databases rather than sucked up from the internet. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

In July, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512, which is the first ABA opinion on GAI. Any lawyer who relies on GAI in their practice should read Formal Opinion 512. Below are the highlights and applicable rules.

First, under ER 1.1 (competency) a lawyer must acquire a reasonable understanding of the risks and benefits of GAI, either personally or through the use of the expertise of others. Formal Opinion 512 specifically identifies as a risk the "hallucinations" by GAI (ChatGPT is notorious for hallucinations) that have created ethical problems for some lawyers. The ABA accurately defines "hallucinations" as "ostensibly plausible responses [to a GAI prompt entered by a lawyer] with no basis in law or fact." In almost every case where lawyers have been subject to discipline for using GAI, the trouble started with the lawyer's assumption that the information generated was accurate and did nothing to verify that assumption.

Second, before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Depending on what GAI tool you are using, the

protections of confidential information (ER 1.6 – confidentiality) will vary wildly. For example, Lexis AI has a feature that will summarize up to 50 pages of deposition transcript at a time, and then will erase the uploaded information shortly after it is uploaded, which minimizes the risk that a client's confidential information will be accessed by a third-party. Not all GAI platforms are as concerned about the confidentiality of information as one that is designed specifically for use by lawyers.

The disclosure of client confidential information requires informed consent. If you or your firm is considering using GAI, it might be a good idea to disclose that in writing to your clients and provide the risks and benefits of such disclosure. Formal Opinion 512 states: "To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient."

Third, beyond the disclosure of confidential information, a lawyer should inform the client (ER 1.4 – communication) if they intend to use GAI for a particular task so that the client can understand the risks and benefits. For example, if the lawyer is using GAI to evaluate potential litigation outcomes or jury selection, the client should be informed. Moreover, just as with anything else, the use of GAI is not a substitute for the lawyer exercising their independent professional judgment. Blaming GAI will not be a great defense in front of the state bar or in a malpractice suit if your GAI gives you bad information. Not all uses of GAI must be disclosed to a client. Whether and how much to disclose to the client will depend on how much influence the use of GAI has on the representation.

Fourth, as previously mentioned, the primary trouble GAI has caused lawyers arises from hallucinations that result in frivolous arguments or phony legal citations (ER 3.1 – frivolous claims or defenses). In almost every case, that trouble is compounded by the lawyer not falling on their sword and coming clean with the court when the court or opposing counsel discover the mistake (ER 3.3 – duty of candor to the tribunal).

Fifth, managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI. As law students become familiar with Lexis and Westlaw's GAI, which will be provided to them free during law school, they will be tempted to view GAI as a reliable substitute for reading and understanding the

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Focus on Topic Sentences

LEGAL WRITING

Tamara Herrera



A good topic sentence introduces the subject of that paragraph. A good topic sentence will also provide a transition from one subject (or paragraph) to the next. A **GREAT** topic sentence will add the relevant detail to make the connections clear. My son's teacher called these sentences "focus sentences." A focus sentence should tell the reader not only the subject of that paragraph, but it should also help organize the overall document and relate back to the document's overall purpose (or thesis).

Consider the following topic sentence:

The employee handbook is an important document.

It signals to the reader that the subject of the paragraph is the employee handbook and (most likely) the role it plays. I would categorize this sentence as good. To make it great, I ask the questions "so what?" or "why?". Why is the handbook so important? So what about it makes it important? Incorporating this context into the topic sentence will move the sentence from good to great.

The employee handbook is important because it provides the steps to report harassment.

The employee handbook is the only document that provides the steps to report harassment.

Taking time to make the topic sentences into more complete focus sentences helps the reader understand the document and its arguments. And if these sentences are written well, the document's topic/focus sentences (put in order) provide a quality outline of its arguments.

A word of caution: You can include too much "so what" or detail into a topic sentence. If you find that your sentence is no longer short and focused – it extends beyond roughly two typed lines – then check to make sure you are not combining topics that should be in separate paragraphs, as the following example shows.

The employee handbook is important because it provides the steps to report harassment, gives a notice period, and sets forth the details about what to expect after the filing.

However, if these topics are short, closely related points, I suggest using numbering and transitions for clarity. This structure allows you to address the topics all in one paragraph.

The employee handbook is important because (1) provides the steps to report harassment, (2) gives a notice period, and (3) sets forth the details about what to expect after the filing. First, . . . ■



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EMPLOYMENT LAW SECTION

A Lawyer's Guide to Advising on and Conducting Internal Employment Investigations

By Melissa Costello and Jay Zweig

In the dynamic landscape of corporate law, attorneys often find themselves at the helm of internal employment investigations. These investigations are crucial for resolving conflicts, addressing misconduct and ensuring compliance with legal and ethical standards. Drawing from our experience as independent third-party investigators for companies of all sizes, and as outside employment counsel for clients who have sought guidance on their own investigation of sexual harassment, discrimination, wage and hour, whistleblower and "hotline" complaints by current and former employees, we wanted to share touchpoints and lessons learned over the course of scores of these investigations to assist in-house and outside counsel in navigating complex and even seemingly straightforward employment law related investigations. These guidelines apply whether your client chooses to conduct the investigation internally or decides due to conflicts or other reasons to hire independent investigators.

When to Consider Hiring an Independent Investigator

While in-house lawyers, HR professionals and regular outside counsel are

often well-positioned to handle many internal investigations for their clients, there are specific scenarios where involving an independent third-party investigator can be particularly beneficial:

- **Conflicts of Interest:** If the investigation could impact individuals with close ties to key decision-makers or if there's a risk of perceived bias, or even the potential to damage long-term working relationships regardless of the result of the investigation, an independent investigator provides a neutral perspective.
- **Specialized Expertise:** Complex issues such as alleged fraud or financial misconduct, regulatory breaches, or intricate legal matters might require specialized knowledge that external investigators possess.
- **High-Profile Cases:** For sensitive or high-profile issues, or matters involving executives and companies in the public eye, an independent investigator may offer an additional layer of objectivity and discretion.

Fundamentals of Conducting an Internal Investigation

Effective internal investigations, by inside or outside investigators involve several key steps:

1. **Planning and Scoping:** Begin by clearly defining the investigation's objectives, identifying key individuals for interviews, and setting a timeline. Effective planning helps ensure that the investigation remains focused and efficient.

2. **Document Review:** Preserve, collect and review all relevant documents, such as employment records, emails, text messages, call records, and company policies. Thorough document analysis is essential for understanding the context and identifying evidence. To maintain admissibility in the event of litigation, ensure that documents are collected and preserved in a manner consistent with legal standards.

3. **Witness Interviews:** Conduct structured interviews with witnesses to gather accurate information while maintaining confidentiality, clarity as to the relationship between the investigators and witnesses, and neutrality in fact-finding. Proper interviewing techniques by trained interviewers and investigators who take thorough notes are vital for obtaining reliable accounts. We generally do not audiotape recordings and make it clear to witnesses that they are not to do so. Special consideration need to be given if the employee is represented by a union or demands counsel or a representative be present. Consistency is key.

4. **Analysis and Reporting:** Objectively evaluate the findings and prepare a comprehensive report detailing the investigation process, conclusions, and recommended actions. A well-documented report supports informed decision-making and provides a clear record of the investigation. Establish the format for the report and if there will be a readout of the report.

Potential White Collar Implications

Internal investigations sometimes uncover issues that could involve white-collar crimes such as fraud, embezzlement, government contracts, laws of foreign jurisdictions, or regulatory violations. Recognizing these issues early and understanding the legal implications is crucial. In such cases, external investigators with experience in white-collar criminal defense are valuable partners with employment lawyers to collaborate and help navigate complex legal terrain.

Preserving Attorney-Client and Work Product Privilege

Maintaining attorney-client privilege is fundamental throughout the investigation process. Lawyers should define their role as legal counsel rather than as fact-finders, to help ensure that communications and findings remain confidential. Independent investigators can help maintain this separation, safeguarding sensitive information. Consideration should also be given to work product privilege as it applies to drafts and interview notes.

Best Practices and Considerations

- **Ensure Impartiality:** Whether managing an investigation internally or externally, maintaining neutrality and avoiding conflicts of interest is essential for preserving the investigation's integrity.
- **Protect Confidentiality:** Safeguarding sensitive information is vital for protecting all parties involved.
- **Adhere to Compliance:** Follow relevant employment laws, company policies, and ethical guidelines.

Conclusion

Conducting internal employment investigations requires careful planning, intentional adherence to best practices, and a keen understanding of legal and ethical considerations. By evaluating the when and how of engaging independent investigators and adhering to established investigation protocols, attorneys can navigate these challenging situations effectively, ensuring fair and credible outcomes.

For attorneys dealing with complex cases, conflicts of interest, or challenges in maintaining attorney-client privilege, consulting with or hiring an independent investigator can be highly beneficial. As attorneys with decades of experience in employment law and related white collar criminal investigations, we recognize that investigations are an art, and that we learn by listening and preparing before doing to conduct fair, efficient, and impartial investigations. What the client chooses to do with the results and conclusions of the investigations can have a lasting impact on the business. Knowing that the investigation was done properly provides a strong basis for management and boards of directors to make sound decision. ■

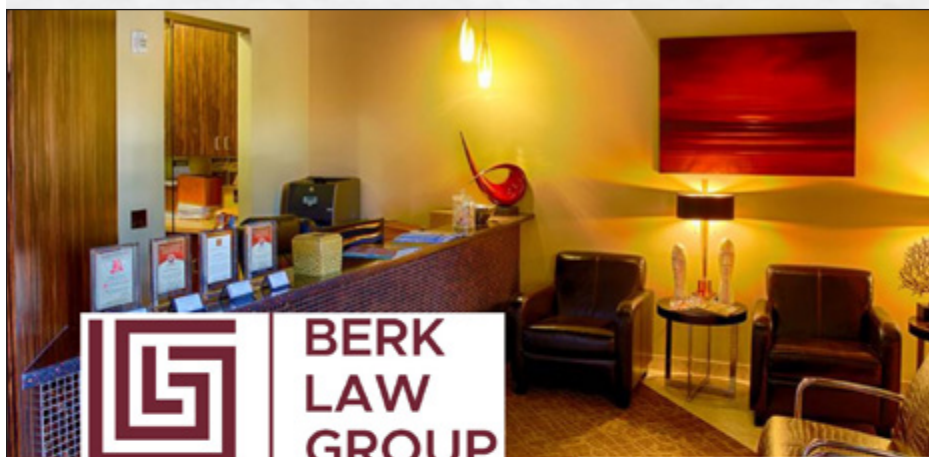
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statutes and cases relied upon in a brief. Lexis and Westlaw will be the first to tell you, they do not claim their GAI products have that capability. And even if they did the judge and the state bar will not care. Supervise your lawyers accordingly.

Finally, any fees charged by a firm are subject to ER 1.5 and therefore must be reasonable.

Formal Opinion 512 comes in at a breezy 15 pages, so check it out. If this is overwhelming to you, fear not. In 20 years when the robots have taken all our jobs, you will no longer have to worry about anything in this article or care what the ABA thinks. ■

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