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An ethical framework for the use of artificial intelligence in the legal profession

Michele Van Eck

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ARTIKELS

Van der Merwe: The structure of parking in sectional titles schemes 439
Van Eck: An ethical framework for the use of artificial intelligence in the legal profession 454
Badenhorst: Unlawful and illegal mining in South Africa: *primum est leges imponere deinde remedia* 472
Curlewis and Carter: Parole power play: the correctional services minister's power to revoke parole unilaterally 486
Carney: About context, meaning, and statutory interpretation: exploring related concepts to understand contested terms 503
Maganoe: Chapter 9 institutions and legislative oversight: navigating the challenges of executive accountability 519

AANTEKENINGE

Testamentsverlyding in twyfelagtige omstandighede en oorvol hofrolle – Sonnekus 534
Overview of constitutional court judgments on the bill of rights – 2024 – Laubscher 554
Section 2(3) of the Wills Act: *more* uncertainty surrounding the controversial condonation provision – multiple potential documents to be condoned and the application of section 4A disqualifications in the context of condonation – Faber 564

REGSPRAAK

A reassuring judgment for "slip and fall" victims with a *caveat* to restaurateurs to reassess the effectiveness of their disclaimer notices – Scott 579
Subpoena duces tecum issued against an associate professor in the Faculty of Medicine and Health Sciences at the University of Stellenbosch – confidentiality of information obtained from patients raised but not decided – what is the true position? – De Vos 598
The foreign business establishment exemption to the controlled foreign company rules as interpreted by the South African courts in the *Coronation* trilogy – Tredoux 613
An artificial distinction? The interpretation of "debt" in the Prescription Act 68 of 1969 – Joubert 632

BOEKBESPREKINGS

PM Bekker and T Broodryk (volume editors): Fundamental Principles of Civil Procedure – *by De Vos* 642
JV du Plessis and MA Fouché: A Practical Guide to Labour Law – *by Van Staden* 646

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An ethical framework for the use of artificial intelligence in the legal profession

MICHELE VAN ECK*

SAMEVATTING

'N ETIESE RAAMWERK VIR DIE GEBRUIK VAN KUNSMATIGE INTELLIGENSIE IN DIE REGSBEROEP

In 2024 het Van Eck "Error 404 or an error in judgment? An ethical framework for the use of ChatGPT in the legal profession" 2024 *TSAR* 469-490 'n basiese etiese raamwerk vir die gebruik van ChatGPT vir regspraktisyns voorgestel. Sedertdien het meer etiese gebreke in die gebruik van kunsmatige intelligensie tegnologieë binne die regsberoep na vore gekom, insluitend foutiewe saakaanhalings, valse gefabriseerde saakverwysings, sowel as vals inligting in deskundige getuienis in die hof. In al die gevalle is die foutiewe en vals inligting verkry met die gebruik van kunsmatige intelligensie tegnologie. In die lig hiervan het verskeie internasionale regsregulerende liggame in die Verenigde State van Amerika, Kanada, Australië, Nieu-Seeland en Nigerië etiese riglyne ontwikkel vir regspraktisyns se gebruik van kunsmatige intelligensie tegnologie. Die regspraktykraad in Suid-Afrika of die prokureursorde van Suid-Afrika het nog geen sodanige riglyne verskaf nie. Sonder duidelike riglyne bly daar onsekerheid oor presies die verwagte optrede van regspraktisyns en 'n etiese raamwerk in die gebruik van kunsmatige intelligensie tegnologie.

Teen die bogenoemde agtergrond brei die outeur met hierdie artikel die aanvanklike etiese en professionele raamwerk vir die gebruik van kunsmatige intelligensie tegnologie uit wat in bogemelde publikasie voorkom, deur die onlangse ontwikkelings in die Verenigde State van Amerika, Kanada, Australië, Nieu-Seeland en Nigerië te ondersoek. Fokus word geplaas op die mees algemene etiese temas wat uit hierdie jurisdiksies na vore gekom het, naamlik die (i) bevoegdheid en vaardighede van 'n regspraktisyn, (ii) vertroulikheid en datasekuriteit van 'n kliënt se informasie, (iii) toesig verantwoordelikheid van 'n regspraktisyn, (iv) eerlikheid en integriteit van 'n regspraktisyn in die verskaf van regsdienste, asook (v) die hef van redelike fooie in die gebruik van die tegnologie van kunsmatige intelligensie. Binne hierdie etiese temas en internasionale verwikkelinge word die Suid-Afrikaanse Gedragskode vir regspraktisyns ondersoek en wysigings voorgestel. Die argument word dus gemaak dat 'n versuim om die Suid-Afrikaanse Gedragskode op te dateer en die nodige wysigings by te werk nie net regspraktisyns in die algemeen negatief sal beïnvloed nie, maar ook indirek die publiek se vertroue in die regsberoep sal verminder.

1 *Introduction*

The ethics of using emerging technologies, such as artificial intelligence (AI), continues to plague the legal profession.[1] To date, two matters have been reported in South Africa highlighting the ethical failure of legal practitioners to verify the correctness of the information sourced from AI technology. The first was *Parker v Forsyth NO*,[2] and the second, more recent matter, *Mavundla v MEC:*

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1 Nunez "Artificial intelligence and legal ethics: whether AI lawyers can make ethical decisions" 2017 *Tulane Journal of Technology and Intellectual Property* 189 191, describes artificial intelligence (AI) as a type of technology that "teaches a machine how to do a task originally thought to be carried out by humans". Nunez further explains that AI can be found in machine learning, visual recognition, speech recognition and natural language processing.

2 The first of these cases was *Parker v Forsyth NO* (1585/20) 2023 ZAGPRD 1 (29 June 2023).

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Department of Co-Operative Government and Traditional Affairs KwaZulu-Natal.[3] The controversy of using AI technology in legal research is not a new issue and in 2024, after having reviewed several international cases (as well as the *Parker* case), a basic ethical framework for the use of ChatGPT for legal practitioners was proposed where ethical principles were extrapolated from existing ethical codes and international cases.[4] A suggested framework for the ethical and professional duties of a legal practitioner was presented in the following five broad categories:

> "(i) Using AI technology in assisting the practice of law is acceptable; however, problems arise with the blind acceptance of such information.
> (ii) A legal practitioner must be aware of whether AI technology is being used in preparing court or other documents.
> (iii) There is no place for carelessness in the use of AI technologies … legal practitioners' conduct [in this context] could amount to misleading the court and sanctions [can be] imposed on them.
> (iv) In instances where AI technology is used to prepare court or other documents, a legal practitioner must ensure that appropriate steps are taken to verify the accuracy and correctness of the information sourced from AI systems. Failure to do so may breach the obligation to ensure that accurate and correct information is presented to the court.
> (v) A legal practitioner has general supervisory oversight over all legal services provided, whether or not assistance is solicited from other people or AI technologies. In this regard, legal practitioners remain responsible for their legal services, regardless of the source of the information."[5]

Since then, more ethical mishaps have emerged in the use of AI technology within the legal profession, including fictitious case citations as well as false information used in expert testimony that were sourced from AI technology.[6] In light of this, several legal regulatory bodies have developed ethical guidelines for a legal practitioner's use of AI technology, including the American Bar Association,[7] State Bar of California,[8] Kentucky Bar Association,[9] New York State Bar,[10] the joint opinion

[3] (7940/2024P) 2025 ZAKZPHC 2 (8 Jan 2025). Although the headnote indicates that the matter relates to the use of AI, this was never concretely established in the case. There was a strong suspicion of this practice, however, the major issue was that the legal practitioners never verified the cases used in the supplementary notice of appeal, which turned out to be fictitious.

[4] See Van Eck "Error 404 or an error in judgment? An ethical framework for the use of ChatGPT in the legal profession" 2024 *TSAR* 469-490. See also Nunez (n 1) 195, who, referencing Kruse, describes this as legal practitioners using their professional judgment to address a particular legal ethical issue, which includes (i) analysing the language of a particular ethical or professional rule (reading the rules), (ii) analysing the problem in terms of the underlying principles and policies (reading the comments or particular case law), (iii) examining the professional role (considering the legal practitioner's professional role in terms of morality, justice and upholding the law itself).

[5] Van Eck (n 4) 489.

[6] See *In Re Matter of Weber* 2024 NY Slip Op 24258 (NY Surrogates Ct. Oct. 10, 2024).

[7] American Bar Association's Standing Committee on Ethics and Professional Responsibility "Formal opinion 512 on generative artificial intelligence tools" 29 July 2024 https://www.americanbar.org/content/dam/aba/ administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf (18-01-2025) ("ABA Formal Opinion 512").

[8] State Bar of California's Standing Committee on Professional Responsibility and Conduct "Practical guidelines for the use of generative artificial intelligence in the practice of law" 16 Nov 2023 https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000031754.pdf (18-01-2025) ("Californian Practical Guidelines").

[9] Kentucky Bar Association "Ethics Opinion KBA E0457" 15 March 2024 https://cdn.ymaws.com/www. kybar.org/resource/resmgr/ethics_opinions_(part_2)_/kbae457artificialintelligenc.pdf (18-01-2025) ("Kentucky Ethics Opinion").

[10] New York State Bar Association's Task Force on Artificial Intelligence "Report and recommendations of the New York State Bar Association's task force on artificial intelligence" 6 April 2024 https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf (18-01-2025) ("New York State Bar Report").

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from the Pennsylvania and Philadelphia Bar Associations,[11] Law Society of British Columbia,[12] Law Society of Manitoba,[13] Law Society of Ontario,[14] Queensland Law Society,[15] Law Society of New South Wales,[16] New Zealand Law Society,[17] and, on the African continent, the Nigerian Bar Association.[18]

Noticeably absent from the above list of regulatory bodies is the Legal Practice Council and the Law Society of South Africa, which has, at the time of writing this article, provided no guidelines on the use of AI technology for legal practitioners. This is in stark contrast to the developments in the United States of America, Canada, Australia, New Zealand and Nigeria. Arguably, the lack of guidance for ethical and professional duties in the use of AI technology contributed to the ethical challenges in the *Parker* and *Mavundla* cases. Although some of the ethical duties in the use of AI technology may be extrapolated from the existing ethical and professional framework, this would function only as a stopgap measure and is not a sustainable solution to address adequately the full range of ethical challenges posed when using AI technology. Without clear guidelines, the uncertainty remains as to exactly the expected conduct of legal practitioners in the use of AI technology. Arguably, many future ethical and professional missteps of legal practitioners could be avoided with clear guidelines and regulatory intervention from the Legal Practice Council and the Law Society of South Africa in the context of AI technology.

Against this background, this article provides an expanded ethical and professional framework in the use of AI technology for South African legal practitioners by drawing from the recent developments in the United States of America, Canada,

[11] Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association's Professional Guidance Committee's Joint Formal Opinion 2024-200 "Ethical issues regarding the use of artificial intelligence" 2024 https://www.pabar.org/Members/catalogs/ Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf (18-01-2025) ("Pennsylvania and Philadelphia Bar Associations Joint Opinion").

[12] Law Society of British Columbia "Guidance on professional responsibility and generative AI" 12 October 2023 https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Professional-responsibility-and-AI.pdf (18-01-2025) ("Law Society of British Columbia's Guidance Document").

[13] Law Society of Manitoba "Generative artificial intelligence – Guidelines for use in the practice of law" April 2024 https://educationcentre.lawsociety.mb.ca/wp-content/uploads/sites/2/2024/04/Generative-Artificial-Intelligence-Guidelines-for-Use-in-the-Practice-of-Law.pdf (18-01-2025) ("Law Society of Manitoba Guidelines").

[14] Law Society of Ontario "Generative AI: Your professional obligations" 11 April 2024 https://lawsocietyontario-dwd0dscmayfwh7bj.a01.azurefd.net/media/lso/media/lawyers/practice-supports-resources/generative-ai-your-professional-obligations.pdf (18-01-2025) ("Law Society of Ontaria Guidelines").

[15] Law Society of Queensland "Guidance Statement No. 37 artificial intelligence in legal practice" (undated) https://www.qls.com.au/Guidance-Statements/No-37-Artificial-Intelligence-in-Legal-Practice (18-01-2025) ("Law Society of Queensland Guidance Statement").

[16] Law Society of New South Wales "A solicitor's guide to responsible use of artificial intelligence" October 2024 https://www.lawsociety.com.au/sites/default/files/2024-12/LS4527_MKG_Responsible AIGuide_2024-10-25%5B43%5D.pdf (18-01-2025) and Law Society of New South Wales "Statement on the use of artificial intelligence in Australian legal practice" (undated) https://www.lawsociety.com.au/sites/default/files/2024-12/LS4590_PSP_Statement_AI_LawSocietyVersion121224.pdf (18-01-2025).

[17] New Zealand Law Society "Lawyers and generative AI" (undated) https://www.lawsociety.org.nz/assets/Professional-practice-docs/Rules-and-Guidelines/Lawyers-and-AI-Guidance-Mar-2024.pdf (18-01-2025) ("New Zealand Law Society Guidelines").

[18] Nigerian Bar Association's Technology and Law Committee "Draft guidelines for the use of artificial intelligence in the legal profession in Nigeria" April 2024 https://nbaslp.org/wp-content/uploads/2024/04/Guidelines-for-the-Use-of-Artificial-Intelligence-in-the-Nigerian-Legal-Profession.pdf (18-01-2025) ("Nigerian Bar Association's Draft Guidelines").

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Australia, New Zealand and Nigeria. Focus is placed on the most common ethical themes that have emerged from these jurisdictions, being (i) competency and skills of a legal practitioner, (ii) confidentiality and data security of client information, (iii) supervision responsibility of the legal practitioner, (iv) the principles of honesty and integrity, and (v) charging of reasonable fees when using AI technology in the provision of legal services. The five categories of ethical duties discussed in "Error 404 or an error in judgment? An ethical framework for the use of ChatGPT" are developed to align with recent international standards. In this way, a meaningful ethical framework is proposed that aligns with current international best practices for the use of both general and AI technologies in the South African context.

2 *Ethical duties*

2.1 Competency and skills

In South Africa, a general duty is placed on legal practitioners to act with the necessary skill, care and diligence.[19] This standard can generally be linked to what a reasonable legal practitioner would do in a particular set of circumstances.[20] Added to this, the concept of "care" applies to a legal practitioner's clients, the courts and, in some instances, even an opponent.[21] The duty of skill, care and diligence may be further extended to a duty of competency and skills,[22] which is found in section 3.11 of the South African Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities of 2019 ("Code of Conduct"),[23] where a legal practitioner must "use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner". Added to this, section 18.14 requires a legal practitioner to "perform professional work or work of a kind commonly performed by [a legal practitioner] with such a degree of skill, care or attention, or of such a quality or standard, as may reasonably be expected of [a legal practitioner]". Despite these duties, neither the common law nor the Code of Conduct addresses how such ethical and professional duties would be applicable when using AI technology. In fact, the Code of Conduct is silent on a legal practitioner's use of technology altogether. This creates difficulty in pinpointing the expected competency and skills of legal practitioners in the context of both general and AI technologies. International regulatory developments do not suffer from the same shortcomings and may assist as a guide to develop the Code of Conduct.

The New Zealand Law Society Guidelines explains that all legal practitioners "are ultimately responsible for the legal services they provide",[24] which directly connects to a legal practitioner's abilities, competencies and skills. In a South African context this duty is associated with the skill, care and diligence expected

[19] See *Bruce NO v Berman* 1963 3 SA 21 (T) 23F; *Fourie v Van Der Spuy & De Jongh Inc* 2020 1 SA 560 (GP) and *ECS NO v Ronald Bobroff and Partners* 2013 JOL 29823 (SCA).

[20] See *eg Margalit v Standard Bank of South Africa Ltd* 2013 2 SA 466 (SCA) and *Steyn NO v Ronald Bobroff & Partners* 2013 2 SA 311 (SCA); *Steyn NO v Ronald Bobroff & Partners* 2013 1 All SA 471 (SCA), 2013 2 SA 31 (SCA); and *Jurgens v Volschenk* 2019 JOL 45047 (ECP).

[21] See the *Bruce* case (n 19); *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos* 1985 4 SA 341 (T).

[22] See *Law Society of the Cape of Good Hope v C* 1985 1 SA 754 (C), which related to the incompetence in relation to bookkeeping skills of a lawyer.

[23] GN 168 *GG* 42337 (29-03-2019).

[24] New Zealand Law Society Guidelines (n 17) 3.

https://doi.org/10.47348/TSAR/2025/i3a2

of a reasonable legal practitioner in the circumstances. However, due to the novel challenges faced when using AI technology in legal practice, the expected conduct of a legal practitioner is not always easily determined. For this reason, there is a need to expand the understanding of what is meant by the "competencies and skills" of a legal practitioner. The Law Society of British Columbia's Guidance Document provides a useful list of factors that provides a general guideline for determining a legal practitioner's competence and skills:

> "(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
> (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
> (c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
> (i) legal research;
> (ii) analysis;
> (iii) application of the law to the relevant facts;
> (iv) writing and drafting;
> (v) negotiation;
> (vi) alternative dispute resolution;
> (vii) advocacy; and
> (viii) problem solving;
> (d) communicating at all relevant stages of a matter in a timely and effective manner;
> (e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;
> (f) applying intellectual capacity, judgment and deliberation to all functions;
> (g) complying in letter and spirit with all Code rules pertaining to the appropriate professional conduct of lawyers;
> (h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;
> (i) managing one's practice effectively;
> (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
> (k) otherwise adapting to changing professional requirements, standards, techniques and practices."[25]

Although these factors are useful in extrapolating the expected standard of conduct of a legal practitioner, they do not speak directly to the expected conduct of a legal practitioner in the use of AI technology. However, an international consensus has emerged that the duty of competency and skills applies not only to the legal practitioner's ability to practise law but extends to understanding and appropriately using technology.[26] Although there is no equivalent under the Code of Conduct, the duty of legal practitioners to understand the risks in the use of technology is not novel. Take, for instance, rule 1.1 of the American Bar Association's model rules, which explains that a duty exists on a legal practitioner:

> "[t]o maintain the requisite knowledge and skill, a [legal practitioner] should keep abreast of changes in the law and its practice*, including the benefits and risks associated with relevant technology,* engage in continuing study and education and comply with all continuing legal education requirements to which the [legal practitioner] is subject."[27]

[25] See Law Society of British Columbia's Guidance Document (n 12).
[26] See Law Society of Manitoba Guidelines (n 13) 1.
[27] Garon "Ethics 3.0 – Attorney responsibility in the age of generative AI" 2023-24 *The Business Lawyer* 209 210 – emphasis added, who interprets this duty as an expansion of the duty of competence.

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Such a duty includes appreciating the benefits and risks of technology.[28] In fact, the Kentucky and New York State Bar Associations see a legal practitioner's reliance on technology in the practice of law as part of the requirement of competency.[29] The New York State Bar Association expands this duty in relation to AI technology as follows: a legal practitioner must "have a duty to understand the benefits, risks and ethical implications associated with the [AI] Tools, including their use for communication, advertising, research, legal writing and investigation …".[30] The Pennsylvania and Philadelphia Bar Associations Joint Opinion further develops the duty of competence in the use of AI technologies into five sub-categories, requiring a legal practitioner to:

(i) not only understand the technology but also know how such technology works;
(ii) appreciate the benefits of the technology;
(iii) understand the risks of the technology;
(iv) verify all citations, and the material cited in the material or output of the technology; and
(v) educate their client and seek their client's informed consent to use technology.[31]

Similar principles are found in other jurisdictions.[32] In this context a legal practitioner's "judgement cannot be delegated to … AI and remains the [legal practitioner's] responsibly at all times".[33] The Nigerian Bar Association's Draft Guidelines adds that the duty of care applies to AI technology,[34] which duty is owed to the client. This means that "AI cannot be trusted to make correct decision or provide accurate information, [and] a [legal practitioner] has a duty not to rely fully on AI".[35] To do so may expose a legal practitioner to potential breach of their duty of care to their clients and the courts.

The duty of competence and skills is not a once-off event but requires a legal practitioner to remain abreast of technological developments.[36] The practical application of such a duty manifests in training obligations, which may, in some instances, be achieved through a form of self-study.[37] Such training duties are, however, not limited to educating the legal practitioner. The Law Society of Queensland Guidance Statement extends the training requirement to staff in that "[i]f a [legal] practitioner uses or permits use of AI technology in their practice, they must ensure that they and relevant staff possess, or have access to, the necessary skills to do so appropriately".[38]

2.2 Confidentiality and data protection

In South Africa, like many other jurisdictions, the duty of confidentiality of client information is a cornerstone of legal practice and is closely linked to a legal practitioner's duty to avoid situations that would result in a conflict of interests.[39]

[28] Garon (n 27) 210. See also Law Society of Manitoba Guidelines (n 13) 2.
[29] Kentucky Ethics Opinion (n 9) 5. See also New York State Bar Report (n 10) 57.
[30] New York State Bar Report (n 10) 58. This is also supported in Californian Practical Guidelines (n 8) 2.
[31] Pennsylvania and Philadelphia Bar Associations Joint Opinion (n 11) 9.
[32] Californian Practical Guidelines (n 8) 3. See also Law Society of Ontaria Guidelines (n 14) 2.
[33] Californian Practical Guidelines (n 8) 3.
[34] Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.
[35] Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.
[36] Kentucky Ethics Opinion (n 9) 5-6.
[37] ABA Formal Opinion 512 (n 7) 2.
[38] Law Society of Queensland Guidance Statement (n 15) par 4.1.
[39] See *eg Wishart v Blieden NO* 2013 6 SA 59 (KZP).

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A confidential relationship exists between a legal practitioner and their client.[40] This relationship requires a legal practitioner not to "divulge any information received from a client in confidence".[41] Section 3.6 of the Code of Conduct also requires a legal practitioner to "maintain legal professional privilege and confidentiality regarding the affairs of present or former clients or employers, according to law". In this regard, a client's confidential information cannot be used for a legal practitioner's self-interest or for the interests of any other client.[42] Although the legal duties in the protection of data under the Protection of Personal Information Act may supplement aspects of data protection,[43] such legislative requirements do not address a legal practitioner's ethical duties in the context of data protection requirements. Moreover, the common law and Code of Conduct are silent on the extent of a legal practitioner's duty to retain confidentiality in the use of AI technology.

The fundamental problem with using AI technology in legal practice is the unintentional disclosures of confidential or privileged information. Such unintentional disclosures often result from the user not understanding the risks or functionality of the technology.[44] Take for instance the fact that metadata left in electronic word documents may include client information,[45] or the geo-locations when using Google Maps may store private or confidential information.[46] The Nigerian Bar Association's Draft Guidelines note that there is a significant risk that AI technology may expose sensitive and confidential information of clients.[47] This is particularly the case with user prompts, the input of data and information, and the uploading of documents to AI technology, which, in turn, could be accessible to third parties (such as the owner or programmers of the AI technology or tool).[48] After all, an "AI provider may well be able to see your input data and the outputs".[49] Such information may also be transferred overseas, which may, in turn, breach data protection laws.[50] In these circumstances the confidentiality of client information may be compromised by virtue of using the AI technology and thereby the legal practitioner may inadvertently be in breach of their duty of confidentiality. For this reason, international guidelines have extended a legal practitioner's duty of confidentiality to the use of AI technology.[51]

A legal practitioner must pay careful attention to the types of information that is provided to AI tools.[52] The Law Society of Queensland Guidance Statement advises that legal practitioners "should take reasonable steps to ensure that any AI tool they employ does not misuse access to confidential data or unduly expose it to dissemination".[53] However, in other jurisdictions, such as California, legal practitioners are expected to inform and disclose to their clients the use of

40 See *Gamiet v Cape Law Society* 1950 2 SA 706 (C).
41 *Witvlei Meat (Pty) Ltd v Disciplinary Committee for Legal Practitioners* 2013 JDR 2590 (NmS) par 39.
42 the *Witvlei Meat* case (n 41) par 39.
43 Protection of Personal Information Act 4 of 2013.
44 Garon (n 27) 212.
45 Garon (n 27) 212.
46 Garon (n 27) 212.
47 Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.
48 Californian Practical Guidelines (n 8) 2.
49 New Zealand Law Society Guidelines (n 17) 4.
50 See New Zealand Law Society Guidelines (n 17) 4.
51 New York State Bar Report (n 10) 30.
52 See Law Society of British Columbia's Guidance Document (n 12) 3; Californian Practical Guidelines (n 8) 2.
53 Law Society of Queensland Guidance Statement (n 15) par 4.2.

https://doi.org/10.47348/TSAR/2025/i3a2

any AI technology.[54] Added to this, an outright prohibition is placed on a legal practitioner from inputting confidential information in AI technology where there are not sufficient security protections.[55] Several jurisdictions recommend that client information must be anonymised or redacted before using such information in AI technology so as to avoid the client from being identified.[56] There appears, however, to be a general requirement that a client's consent is required before using AI technology,[57] including a client's consent insofar as information cannot be anonymised or redacted.[58] These duties are summarised in the New York State Bar Report, which provides that:

> "When using the [AI] Tools, you must take precautions to protect sensitive client data and ensure that no [AI] Tool compromises confidentiality. Even if your client gives informed consent for you to input confidential information into a [AI] Tool, you should obtain assurance that the [AI] Tool provider will protect your client's confidential information and will keep each of your clients' confidential information segregated. Further, you should periodically monitor the [AI] Tool provider to learn about any changes that might compromise confidential information."[59]

Different AI tools and technologies will pose different forms of risk.[60] Therefore, the information provided or uploaded to AI technology must be selective, and a duty exists to ensure that adequate security measures are in place to protect the client's information.[61] The ethical principles of transparency and expandability may also be applicable, and the Nigerian Bar Association's Draft Guidelines explains the need to be transparent with a client in the use of AI technology.[62] Such protective measures align with data protection regulations and may include physical safeguards regarding the hardware but also other safeguards in relation to a legal practice's policies and procedures.[63]

2.3 Supervision responsibility

In South Africa, there appears to be limited discourse about the exact scope of the duty to control and supervise staff within legal practice. However, one may draw from the characteristics of a *locatio conductio operarum* (an employment contract) to ascertain the meaning of supervision of a legal practitioner's staff. *Smit v Workmen's Compensation Commissioner* describes control and supervision as follows:

> "that the employer (*conductor operarum*) has a concomitant right under (*locatio conductio operarum*) to supervise and control the manner in which the employee (*locator operarum*) is to perform his [or her] services. Control is a wide concept. It includes *inter alia* the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him [or her], the means to be employed by him [or her] in doing it, the time when and the place where it is

54 Californian Practical Guidelines (n 8) 4. See also New York State Bar Report (n 10) 30.
55 Californian Practical Guidelines (n 8) 2.
56 Californian Practical Guidelines (n 8) 2; Law Society of Manitoba Guidelines (n 13) 3. See also Law Society of British Columbia's Guidance Document (n 12) 3.
57 Law Society of British Columbia's Guidance Document (n 12) 3. See also New York State Bar Report (n 10); Law Society of Manitoba Guidelines (n 13) 3.
58 Law Society of British Columbia's Guidance Document (n 12) 3; Law Society of Manitoba Guidelines (n 13) 3.
59 New York State Bar Report (n 10) 58.
60 Law Society of Manitoba Guidelines (n 13) 3.
61 Law Society of Manitoba Guidelines (n 13) 3.
62 Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.
63 Garon (n 27) 213.

https://doi.org/10.47348/TSAR/2025/i3a2

> to be done by him [or her]. Supervision implies the right of the employer to inspect and direct the work being done by the employee."[64]

Naturally, insofar as there are employment relationships between a legal practitioner and their staff, there would be forms of control and supervision. Section 18.3 of the Code of Conduct requires a legal practitioner to "exercise proper control and supervision over his or her staff and offices". This understanding of the duty of supervision is largely limited to human-to-human supervision. AI technology has, in the past, largely been seen as a tool for control and supervision. However, in the current context, where AI technology mimics human characteristics, interactions and work output, the legal practitioner holds an extended supervisory responsibility.[65] There are two parts to the duty, the first of which relates to supervising of the AI technology itself. For instance, rule 5.3 of the New York Rules of Professional Conduct places a duty on legal practitioners to supervise non-legal practitioners in the involvement of "client representation".[66] This principle is expanded in the American Bar Association's model rule 5.3, which expands non-legal practitioners (or non-lawyers) to include "non-human entities".[67] This means that such supervisory duties of legal practitioners include the supervision of AI technology.[68] The Law Society of Queensland Guidance Statement notes that "AI tools should be used as an aid to, and not a replacement for, professional judgment. As with any legal work, legal practitioners remain responsible for supervising the use of AI technologies and ensuring alignment with ethical standards and client interests".[69] Also, the Law Society of Manitoba Guidelines directs its members to "[t]reat … AI tools as another delegation of your work. Review the product AI tools produce for you, making sure it is accurate and conforms with your professional obligations".[70]

The second part of this duty in the legal practitioner's use of AI technology extends to that of other staff members within the legal practice. Although the legal practitioner is responsible for verifying the accuracy of the information generated by AI technology,[71] such "fact-checking outputs" extend to ensuring that staff do not use AI technology unless they are authorised to do so.[72] Moreover, a legal practitioner's staff should use such AI technology correctly. The New York State Bar recommends the following guidelines to be implemented as they relate to a legal practitioner's supervision:

> "If the [AI] Tools are used by non-lawyers or paralegals (or the [AI] Tools themselves are interpreted to be "non-lawyers"), you must supervise their use to ensure compliance with the ethical rules. Further, you must ensure that the work produced by the [AI] Tools is accurate and complete and does not disclose or create a risk of disclosing client confidential information without your client's informed consent…".[73]

64 *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 158, 1979 1 SA 51 (A).
65 Law Society of British Columbia's Guidance Document (n 12) 4.
66 New York State Bar Report (n 10) 30.
67 See New York State Bar Report (n 10) 30.
68 New York State Bar Report (n 10) 30. See also Kentucky Ethics Opinion (n 9) 11-12.
69 Law Society of Queensland Guidance Statement (n 15) par 4.1.
70 Law Society of Manitoba Guidelines (n 13) 4.
71 Law Society of British Columbia's Guidance Document (n 12) 4.
72 New Zealand Law Society Guidelines (n 17) 4.
73 New York State Bar Report (n 10) 58-59.

https://doi.org/10.47348/TSAR/2025/i3a2

This duty of supervision implies that the necessary policies be put in place and that staff members are adequately trained in the use of AI technology.[74] Furthermore, if a legal practitioner performs a task that is capable of being done by technology or a machine, then it would not be considered "practicing law".[75] In this regard, the practising of law requires some form of independent legal judgment,[76] and AI technology should not give legal advice to a client, as this would have the effect of "replacing the work of a human [legal practitioner]".[77] In this context, the New York State Bar Report recommends that human oversight is required when using AI technology and that such technology "should augment but not replace your legal work".[78]

2.4 Honesty and integrity

At the core of all ethical duties are the honesty and integrity of the legal practitioner.[79] In South Africa, a legal practitioner is expected to act with complete honesty at all times.[80] In *General Council of The Bar of South Africa v Matthys* this was described as requiring "personal integrity and scrupulous honesty" of a legal practitioner.[81] As such, the concept of honesty within the legal profession often extends to that of integrity and reliability of a legal practitioner.[82] These principles are reinforced in section 3.1 of the Code of Conduct, which requires a legal practitioner to "maintain the highest standards of honesty and integrity". Such a duty includes being honest in all areas of legal practice.

The Nigerian Bar Association's Draft Guidelines highlight that a legal practitioner should not make it appear that AI-generated content is their own work.[83] Honesty about AI outputs is one thing, but there are two additional ethical categories. The first relates to the use of AI outputs in the courts. Several courts require legal practitioners to disclose and declare the use of AI tools when submitting documents to the court. The idea behind this is to ensure that legal practitioners do not mislead (intentionally or unintentionally) the court when presenting and using information and documentation in court proceedings.[84] The duty of honesty includes not misleading the court deliberately, negligently or by means of ignorant,

74 Californian Practical Guidelines (n 8) 4; Law Society of Ontaria Guidelines (n 14) 5. Pierce and Goutos "Why lawyers must responsibly embrace generative AI" 2024 *Berkeley Business Law Journal* 469 511-515, explain that such policy considerations may include *inter alia* cybersecurity and safety, training and education, establishing a responsible AI culture as well as confidentiality and privacy policies (as well as compliance and ethical policies).

75 New York State Bar Report (n 10) 32.

76 See New York State Bar Report (n 10) 32.

77 New York State Bar Report (n 10) 32.

78 New York State Bar Report (n 10) 59.

79 *Vassen v Law Society of The Cape of Good Hope* 1998 4 SA 532 (SCA) 538G, a legal practitioner must display the characteristics of honesty and integrity in order to practise law, in that "honourable profession which demands complete honesty, reliability and integrity from its members". See also, *Law Society of The Northern Provinces v Le Roux* 2012 4 SA 500 (GNP); *Summerley v Law Society, Northern Provinces* 2006 5 SA 613 (SCA); *Society of Advocates of Natal v Merret* 1997 4 SA 374 (N).

80 *Jasat v Natal Law Society* 2000 3 SA 44 (SCA) par 12. See also *Visser v Visser* 1974 3 SA 356 (W), which extends this duty of honesty in not misleading the other side in a matter.

81 *General Council of the Bar of South Africa v Matthys* 2002 5 SA 1 (E) par 35.

82 the *Jasat* case (n 80) par 12.

83 Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.

84 Californian Practical Guidelines (n 8) 5.

https://doi.org/10.47348/TSAR/2025/i3a2

negligent or intentional conduct.[85] In *Ulde v Minister of Home Affairs*,[86] Sutherland AJ noted that when a legal practitioner presents authority to the court, there is a tacit representation that there is no contradictory authority and that where there is other disapproving authority, this should be pointed out.[87] Ignorance, in this context, may be argued as being a form of negligence.[88] It has also been argued that this principle could be extended to ensure that fictitious or inaccurate cases are not presented to the court.[89] However, the duty of honesty, in this context, has evolved into a duty of disclosure to the courts when using AI technology.

The second category is the duty of honesty in relation to AI technology towards a client. There is a general duty that legal practitioners must be honest towards their clients regarding the use of AI technology and their outputs.[90] This places an ethical duty on a legal practitioner to inform a client of any AI technology used in their matter.[91] The Law Society of Queensland Guidance Statement describes such an ethical duty as follows: "[w]here feasible, clients should be advised if an AI tool will be used when performing their work. The more significant the AI contribution to a client's work will be, the more stringent the obligation to bring this to their attention".[92] This then extends to advising one's client as to how AI tools would be used.[93] The Nigerian Bar Association's Draft Guidelines recommend that AI-related risks must be disclosed to clients,[94] whilst the Law Society of British Columbia's Guidance Document requires a client's prior consent before the use of AI technology.[95]

The duty of honesty and integrity is, however, not limited simply to indicating who is responsible for the work output. Rather, the Law Society of Ontaria Guidelines note that the duty will depend on the following factors:

> "(i) how the AI technology is used;
> (ii) the purpose for using the AI technology in a client's matter;
> (iii) whether the AI technology could impact the outcome of the matter or any legal services provided;
> (iv) if the AI technology would impact costs and fees;
> (v) any protections afforded from AI technology venders; and
> (vi) the processes and protocols to mitigate risks in the AI technology."[96]

The reason for such duties of disclosure is to mitigate the inherent risks associated with the use of AI technology. An added consideration in the Nigerian Bar Association's Draft Guidelines is that the ownership of AI technology by third parties could create a conflict of interests,[97] which may require additional processes, procedures and policies to mitigate such risks within legal practice.

85 *Ulde v Minister of Home Affairs* 2008 6 SA 483 (W) par 37. See also the *Merret* case (n 79).
86 the *Ulde* case (n 85) par 37.
87 the *Ulde* case (n 85) par 37.
88 the *Ulde* case (n 85) par 37.
89 See the argument in Van Eck (n 4) 483-484.
90 Law Society of British Columbia's Guidance Document (n 12) 3. See also Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.
91 Kentucky Ethics Opinion (n 9) 5-6.
92 Law Society of Queensland Guidance Statement (n 15) par 4.3.
93 Law Society of British Columbia's Guidance Document (n 12) 3.
94 Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.
95 Law Society of British Columbia's Guidance Document (n 12) 3-4.
96 Law Society of Ontaria Guidelines (n 14) 4.
97 Nigerian Bar Association's Draft Guidelines (n 18) par 3.2.

https://doi.org/10.47348/TSAR/2025/i3a2

2.5 Fees

It is generally accepted that fees must meet a reasonableness standard. The Code of Conduct confirms this principle in section 3.12, which states that a legal practitioner is "entitled to a reasonable fee for their work". This requirement is expanded in section 18.7 of the Code of Conduct, where a legal practitioner is not allowed to "overreach a client or overcharge the debtor of a client, or charge a fee which is unreasonably high, having regard to the circumstances of the matter". Although these principles are relatively well established in the South African context, there is little guidance as to what would be considered "fair and reasonable" or "overreaching" in using AI technology.[98]

A general understanding has emerged that the use of AI technology in legal practice would require legal practitioners to review their billing practices.[99] Although it is often not easy to determine what would be considered fair and reasonable, the commentary to the rule 3.6 Code of Professional Conduct for British Columbia provides eleven factors that should be taken into account to determine whether a fee is fair and reasonable:

"(i) the time and effort required and spent;
(ii) the difficulty of the matter and the importance of the matter to the client;
(iii) whether special skill or service has been required and provided;
(iv) the results obtained;
(v) whether the fees are authorised by statute or regulation;
(vi) any special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
(vii) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;
(viii) any relevant agreement between the lawyer and the client;
(ix) the experience and ability of the legal practitioner;
(x) any estimate or range of fees given by the legal practitioner; and
(xi) the client's prior consent to the fee." [100]

AI technology has the ability to reduce time spent in providing legal services, which is one of the factors that should be taken into account in determining whether fees are fair and reasonable. Some guidelines recommend that a legal practitioner should not use an hourly time-based fee model and charge for time saved when using AI technology.[101] However, the Kentucky Bar Association argues that the reduced time spent on a client's matter (as a result of the use of AI technology) would naturally result in a reduced fee being charged.[102] However, the costs associated with the development of AI technology could be recoverable.[103] This would require such developmental costs to be disclosed upfront and require the recovery of such costs to be regulated in an agreement with the client.[104] In the context of using AI technology, California allows a legal practitioner to "charge for the actual time spent",[105] which

98 Law Society of British Columbia's Guidance Document (n 12) 5.
99 New Zealand Law Society Guidelines (n 17) 5.
100 Law Society of British Columbia "Code of Professional Conduct for British Columbia" (undated) https://www.lawsociety.bc.ca/for-lawyers/act-rules-and-code/code-of-professional-conduct/chapter-3-%E2%80%93-relationship-to-clients/#3.6 (18-02-2025).
101 Californian Practical Guidelines (n 8) 4.
102 Kentucky Ethics Opinion (n 9) 7.
103 Kentucky Ethics Opinion (n 9) 7.
104 Kentucky Ethics Opinion (n 9) 7.
105 Californian Practical Guidelines (n 8) 4.

https://doi.org/10.47348/TSAR/2025/i3a2

includes, for example, the manner in which prompts are inputted into the AI technology and reviewing and editing the outputs of the AI technology.[106] Added to this, costs may be charged as long as they comply with applicable laws.[107] However, any fees and costs must be explained within the fee agreement with the client.[108] The Law Society of Manitoba Guidelines provide a good overview of the expectations when charging a client:

> "Fee arrangements should not generate an inappropriate windfall for a [legal practitioner] arising from the efficiencies created by using an AI tool to perform a certain task. Where Generative AI tools are used, time spent in various tasks might be reduced, creating efficiencies for counsel. It would not be appropriate to charge hourly fees reflecting the time it would have taken to generate the work product without the use of generative AI. However, it is appropriate to charge for the time spent in crafting and refining AI inputs and prompts and in reviewing, confirming, analy[s]ing and editing generative AI tool output." [109]

The charging of fees in the use of AI technology in the practice of law would naturally depend on the billing model used in the legal practice. If the model is a time-based fee model, then the use of AI technology to provide information will have to be considered in the context of how much work a legal practitioner has actually done.[110]

3 *Updating the Code of Conduct*

3.1 Introduction

The Code of Conduct provides general ethical and professional principles in the categories of competency and skills of a legal practitioner, the duty of confidentiality, supervision responsibility, honesty and integrity as well as charging reasonable fees. The Code of Conduct does not, however, provide guidance on the expected conduct when a legal practitioner uses technology (whether that is technology generally or AI technology). The discussion in point 2 (above) illustrates that international jurisdictions have expanded ethical duties far beyond what may reasonably have been extrapolated from the Code of Conduct, which addresses the unique nature of AI technology. In order for the South African legal profession to navigate the ethical and professional pitfalls of AI technology successfully, there is a need to update the Code of Conduct. These updates, based on international developments, are proposed in the paragraphs that follow.

3.2 Competency and Skills

Category (iv) of the five categories in "Error 404 or an error in judgment? An ethical framework for the use of ChatGPT in the legal profession" suggests that:

> "In instances where AI technology is used to prepare court or other documents, a legal practitioner must ensure that appropriate steps are taken to verify the accuracy and correctness of the information sourced from AI systems. Failure to do so may breach the obligation to ensure that accurate and correct information is presented to the court."[111]

[106] Californian Practical Guidelines (n 8) 4.
[107] Californian Practical Guidelines (n 8) 4.
[108] Californian Practical Guidelines (n 8) 4.
[109] Law Society of Manitoba Guidelines (n 13) 6.
[110] New Zealand Law Society Guidelines (n 17) 5.
[111] Van Eck (n 4) 489. See also Pierce and Goutos (n 74) 481.

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This stems from the principle that a legal practitioner "is not absolved from responsibility for legal advice or defects in an end-product (such as a contract) because it is derived from AI".[112] The Nigerian Bar Association's Draft Guidelines also caution that AI technology poses the following risk: "Overreliance on AI outputs without proper understanding of the technology and its limitations could lead to errors or missed nuances".[113] However, addressing verification requirements is only one aspect of the duty of competency and skills.

Section 3.13 of the Code of Conduct requires a legal practitioner to "remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practise". No reference is made to the developments of technology. The approach taken by the American Bar Association's model laws and the New York State Bar could address this deficiency by including similar wording in section 3.13 of the Code of Conduct so as to read: "remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practise *including the benefits and risks associated with relevant technology used within their practice*".[114] In doing so, a duty is placed on a legal practitioner to assess the benefits and risks of any type of technology, whether it relates to general or AI technologies. Such an amendment may address some of the challenges faced with AI technology. However, as the Code of Conduct makes no reference to general technology, the principle should further be expanded to include a general duty of "technological competence" of the legal practitioner in the use of both general and AI technologies.

The Code of Conduct should include the principles of category (iv) of ethical duties discussed in "Error 404 or an error in judgment? An ethical framework for the use of ChatGPT in the legal profession", by placing a duty on the legal practitioner to verify and fact-check information produced by both general and AI technologies. This duty should be expanded to apply not only to verifying and fact-checking information presented to court, but also to information used in legal practice in general.

Finally, the Code of Conduct should include a training requirement for legal practitioners and staff in the use of technologies. Such a training duty would reinforce the proposed updates to section 3.13 of the Code of Conduct for legal practitioners (and their staff) to remain reasonably abreast of developments, risks and benefits associated with the use of general and AI technologies.

3.3 Confidentiality and data protection

The Protection of Personal Information Act places a legal duty on legal practitioners to protect personal information. However, such protection does not extend to all forms of confidential or sensitive information that would be relevant to a client. It is interesting to note that unlike Nigeria, which has developed a separate document addressing data protection in AI technology within the legal sector, Chapter 7 of the Protection of Personal Information Act already establishes a mechanism to develop specific sector codes of conduct to clarify the application of the Protection of Personal Information Act within that particular sector or industry. At the time

[112] New Zealand Law Society Guidelines (n 17) 3.
[113] Nigerian Bar Association's Draft Guidelines (n 18) par 3.2. See also Goodman "AI/ESQ.: Impacts of artificial intelligence in lawyer-client relationships" 2019 *Oklahoma Law Review* 149 183.
[114] See also Pierce and Goutos (n 74) 482.

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of writing this article, such a code of conduct had not been published for the legal sector. An opportunity exists to develop a robust protection for client information (which includes not only personal information but also confidential and sensitive information) within such a legal sector code of conduct. Such a code of conduct, with appropriate amendments to the Code of Conduct, would provide clear guidance to legal practitioners on their ethical, professional and legal duties in data protection and would also provide additional layers of protection to clients' information when using AI technology. Such developments would supplement the Code of Conduct, which currently provides only a general duty of confidentiality. In the context of the international developments discussed in paragraph 2 (above), the current shortcomings in the Code of Conduct could be addressed by including the following principles to align with international best practices:

(i) A legal practitioner should exercise due care as to the input, information and documents shared with general and AI technologies. Insofar as general and AI technologies are used client information must, as far as possible, be anonymised and care should be taken not inadvertently to allow sensitive, confidential and privileged information of a client to be disclosed or ascertained from the use of general or AI technologies.
(ii) Insofar as client information is used in AI technology, then prior client consent must be obtained, and an appropriate confidentiality undertaking must be secured from the supplier of such AI technology.
(iii) A legal practitioner must extend the same or equivalent protections in the monitoring and protection of client's sensitive and confidential information as it would for personal information under the Protection of Personal Information Act.

3.4 Supervision responsibility

Category (v) of the five categories in "Error 404 or an error in judgment? An ethical framework for the use of ChatGPT in the legal profession" suggests that:

> "A legal practitioner has general supervisory oversight over all legal services provided, whether or not assistance is solicited from other people or AI technologies. In this regard, legal practitioners remain responsible for their legal services, regardless of the source of the information."[115]

To address the supervisory duties of AI technology, the Code of Conduct should incorporate the above principle. After all, a legal practitioner's "judgment cannot be delegated to … AI", and the legal practitioner remains responsible for the legal advice provided to clients.[116] Such duties extend to the operation of the legal practice and should include a duty to implement necessary policies related to the use of general and AI technologies as well as providing necessary training and guidance to staff. This is closely connected to the training duties found under the duty of competency and skills and may be viewed as complementing one another in addressing the ethical risks in using AI technology.

3.5 Honesty and integrity

Internationally, the duties of honesty and integrity are categorised into three broad groups: (i) honesty about who created the outputs when using AI technology, (ii) a

[115] Van Eck (n 4) 489.
[116] Law Society of Manitoba Guidelines (n 13) 3.

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duty of disclosure to the courts when using AI technology for the production of court documents, and (iii) the duty of disclosure and consent from clients when using AI technology in client matters.

Although not part of the scope of this article, it is worth mentioning that at present there are no court practice directives requiring disclosure of the use of AI technology in the creation of court documents. Adopting such a directive would not only be beneficial for legal practice but would create an added layer of clarity as to the expected conduct of legal practitioners. If such directives were implemented by the courts, this may have functioned as a preventative measure to avoid the situation as seen in the *Parker* and *Mavundla* cases.[117]

The ethical and professional conduct of a legal practitioner should not only require honesty regarding the AI output and true authorship of documentation but should be expanded to a duty of disclosure in the use of AI technology both towards the courts and in relation to clients. This should include a duty on the legal practitioner: (i) to disclose if any AI technology would be used, (ii) to disclose the extent of the use of such AI technology, and (iii) to obtain the client's prior consent for the use of AI technology in their matter.

3.6 Fees

The normal hourly-based fee structure should not be used when services were supplemented by AI technology. The reason for this is that AI technology inherently increases the efficiency and speed at which work can be produced.[118] Some jurisdictions (like the Kentucky Bar Association) have recognised that the reduced time spent on a client's matter would naturally result in a reduced fee being charged.[119] In this regard, two principles should be included in the Code of Conduct. The first is that insofar as a legal practitioner uses AI technology (and has obtained the necessary consent to do so), the legal practitioner should agree with their client on a reasonable and appropriate fee for services rendered and the use of AI technology. The second principle is to address what would be considered a "reasonable fee" in these circumstances. In this regard the principles from the Law Society of Manitoba Guidelines provide a good foundation.[120] There is little hope for a legal practitioner to navigate the charging of appropriate and reasonable fees without some form of guidance and update to the Code of Conduct.

4 *Conclusion: putting it all together*

Ethical and professional duties in the legal profession are not static. Rather, ethical and professional duties must be assessed and, where necessary, updated in the context of

[117] See Van Eck (n 4) and the *Mavundla* case (n 3).

[118] Generally, the term "cottage industry" describes a situation where standardised documentation is re-used to increase the fees and profitability of legal practitioners (which a legal practitioner would not normally be entitled to as the time spent on such standardised documentation does not justify the fees charged). See *eg Ex Parte Arntzen (Nedbank Limited Intervening Creditor)* 2012 JOL 29552 (KZP) par 11; *Sibiya v Director-General: Home Affairs* 2009 5 SA 145 (KZP), 2009 3 All SA 68 (KNP) par 37; *Ex Parte Concato* 2016 2 All SA 519 (WCC), 2016 JOL 35442 (WCC) par 13 and *Mthimkhulu v Rampersad (BOE Bank Ltd, Intervening Creditor)* 2000 3 All SA 512 (N) 514.

[119] Kentucky Ethics Opinion (n 9) 7.

[120] Law Society of Manitoba Guidelines (n 13) 6.

https://doi.org/10.47348/TSAR/2025/i3a2

societal and professional developments. One of these contemporary developments is technology, which has formed a central function of legal practice. Added to this, AI technology is seen, for many, as the solution to a variety of problems in society and the legal profession.[121] Yet, the unique nature of AI technology poses risks for legal practitioners in that the "[i]mproper, negligent or incompetent use of AI" may lead to serious breach of ethical and professional duties.[122] These risks must be managed and addressed through proper regulation, without which the public's confidence in the legal profession may falter.

From a regulatory perspective, there are generally two ways to approach the regulation of AI technology. The one way is self-regulation, which requires the individual or organisation to adopt voluntary standards, training structures and then implement them without oversight from a regulatory body. Clearly, self-regulation is problematic within the legal profession as there have been several ethical mishaps in the use of AI technologies, the *Parker* and the *Mavundla* cases being but two examples.[123] Added to this, the South African legal profession is a regulated industry and already has a regulatory framework to guide legal practitioners on the expected level of conduct through the Code of Conduct. Unfortunately, the Code of Conduct has yet to address the ethical standards for the use of technology in general, let alone AI technology. Such a lack of regulatory oversight has effectively left legal practitioners to act within a self-regulatory manner and to extract ethical principles from the Code of Conduct in the context of AI technology.

International developments have expanded general ethical principles in the context of AI technology into the categories of competency and skills of a legal practitioner, the duty of confidentiality, supervision responsibility, honesty and integrity as well as charging reasonable fees. The Code of Conduct should be updated to align with such international developments. In this regard, the Code of Conduct may introduce a new section (Part VIII), to address the ethical and professional duties in the proper and ethical use of technology, which may be drafted as follows:

"PART VIII - Conduct of legal practitioners in using technology

64.1 Part VIII of this code applies to all legal practitioners and candidate legal practitioners in relation to any legal services provided. The use of the term "technology", unless indicated otherwise, includes both general technology and artificial intelligence (AI) technology.

64.2 Legal practitioners must at all time act in an ethical manner in the use of technology and must, without limiting the general nature of their ethical and professional duties, adhere to the following principles:

64.2.1 Technology should never replace a legal practitioner's professional judgment and a legal practitioner remains responsible for whatever is produced in the use technology.[124] It is incumbent on the legal practitioner to verify any information produced and obtained from the use of technology and a legal practitioner has general supervisory oversight over all legal services provided, whether or not assistance is solicited from other people or technology.

64.2.2 A legal practitioner must remain reasonably abreast of developments, functionality, benefits and risks associated with technology used within their practice.[125] In doing so the legal practitioner must ensure that they have a reasonable level of technological competence in the use of technology.

[121] See Goodman (n 118) 150; Pierce and Goutos (n 74) 491-495.
[122] New Zealand Law Society Guidelines (n 17) 5.
[123] See *eg* Van Eck (n 4) 469-490.
[124] Nigerian Bar Association's Draft Guidelines (n 18) par 7.2.
[125] Nigerian Bar Association's Draft Guidelines (n 18) par 7.2.

https://doi.org/10.47348/TSAR/2025/i3a2

64.2.3 A legal practitioner must ensure that necessary safeguards are put in place for the use of technology, including policies on when such technology may be used and training for legal practitioners and staff in the use of technology that is used in the legal practice.

64.2.4 A legal practitioner has a general duty of care as to the type of information and data shared with technology. A legal practitioner must not inadvertently allow sensitive, confidential and privileged information of a client to be shared with technology. Insofar as AI technology is used then:

(i) Prior disclosure must be made to a client and the client's consent must be obtained prior to using the AI technology;

(ii) An appropriate confidentiality undertaking must be secured from the supplier of the AI technology;

(iii) Client information must, as far as possible, be anonymised;

(iv) The equivalent protections in the monitoring and protection afforded for personal information under the Protection of Personal Information Act 4 of 2013 must be extended to clients' sensitive and confidential information; and

(v) A legal practitioner has a duty to disclose to a client if any AI technology would be used in the provision of legal services and the extent of the use of such AI technology.

64.2.5 A legal practitioner must act honestly and with integrity when using AI technology, which includes being honest about who is responsible for work produced for the client.

64.2.6 Insofar as AI technology is used an agreement should be reached with clients on the fee structure. Insofar as an hourly-based fee structure is used, it would be inappropriate to charge hourly fees reflecting the time it would have taken to generate the work without the use of AI technology. Rather, a reasonable fee would relate to the actual time spent in crafting and refining the inputs and prompts into the AI technology and the reviewing, confirming, analysing and editing the output of the AI technology. It is incumbent on the legal practitioner to account for the actual time spent honestly."

Although the use of AI technology does not change the legal, ethical and professional duties of a legal practitioner,[126] there is a clear need for guidance to assist a legal practitioner in navigating the ethical environment. Failure to do so may well see a repeat of the ethical mishaps found in the *Parker* and *Mavundla* cases. It is perhaps worth noting here that although the Code of Conduct may "inform moral choice[s], it does not [in itself] constitute moral choice".[127] Put differently, the Code of Conduct serves as guidelines in relation to a legal practitioner's expected conduct and it does not replace the moral and ethical obligations of a legal practitioner. Nevertheless, a failure to update the Code of Conduct will not only negatively impact legal practitioners in general, but may indirectly erode the public's confidence in the legal profession.

[126] Pierce and Goutos (n 74) 487.

[127] Giegerich "The lawyer's moral paradox" 1979 *Duke Law Journal* 1335 1357. Giegerich argues that professional codes of conduct do not reflect a moral code. However, in a modern context, such professional codes of conduct do provide guidance to moral decision making. Giegerich is correct, however, that such professional codes of conduct do not completely replace a legal practitioner's model decision making in a particular situation.

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