

**THE NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

FORMAL OPINION 2026-2: ETHICAL ISSUES AFFECTING USE OF AI TO RECORD, TRANSCRIBE, AND SUMMARIZE CONVERSATIONS WITH PERSONS WHO ARE NOT CLIENTS

DIGEST: This Opinion addresses how the New York Rules of Professional Conduct (the “Rules”) impact audio and video calls between attorneys and persons who are not clients where either the attorney or the client may want to make use of an artificial intelligence (“AI”) tool to record, transcribe and create a summary of the conversation. The Opinion concludes that, as is true with clients, an attorney should obtain consent of all other parties to a call before recording it, and should consider whether recording, transcribing and summarizing is tactically well-advised in the particular circumstances.

RULES: 1.1, 1.18, 3.4, 4.2, 4.3, 8.4

QUESTION: What ethical issues should attorneys consider when using AI-enabled communications tools that can record, transcribe, and summarize conversations with persons who are not clients?

DISCUSSION:

I. INTRODUCTION: FOCUS AND SCOPE OF OPINION

This opinion builds upon two of the Committee’s earlier opinions: Opinion 2024-5: *Generative AI in the Practice of Law*, and Opinion 2025-6: *Ethical Issues Affecting Use of AI to Record, Transcribe, and Summarize Conversations with Clients*. The opinion explains that the general principles set out in the earlier opinions apply to a wide variety of contexts beyond the specific context of the attorney-client relationship. In addition, the opinion discusses issues that may arise in several specific practice contexts. The opinion also recommends that, as the default practice (that is, absent a good reason to record a conversation in a particular instance) an attorney should avoid recording conversations because recording entails ethical and tactical risks.¹

II. GENERALLY APPLICABLE PRINCIPLES

Opinion 2024-5 sets out the grounding principle for the use of generative AI in legal practice. The Rule 1.1 duty of competence requires that lawyers have sufficient mastery of and confidence in using the AI tools they incorporate into their law practices to be able to anticipate the ethical issues that may arise. See Rule 1.1, Cmt. [8]. The duty of competence includes knowing how to turn off the recording function, so that conversations are not inadvertently recorded.

¹ For a discussion of these risks, see Dan Bressler, *Risk Reading — AI Assimilating Audit Function at Accounting Firm, AI Recording Risk, Confidentiality Breach Results Costs Attorneys Fees*, www.BresslerRiskBlog.com (All websites last accessed August 5, 2026).

Building on that foundation, Opinion 2025-6 sets out four general principles:

- As part of their duties under Rule 8.4, attorneys must not surreptitiously record conversations, including videoconferences, with any third parties. Attorneys must disclose the intention to record the conversation and obtain permission from all participants.
- Whenever attorneys contemplate recording conversations, it is important to understand (with reference to Rule 1.1) how AI tools record, transcribe, and summarize conversations, and how this information is stored and shared, because issues of confidentiality and privilege are implicated.
- The recording of conversations may add obligations to review transcripts and summaries of those conversations for accuracy, thereby potentially adding to costs/fees.
- Lawyers must also be aware of the challenges that arise when clients or other participants in videoconferences have chosen to use their own AI tools to record, transcribe, and summarize the conversations. The challenges that arise when clients or other videoconference participants use their own AI tools include a lack of control over the security features necessary to ensure confidentiality, an inability to review transcripts and summaries for accuracy and lack of access to the transcripts and summaries when developing strategy, preparing for trial, and so on.

III. ETHICAL ISSUES ARISING IN SPECIFIC CONTEXTS

Although the earlier opinions discussed these issues as they arise between attorneys and clients, this opinion makes clear that the same principles apply in many other practice contexts as well, including in conversations with co-counsel, prospective clients, opposing counsel, witnesses, and employees or agents of the attorney such as investigators.

The following sections briefly discuss these specific contexts and highlight some of the ethical issues that are implicated. As noted, in some of these contexts, the risk involved in recording the conversation will outweigh the value of doing so. In addition, features in the AI recording technology may complicate the process of obtaining informed consent, because the technology may lock people out of the discussion if they do not grant consent to the recording. For these reasons, the default position (that is, absent a good reason to record a conversation in a particular instance) should be not to record the conversation.²

A. Co-counsel and aligned counsel

Similar to conversations with clients, steps must be taken to ensure that recordings and summaries of conversations with co-counsel are not accessible beyond attorneys and others involved in the joint representation, in order to preserve the privilege. In addition, counsel should consider including a

² A different balance may be called for when the attorney suffers from a hearing impairment and believes that AI recording and transcribing is useful for that reason in fulfilling the obligation to provide competent representation. Rule 1.1. Those attorneys may find, while obtaining consent from other participants, that AI recording and transcribing conversations with others should be a common practice in the absence of countervailing considerations.

provision in any joint defense or common interest agreement specifying whether conversations will be recorded and what steps will be taken if the conversations are inadvertently recorded.

B. Prospective clients

During the process of communicating with a person who desires legal assistance and of creating a prospective client relationship under Rule 1.18, the question whether to record conversations with the prospective client presents a paradox. On the one hand it may be helpful to have a record of the conversation so that an attorney can make a better decision about whether to accept the case and, should the attorney decline, to document the bases for declining if the attorney desires to preserve a documentary record. In addition, making and preserving the recording of the conversation will establish that only the minimum of confidential information needed to make a determination about representation was obtained, *see* Rule 1.18(d)(2), and that no actual attorney-client relationship was formed. On the other hand, having a record that is accessible within the firm that turned down the client creates the risk of information sharing and a potential conflict of interest both for the individual attorney whom the prospective client consulted and for that attorney's firm under Rule 1.18. As in other situations discussed in this Opinion, the default practice (that is, absent a good reason to do so in a particular instance) should be not to record the conversation.

C. Opposing counsel

Although privilege and confidentiality concerns do not arise as often in conversations with opposing counsel as in some of the other contexts addressed in the opinion, they may arise in connection with settlement discussions or mediation. If the settlement discussions or mediation are recorded, attorneys therefore need to take special care to protect the evidentiary privileges that attach to such discussions and the confidentiality of any client information that is disclosed in the course of such discussions.

D. Witnesses

Conversations with witnesses and potential witnesses implicate Rule 3.4 (fairness to opposing party and counsel), Rule 4.2 (communication with person represented by counsel), and Rule 4.3 (communication with unrepresented persons). While there is value in making and preserving recordings to document what was communicated to (or by) the witness or potential witness in order to show compliance with these Rules or for some evidentiary purpose, these recordings are potentially discoverable. This creates a risk that preserving, transcribing, and summarizing a recording will jeopardize confidentiality, create unfavorable evidence out of context, and perhaps place protected work product at risk. Because the potential risks ordinarily outweigh the benefits, the default practice should be not to record the conversations.

E. Employees or agents of the attorney such as investigators

The conversations employees and agents conduct on behalf of attorneys implicate Rules 4.2 and 4.3, as well as Rule 8.4(a) (violating the Rules of Professional Conduct through the acts of another). There is value in making and preserving recordings to memorialize how the employee or agent dealt with a witness or other third party in order to establish compliance with Rules 4.2, 4.3, and 8.4. But because the recording and preservation of conversations conducted by the employees or agents may jeopardize

confidentiality and privilege, and because questions will often arise about the means by which the employee or agent obtained consent, the risks of recording the conversations typically outweigh the benefits, and the default practice should be that these conversations will not be recorded.

IV. CONCLUSION

As discussed in earlier opinions, AI technology is evolving rapidly, and attorneys must constantly educate themselves to stay abreast of these technological developments and understand the AI systems they are using. AI systems that record, transcribe, and summarize conversations can be useful tools, but attorneys must be mindful of the ethical issues that arise when AI is used for this purpose. This opinion provides a non-exhaustive list of some of the ethical issues—and potential risks—that arise when attorneys use AI to record, transcribe, and summarize conversations with people other than their clients, and the default practice should be not to use AI tools to record, transcribe or summarize conversations absent a good reason in a particular instance.