

# PROFESSIONALLY SPEAKING

## NEWS & INSIGHTS

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### Wilson Elser's newsletter features articles written by the firm's Professional Liability & Services Practice attorneys.

*Professionally Speaking* explores current topics of interest to general counsel, claims professionals and risk managers for various professional liability lines, including accountants, lawyers, design professionals, insurance brokers and others.

### New ABA Guidance on Generative Artificial Intelligence Use – What It Means for the Legal Malpractice Landscape By Daniel Tranen

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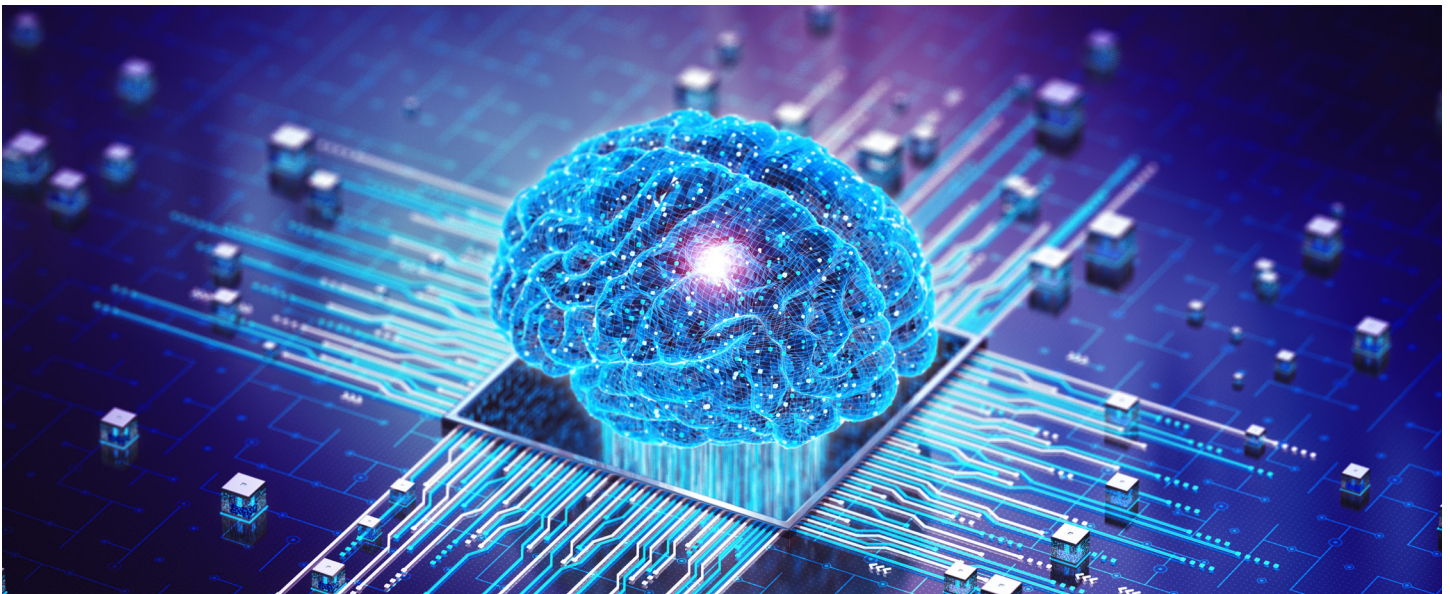
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## FEDERAL OPINION 512 PROPOSES NEW STANDARDS

Last summer, likely in response to the *Mata* case and similar matters, the American Bar Association (ABA) issued Formal Opinion 512 regarding the ethical obligations of lawyers who use GAI tools. The fifteen-page guidance identifies the many ways in which the Rules of Professional Conduct might impact the use of GAI in a lawyer’s practice and offers new standards to help lawyers comply with their ethical obligations under these rules. In particular, the formal ethics opinion focuses on the need for attorney competence in using GAI, the protection of client information submitted through a GAI tool, proper communication with the client regarding the usage of a GAI tool in connection with the legal representation, the supervision of others within the law firm who may use GAI, and candor regarding tribunal obligations, like those considered by the court in the *Mata* case.



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The key takeaway from the ABA formal opinion is that any lawyer using GAI must understand the capabilities and limitations of the tool. Thus, in a nutshell, a lawyer who uses a GAI tool cannot reasonably rely upon the accuracy, completeness and validity of any GAI-generated content. Instead, the material must be carefully evaluated and tested before it is used, whether to communicate legal advice to a client or others or in briefings submitted to a court, for example. The ABA opinion notes, “Lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment.”

### DUE CARE STANDARDS REQUIRE ONGOING EDUCATION

While a lawyer must become competent and fully understand the benefits and risks of using GAI, the lawyer’s efforts to understand its limits and capabilities must be continuous as GAI tools develop and change over time. As the court in *Mata* noted, good lawyers rely on others, including junior associates or law students, for example. A good lawyer cannot use their work product without vetting it first. While the *Mata* sanctions decision was decided under Rule 11 of the Federal Rules of Civil Procedure, the new ABA formal ethics opinion provides a novel framework for assessing lawyer due care when using GAI.

As most lawyers who defend lawyers know, an ABA formal opinion, while not determinative, can influence a court or jury’s decision on what constitutes the exercise of due care in performing legal services for a client. And so, when considering whether a lawyer’s conduct has fallen below the standard of due care, a lawyer’s failure to comply with the standards set forth by attorney industry groups like the ABA may be permitted by a court for use as evidence in a legal malpractice lawsuit. It is critical for those who practice law and use GAI tools, those who defend lawyers who practice law using GAI tools, and those who insure lawyers who practice law using GAI tools to become familiar with the ABA formal opinion on GAI, as well as fully understand the limitations and benefits of using GAI tools in the practice of law.

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## Clarity on Ancillary Law-Related Services

By **Carole J. Buckner**

Lawyers and law firms frequently engage in a wide variety of ancillary, law-related services. Law-related services can include lobbying activities, civic positions, litigation funding, providing financial advice and serving as a fiduciary. Lawyers and firms can deliver such services through a law firm or separately. While some states follow a version of ABA Model Rule 5.7, as enacted in their jurisdiction's Rules of Professional Conduct, others have yet to adopt specific guidance. Either way, providing law-related services raises important ethical issues, including conflicts of interest. Lawyers and firms should design any law-related services accordingly.

What are law-related services? Model Rule 5.7 defines them as services that might reasonably be performed with and in substance are related to the provision of legal services, and are not the unauthorized practice of law. Where such services are provided through an entity controlled by a lawyer and are not distinct from the lawyer's or law firm's provision of "traditional" legal services, compliance with Rule 5.7 is required.

### ETHICAL CONSIDERATIONS

The most important foundational requirement in providing law-related services is that the recipient is informed of the nature of the services and whether the attorney-client relationship protections govern them. From the lawyer and law firm's perspective, the key question is whether the non-traditional law-related services comply with the Rules of Professional Conduct.

Where law-related services are integrated with the lawyer's or law firm's practice, recipients will generally assume that they enjoy the protections afforded by the attorney-client relationship, including the duty of confidentiality and adherence to conflict of interest rules. If the parties do not intend for a law-related services engagement to be governed by these traditional elements of legal representation, these provisions should be disclaimed in writing so the recipient is aware that the services will not include such protections. Lawyers must take reasonable measures to ensure this delineation is clear.

The extent to which law-related services are delivered apart from the lawyer or the firm may impact how the standard protections of the attorney-client relationship apply. This may depend on whether the lawyer's relationship with the law-related activity is passive, such as having an ownership interest in an entity providing law-related services, or active, where the lawyer personally delivers the law-related services. If law-related services are delivered through the lawyer's firm, and the lawyer uses the stationery, email, offices and resources related to the lawyer's or the firm's traditional legal practice, it will likely suggest to the client that the law-related services are being delivered by the law firm, even when a lawyer may view them as separate.



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Where the ancillary law-related services are delivered through a law firm and could be adverse to existing clients, a conflict check is appropriate. Conflict of interest issues may arise when law-related services are provided to an established or “traditional” client of the firm. Such a scenario may involve a current client conflict and may necessitate compliance with Rule 1.7, requiring disclosure and informed written consent. Law-related services provided to a current client may also involve a business transaction with a client, requiring compliance with Rule 1.8, mandating that the transaction terms be fair, reasonable and fully disclosed to the client. The client also must be advised in writing of the right to obtain independent counsel and allowed the opportunity to obtain it.

When law-related services are not provided to a client of the lawyer or law firm, the services may raise other conflict of interest issues. For example, there may be adversity between the existing legal services client and the recipient of the law-related services. Lawyers engaging in law-related services may obtain confidential information that is material to the representation of a legal services client.

### ADDITIONAL CONSIDERATIONS

Lawyers engaging in law-related services should also consider the coverage provided under their lawyers’ professional liability policies. When such services are offered through a separate entity, lawyers should consider having that entity named as an additional insured. When a lawyer or law firm has an ownership interest in that entity, the policy may provide for limitations on coverage should the lawyer own more than a specified percentage of the entity.

Finally, prospective laterals should be screened for any ancillary law-related service. If a lawyer has provided ancillary law-related services, the lawyer may have acquired confidential information adverse to a client of the new firm, in which case the new firm may consider whether screening could resolve the potential conflict.

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# If It's Not In, It's Out: The Crucial Role of Retainer Agreements

By Arman Nafisi and Leeza Birko

The scope of representation is crucial in an attorney-client relationship, which is why the parties enter into a retainer agreement. The retainer agreement must lay out the scope of the representation to prevent the attorney from having responsibility for legal issues beyond the ones for which the client retained the attorney. In lawsuits arising from a breach of the retainer agreement, courts look at the scope of representation within the agreement. Where the attorney does not fulfil their obligations set forth in the scope of representation in light of the retainer, the attorney may be in breach of the agreement.

## WHAT IS A RETAINER AGREEMENT?

An attorney-client retainer is a contractual agreement for compensation between a client and an attorney that outlines the terms of the attorney's representation and compensation for the services provided. The retainer also secures the attorney-client relationship for the attorney's representation in a matter. As American Bar Association (ABA) Model Rule 1.2 notes, the retainer details the scope of legal service to be provided, the financial terms including fees and billing practices, and the responsibilities of all the parties. Depending on the financial terms, a client may pay a retainer fee to cover the initial costs for the attorneys' fees. A retainer agreement is significant because it ensures that the attorney will commit to their client's matter, but only within the scope of representation provided.

According to the ABA, the retainer agreement defines the attorney-client relationship in two ways. First, it defines the scope of the representation. Second, it communicates the obligations undertaken by both parties. The Model Rules allow attorneys to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

## CONTRACT PRINCIPLES

Retainer agreements often are governed by basic contract principles. However, some courts recognize that "ordinary contract principles must give way to the higher ethical and professional standards that govern the attorney-client relationship." For a valid contract to be formed, there generally must be an offer, consideration and acceptance. Contract formation, however, is not often an issue because attorneys are advised to send non-engagement letters to prospective clients when they turn down cases. This prevents ambiguity and creates a record when there is no meeting of the minds regarding an attorney's representation. Rather, issues may arise when there is a dispute as to the scope of the attorney's obligations under the retainer agreement. "When performance of a duty under a contract is due, any non-performance is a breach."

## ASSUMPTIONS AND MISUNDERSTANDINGS

In a recent Arizona Superior Court matter, the plaintiff sued his attorney for allegedly not performing within the scope of the retainer agreement. The plaintiff requested that the attorney review the terms of transferring property within a family trust that was at issue in a prior family law matter, in which the attorney was not a representative. Although the retainer agreement clearly stated that the attorney did not represent the plaintiff in any capacity in relation to the family law matter, the plaintiff assumed the attorney would appeal the decision in the family law matter in light of the issues regarding the terms of property transfers he addressed with the plaintiff while reviewing the family trust.



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The defendant moved to dismiss the plaintiff's complaint. During oral arguments, the plaintiff tried to explain to the judge that after the retainer was signed, the parties discussed the attorney's representation of the plaintiff beyond the scope agreed upon in the retainer agreement. However, since there was no amended retainer agreement or a new agreement for representation, the plaintiff failed to provide evidence that his attorney actually agreed to provide representation beyond the scope provided in the executed retainer agreement for the review of the family trust.

After oral arguments, the court analyzed the retainer agreement in relation to the canons of construction under the common law of contracts in considering the defendant's motion. The plain language of the retainer agreement at issue specifically narrowed the scope of representation. The limits of representation stated in the retainer agreement were refined to relate only to the scope of the review of the trust. The scope was even more refined to restrict representation related to any other actions, claims or matters. The provision regarding the limitation on representation also clearly stated that in order for the attorney to undertake any representation in other matters, the execution of a separate agreement or an addendum to the original retainer agreement was required. The court granted the defendant's motion to dismiss with prejudice. This ruling is consistent with ABA rules.

## SCOPE

The ABA Model Rules set forth what an attorney must clearly include in a retainer agreement to limit the scope of their representation:

- The limitations of the attorney's representation
- The effect of the limitations on the client's rights and interests
- Whether it is foreseeable that more extensive services will be needed
- That the limitation cannot so restrict representation as to render it inadequate to meet the client's goals
- That an attorney hired by a third-party insurer must communicate the limited representation to the client.

The scope and limitations set out in a retainer agreement outline the boundaries for which the attorney is responsible and ensures that the parties to the agreement understand what is expected for the duration of the agreement. Attorneys limit the scope of representation by defining the specific legal services they agree to provide. A typical scope clause will state basic details about the matter, the tasks for which the attorney is responsible in relation to the matter, and limitations on the services provided.

For example, an attorney can agree to represent a client solely in a divorce proceeding, but not in related matters such as child custody or property division. Another example could involve a transactional attorney limiting their legal services to contract review, without taking on litigation should a dispute arise. By limiting such representations, the attorney and client's expectations are more manageable and the attorney can be protected from potential malpractice claims.

A retainer agreement containing a well-drafted provision regarding the scope protects the interests of the parties, especially those of the attorney. Where the scope provision is not detailed and well-drafted, disputes can arise regarding the duties of the representing attorney. Such issues may result in breach of contract and professional negligence claims and even ethical issues before a licensing authority for the attorney.

To prevent such issues, the retainer agreement must have strong contract terms and provisions that are abided by, and representation beyond the scope should not take place. Templates used as retainer agreements should be reviewed regularly and revised as needed, and boilerplate retainer agreements should be avoided in many circumstances.

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# The Benefits and Risks of AI in Construction and Design

By **Wendy Testa**

The use of Artificial Intelligence (AI) to monitor and prioritize risks on a job site has resulted in significant strides to make projects safer, but AI is just too new to be certain which vendors will prove themselves over time. In this article, which appeared in the Summer 2024 edition of CLM Construction Claims, Wendy Testa (Design Professionals Practice Cochair-Philadelphia) and her coauthor weigh the pros and cons of using AI in construction-related jobs and caution that construction and design professional clients will need to work closely with their insurance, broker and legal partners to plan for the risks associated with this new technological endeavor.

[Click here to read the entire article.](#)

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