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The Use of Artificial Intelligence and the Professional Duties of German Lawyers

Abstract. The rapid progress in the field of artificial intelligence, which is particularly evident to the public in the form of the emergence of large language models (LLMs) like ChatGPT, now allows the technology to be used in the field of legal services. Consequently, a growing number of lawyers are using AI to assist with legal research or drafting legal documents. This is associated with a wide range of legal issues, ranging from the regulation of legal service providers and the contractual duties of lawyers vis-à-vis their clients to the professional duties of lawyers that derive from professional codes governing the legal profession. This article shows that the professional duties of German lawyers may be affected when AI is used. After providing the reader with a general overview of the legal challenges associated with AI use by lawyers, as well as the development and current state of the legal landscape imposing German lawyers with professional duties, the article concentrates on the duty to remain independent, confidentiality obligations, in addition to the general duty to act faithfully. It also gives an overview of possible sanctions in cases of non-compliance with professional duties. By summarizing the findings, the article emphasizes remaining legal uncertainties, advising German lawyers to exercise caution when turning to AI for assistance.

Keywords: artificial intelligence (AI) – large language models – legal profession – lawyer – professional duties

Introduction

We live in the times of artificial intelligence's (AI) ascent – a technology that is believed to possess revolutionary potential for the way humanity works. As a recent study by *Goldman Sachs* estimates that

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44% of legal tasks may be subject to future automation,[1] this also includes the legal profession. However, the anticipated displacement of humans in providing legal services has yet to materialise. At the moment, most pioneering efforts appear to be suffering from typical teething problems: for example, the attempt to establish the "world's first robot lawyer" in the US through the use of AI has proved rather unsuccessful, as it has recently resulted in the Federal Trade Commission (FTC) bringing charges against the company running the AI-based legal service due to its output not being reviewed by humans.[2] While widespread AI replacement of humans in the field of legal services does not seem imminent, it is already a reality that lawyers use AI, especially generative AI (gAI), which forms the basis of large language models (LLMs) like *ChatGPT*, to assist with their legal work: using legal chatbots to communicate with clients, prepare legal documents or do legal research with AI. In fact, according to a survey conducted in January 2023, 36% of US lawyers already use this type of technology in their profession.[3]

As both the market for legal services and the legal profession itself are thoroughly regulated, it is not surprising that the use of AI by lawyers leads to legal questions. According to the German "Rechtsdienstleistungsgesetz" (RDG), the provision of out-of-court legal services is restricted to qualified persons, especially lawyers. As the law aims to protect both law-seeking individuals and the legal system from unqualified legal services,[4] there is obvious potential for conflict when AI is used to autonomously provide legal services or to support human providers of such services, as seen with the example of the "world's

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[1] J. Briggs, D. Kodani, *The Potentially Large Effects of Artificial Intelligence on Economic Growth*, "Goldman Sachs Economics Research", 26 III 2023, p. 6, https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst_-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf (accessed: 3 X 2024).

[2] See *DoNotPay*, FTC, 25 IX 2024, https://www.ftc.gov/legal-library/browse/cases-proceedings/donotpay (accessed: 3 X 2024). The FTC and "DoNotPay" ultimately settled the charges. The settlement obliges "DoNotPay" to pay $193.000 and to give a notice to customers who used the companies' service warning them about the limitations of the law-related features on the service.

[3] LexisNexis, *Generative AI & the Legal Profession (2023 Survey Report)*, p. 5, https://www.lexisnexis.com/pdf/ln_generative_ai_report.pdf?srsltid=AfmBOopLsEdm0ZoUA5yXeX-1Y7WvSD4UHrIt2PAoEoYFeZjqmOAl8m78C (accessed: 22 X 2024).

[4] M. Krenzler, F. Remmertz, in: *Rechtsdienstleistungsgesetz*, eds. M. Krenzler, F. Remmertz, 3rd ed., Baden-Baden 2024, section 1, recitals 71 et seq.

first robot lawyer."[5] Additionally, the recently adopted AI Act[6] of the European Union uses a risk-based approach to AI that raises questions concerning the harmonisation with sector-specific regulation, e.g. the rules governing the provision of legal services.[7] Using AI might have implications for the contractual duties of lawyers vis-à-vis their clients that also derive from private law. Consequently, the scope of such duties influences the potential contractual or tort liability of lawyers when the use of AI has unintended consequences.[8] One such instance is the rather prominent case of a court document filed by a New York-based lawyer, which contained several references to precedents that in reality did not exist: it transpired that *ChatGPT* had invented (or rather, in technical terms, 'hallucinated'[9]) them while assisting the lawyer in drafting the document.[10]

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[5] M. Ebers, *Erbringung von Rechtsdienstleistungen durch LLMs*, in: *Rechtshandbuch ChatGPT*, eds. M. Ebers, B. Quarch, Baden-Baden 2024, chapter 13, recitals 39 et seq.; M. Hartung, *Smartlaw, ChatGPT und das RDG*, "Recht Digital" 2023, p. 211 et seq.; F. Remmertz, *Rechtsdienstleistungen durch Large Language Models (LLMs)*, "Recht Digital" 2023, p. 401. Similar potential for conflict exists if LLMs are used in a medical context, see S. Vorberg, F. Gottberg, *ChatGPT als Medizinprodukt*, "Recht Digital" 2023, p. 159.

[6] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 VI 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[7] For the relationship of the AI Act with the regulation of legal services, see specifically M. Hartung, *AI-Act für die Anwaltschaft?*, "beck-aktuell," 30 IX 2024, https://rsw.beck.de/aktuell/daily/magazin/detail/kolumne-njw-2024-40-ai-act-fuer-die-anwaltschaft?bifo=port (accessed: 3 X 2024); F. Remmertz, *Legal Tech-Update im anwaltlichen Berufsrecht und im RDG*, "Legal Tech Zeitschrift" 2024, p. 99 et seq.

[8] See, for example, D. Schnabl, *ChatGPT im Lichte der Anwaltshaftung*, "Recht Digital" 2025, p. 8 et seq.; D. Michel, *Haftung für Fehler autonomer Systeme in den Freien Berufen*, in: *Arbeit, Wirtschaft, Recht: Festschrift für Martin Henssler zum 70. Geburtstag*, eds. C. Deckenbrock et al., München 2023, p. 1461.

[9] According to a recent study, the hallucination rate of the most widely used AI-driven legal research tools lies between 17% and 33%, see V. Magesh et al., *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, preprint 2024, https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (accessed: 24 X 2024). Another study that focused on general LLMs found that such models hallucinate at least 58% of the time when being prompted with legal tasks, see M. Dahl et al., *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models*, "Journal of Legal Analysis" 2024, no. 16, p. 64.

[10] See B. Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, "New York Times," 27 V 2023, https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html (accessed: 3 X 2024).

While the above-mentioned areas will require further research, this article focuses on the professional duties of lawyers when using AI, because the lawyer profession is defined by these duties. This seems to be a rather topical issue,[11] as regulatory bodies that are tasked with implementing professional conduct rules increasingly seem to notice the challenges deriving from AI used by lawyers. For example, in July 2024, the "American Bar Association" (ABA) issued a formal opinion that contained substantiations of the rules for professional conduct laid down in the "ABA Model Rules of Professional Conduct,"[12] when lawyers use gAI for providing legal services for their clients.[13] Before analysing specific professional duties, the ABA formulates several questions resulting from the meeting of AI use and rules regarding the professional conduct of lawyers:

> What level of competency should lawyers acquire regarding a gAI tool? How can lawyers satisfy their duty of confidentiality when using a gAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a gAI tool to clients? What level of review of a gAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a gAI tool to provide legal services to clients?[14]

As these questions pertain to issues regarding the competent provision of legal services as well as the relationship between lawyer and client, they affect core components of lawyering. There are several guidelines of this nature, albeit legally non-binding,[15] and mainly operating in the US, though increasingly in the European Union, which aim at enabling lawyers to act according to professional duties.[16] Since

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[11] The clash between AI and lawyers' professional law is also discussed in a recent podcast by the German Bar Association ("Deutscher Anwaltsverein"), which was published on 22 X 2024, and is available in German at: https://zurechtgehoert.podigee.io/34-new-episode (accessed: 24 X 2024).

[12] Available at: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (accessed: 3 X 2024).

[13] *Formal Opinion 512 – Generative Artificial Intelligence Tools*, American Bar Association, 29 VII 2024, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf (accessed: 24 X 2024).

[14] Ibidem, p. 2.

[15] B. Quarch, S. Thomas, *Regelung der Nutzung intelligenter Sprachmodelle*, "Legal Tech Zeitschrift" 2024, p. 245.

[16] See, for example, the Council of Bars and Law Societies of Europe, Guide on the use of Artificial Intelligence-based tools by lawyers and law firms in the EU, 2022, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Reports_studies/EN_ITL_20220331_Guide-AI4L.pdf (accessed 21 X 2024); see for further examples M. Ebers, op. cit., recital 70; B. Quarch, S. Thomas, op. cit., p. 245 et seq.

AI systems are widely available, such challenges are not limited to the work of lawyers in the US, but also pertain to lawyers in other countries, for example, Germany. After a brief overview of possible ways to use AI for legal task assistance (section 1), the analysis of specific professional duties of German lawyers amid the use of AI forms the core of this article (section 2), which concludes with a brief look at the potential future developments.

1. AI use for legal tasks

The provision of legal services is a language-based profession, and gAI models like LLMs are increasingly deployed by lawyers to assist them with legal tasks. Regarding the use of such systems for legal purposes, the literature distinguishes two types of LLMs: general LLMs – prominent examples being *ChatGPT* or *Copilot* – and specialised legal software that uses LLMs trained on legal data (so-called Legal AI), examples being services like *Harvey* or *Lexion*.[17] The landscape for Legal AI is currently developing, as early 2024 saw the release of *Noxtua*, which is described as "Europe's first sovereign Legal AI."[18] (g)AI systems can be used for several tasks that are typical of legal work, for example, analysing the facts of the case or for legal research,[19] drafting legal texts such as pleas or contract templates,[20] or developing speech-to-text-tools or legal chatbots.[21] Because tasks of this nature need to be performed not only by lawyers but the entire legal profession, it is natural that lawyers are not the only ones that can use AI. A recent study authored by the German law firm *Noerr* investigates AI use in the legal departments of private companies and shows that a quarter of the companies interviewed already use AI technology.[22] Legal protection insurance companies have started to deploy AI as well.[23]

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[17] M. Ebers, op. cit., recital 10.

[18] See https://xayn.com (accessed: 21 X 2024).

[19] M. Ebers, op. cit., recital 12 et seq.; D. Schwarcz, J. Choi, *AI Tools for Laywers*, "Minnesota Law Review Headlines" 2023, vol. 108, p. 8 et seq.

[20] M. Ebers, op. cit., recital 16 et seq.; D. Schwarcz, J. Choi, op. cit., p. 20 et seq.

[21] M. Ebers, op. cit., recital 18 et seq.

[22] *KI in der Rechtsabteilung – Use Cases und KI-spezifische Rechtsfragen*, Noerr, August 2024, https://www.noerr.com/de/-/media/files/web/studien/240905_noerr_ki_studie.pdf?rev=b6834b5d4523440b825fddca4bdab252&hash=6CF92B2B6D23760935DE7794536ED3DE (accessed: 11 X 2024).

[23] See D. Wendt, *Rechtsschutzversicherung und Legal Tech (AI Systems)*, "Legal Tech Zeitschrift" 2024, p. 110.

2. Lawyers' use of AI and the German professional code for lawyers

2.1. A short introduction to the German professional code for lawyers

As legislation concerning professional duties of lawyers is not heavily influenced by European Union law, the form of its codification and content mainly lies within the jurisdiction of national states. In Germany, the professional code for lawyers is codified in the federal law governing the legal profession in the "Bundesrechtsanwaltsordnung" (BRAO). The BRAO is a formal act and contains provisions concerning the admission of lawyers (sections 4 to 17 of the BRAO), their professional duties (sections 43 to 59a of the BRAO), federal and regional bar associations (sections 60 to 89 of the BRAO), and also the implementation of and procedural rules for lawyer courts that are responsible for litigating violations of professional duties (sections 116 to 211 of the BRAO). As this article focuses on the professional duties of lawyers, it is necessary to mention the professional rules and regulations for lawyers ("Berufsordnung für Rechtsanwälte," BORA, not to be confused with the aforementioned BRAO). These stipulate some of the duties laid down in the BRAO and are issued in the form of by-laws by the federal bar chamber ("Bundesrechtsanwaltskammer," BRAK), based on the authority given to it by section 59b of the BRAO. It should be noted that the BRAK may utilise this authority to issue further substantiations of lawyers' professional duties in the future, especially regarding the use of AI. However, at the time of writing, no such update of the BORA is imminent.[24]

2.2. Professional duties of German lawyers and the use of AI

In the following section, several professional duties that could be affected by using AI will be analysed. The rationale behind the professional duties of the BRAO was originally based on the idea of an individual lawyer. Pursuant to section 59e (1) of the BRAO, the professional duties

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[24] While the responsible committee of the BRAK at the time of writing did not see the need for update the BORA, discussions will be continued in the future, reports F. Remmertz, *Legal Tech-Update…*, p. 99.

that will be discussed in the following equally apply to law firms ("Berufsausübungsgesellschaften"). Based on risk evaluation, law firms must take appropriate steps to prevent and detect any violations of professional duties, for example, by training lawyers (section 59e (2) of the BRAO, section 31 (1), (2) of the BORA). The use of new technologies like AI can be qualified by law firms to come with the risk of violating professional duties.[25] Professional duties must also be observed by in-house lawyers working in the legal departments of private companies ("Syndikusrechtsanwälte"), as they are subject to regulations concerning lawyers, according to section 46c of the BRAO.

Section 43 of the BRAO contains a general duty to act in a faithful manner, while subsequent provisions contain more specific duties. Section 43a of the BRAO contains, for example, the duty to remain independent, to treat client information confidentially and to act objectively, in addition to rules for dealing with conflict of interest. The coexistence of a 'general duty' and 'more specific duties' is the result of the German legislators' reaction to a ruling by the German Federal Constitutional Court ("Bundesverfassungsgericht," BVerfG) from 1987. In the so-called "Bastille decisions,"[26] the court considered the concretisation of the general duty to act faithfully through guidelines issued by the Federal Bar Association as unconstitutional infringing on the freedom of profession (article 12 of the German constitution, "Grundgesetz").[27] The German legislator had to react to this ruling by introducing more specific professional duties, which have been enacted as formal law in 1994. Because of this, it is uncertain whether section 43 of the BRAO possesses a stand-alone meaning. Considering this, the following analysis begins with the more specific professional duties which can without question be applied on their own. Particularly in the context of the use of information technology (IT), it is important to note that professional duties follow the principle of "technology neutrality."[28] This means that while there are, with few exceptions, no duties directly concerning the use of IT in general or AI in specific, they still apply of the type of technology used by the lawyer.

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[25] F. Remmertz, *Rechtsanwalt, Berufsrecht*, in: *Legal Tech: Recht, Geschäftsmodelle, Technik: alphabetische* Gesamtdarstellung, ed. M. Ebers, Baden-Baden 2024, recital 6.

[26] BVerfG "Neue Juristische Wochenschrift" 1988, p. 191; BVerfG "Neue Juristische Wochenschrift" 1988, p. 194.

[27] See also M. Bauckmann, in: *Bundesrechtsanwaltsordnung*, ed. D. Weyland, 11th ed., München 2024, section 43 of the BRAO, recital 7 et seq.

[28] F. Remmertz, *Rechtsanwalt*…, recital 59.

2.2.1. Duty to remain independent, section 43a (1) of the BRAO

The professional code is based on the idea of the lawyer as an "independent body of the administration of justice" (section 1 (1) of the BRAO). The independence of lawyers is one of the profession's key features, as can be seen in section 43a (1) of the BRAO, which prohibits lawyers from entering into any commitments that could compromise their professional independence. The overarching concept of lawyers' independence includes several aspects, ranging from a lawyer's independence from state, society and clients as well as financial independence.[29]

Before even considering the use of AI systems as a potential 'commitment' precluding a lawyer's independence, the sheer existence of a commitment within the meaning of section 43a (1) of the BRAO is already questionable, based on the described uses of (g)AI in mind.[30] This is because AI merely serves as an auxiliary device, while the lawyer still bears the responsibility for the service provided. Even before the digital age, lawyers used analogue handbooks containing contract templates in the drafting process: since this does not preclude independence, there is no convincing reason why using AI cannot be dealt with in a similar manner.[31]

2.2.2. Confidentiality obligation, section 43a (2) of the BRAO

As confidentiality is a major component of the relationship between lawyers and their clients, it may seem intuitive that, in principle, lawyers are not allowed to disclose any information about their clients to human parties that stand outside of the lawyer-client-relationship. The use of AI may challenge this intuition, as interpersonal exchanges are replaced with interaction between human and machine. Moreover, to individualise desired outputs and increase the degree to which AI simplifies legal work, lawyers might be tempted to enrich AI prompts[32] by using information that directly or indirectly relates to their client.

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[29] M. Bauckmann, op. cit., section 43a of the BRAO, recital 4.

[30] M.S. Haase, H. Heiss, *Der Einsatz von künstlicher Intelligenz im Rechtsanwaltsberuf*, "Zeitschrift für Innovations- und Technikrecht" 2023, p. 165.

[31] Ibidem.

[32] Prompts can be information, sentences, or questions that you enter into a gAI tool, see, *Getting started with prompts for text-based Generative AI tools*, Harvard University

Such a use of AI may constitute a violation of a lawyer's professional duty to treat client information as confidential. In order to clarify the US model rules for professional conduct, the ABA's formal opinion has already stated that lawyers are obliged to "keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorised to carry out the representation, or disclosure is permitted by an exception."[33] In Germany, this is regulated in a similar manner as section 43a (2) of the BRAO contains an equivalent obligation concerning professional confidentiality. Its material scope covers any information – regardless of its source – that lawyers obtain during the provision of their services, while its temporal applicability begins with the initiation phase of the relationship with a client (e.g. first contact) and is binding even beyond the end of the relationship.[34] Section 2 (2) sentence 1 of the BORA clarifies the requirements for lawyers to uphold the confidentiality obligation of the BRAO when using IT: Lawyers have to take organisational and technical measures appropriate to the risk to safeguard client confidentiality. The measures must be within reason to their legal profession at the same time, which means that they must be implemented based on an assessment of possible risks to the lawyer's practice and clients and at an appropriate cost. As technical measures are deemed sufficient if they conform to the requirements of personal data protection law (section 2 (2) sentence 2 of the BORA), there is a link between the confidentiality obligation and data protection law.[35]

Regarding the use of (g)AI by lawyers, there is a clear distinction to be made: if the AI systems used by lawyers necessitate the transfer of client information to third parties because they are stored on an external server that is not solely controlled by the lawyer or the law firm, entering such information directly or indirectly relating to clients constitutes a violation of the confidentiality obligation as well as the data protection law.[36] There is an additional risk of the system using client-related information for training to generate new output in another context, especially with

Information Technology, 30 VIII 2023, https://huit.harvard.edu/news/ai-prompts (accessed: 9 X 2024).

[33] *Formal Opinion 512…*, p. 6.

[34] Section 2 (1) of the BORA; see also M. Bauckmann, op. cit., section 43a of the BRAO, recital 16.

[35] J.-P. Praß, in: *Beck'scher Online-Kommentar BORA*, ed. V. Römermann (last updated: 1 IX 2022), section 2 of the BORA, recital 12b.

[36] M. Hartung, op. cit., p. 216; M.S. Haase, H. Heiss op. cit., p. 165.

self-learning gAI. Conversely, at least with regard to the confidentiality obligation, lawyers are allowed to prompt AI systems with abstract requests, for example, to draft a contract template that is then tailored to the individual case by the lawyer without the assistance of AI.[37] Furthermore, the use of an AI system that is controlled by the lawyer or the law firm, thus not requiring the transfer of client information to third parties, is compliant with the confidentiality obligation.[38] Neither of the last two instances requires the client to give consent. In theory, one might consider the disclosure of client information to AI systems as necessary for the performance of a contract between lawyer and client. According to article 6 (1) (b) of the General Data Protection Regulation (GDPR[39]), data processing would be possible without the client's consent in this case. However, it is hard to imagine a situation in which the disclosure of client information to an AI system is necessary for the performance of the contract, as the lawyer is generally obliged to perform the legal services on a personal basis (section 613 of the German Civil Code, BGB).

In all other instances, clients 'control' the confidentiality obligation, as they can release their lawyer from confidentiality by consenting to the disclosure of all or certain information. This consent can be given by the client either through the expressive release from the confidentiality obligation or, while not being expressly declared, implied consent, e.g. if the client is aware that the lawyer must use third parties to fulfil his obligations.[40] In the case of the disclosure of client information, for a consent of the client to be valid, it must be informed, which means that the lawyer must inform the client about the scope of information and the way that it will be disclosed.[41] Conclusive consent mainly comes into consideration when the disclosure of information by the lawyer is necessary to provide the legal services the client asked for.[42] For example, the enforcement of a claim requires the lawyer disclosing information to the opposing party or the court to prove the existence of the claim. However, as mentioned previously, it is difficult to imagine a scenario

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[37] M.S. Haase, H. Heiss, op. cit., p. 165.

[38] F. Remmertz, *Legal Tech-Update…*, p. 99.

[39] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 IV 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[40] M. Bauckmann, op. cit., section 43a of the BRAO, recital 23 et seq.

[41] Ibidem.

[42] Ibidem, recital 24.

in which the use of AI is necessary for providing the required legal services, as its deployment exclusively functions as an aid to the lawyer's work and not as a substitute.

Another potential exception to the confidentiality obligation is laid down in section 43e of the BRAO, which allows lawyers to disclose client information to "service providers"[43] in cases in which such a disclosure is necessary for service provision. By introducing this exemption in 2017, the legislator wanted to simplify non-legal outsourcing like the use of cloud-based storage space.[44] While the use of AI systems has not been considered when this provision was introduced, the professional code is in general technologically neutral, leading scholars to question whether section 43e of the BRAO can be used to justify the disclosure of client information to AI systems. With common (g)AI systems like *ChatGPT* in mind, the applicability of the exemption seems doubtful at the very least. To begin with, it is not even clear whether AI systems qualify as "service providers" at all.[45] Furthermore, the application of section 43e of the BRAO is connected to several further requirements with which the lawyer who aims to integrate the service provider must comply. For example, pursuant to section 43e (2) sentence 1 of the BRAO, the lawyer is obliged to meticulously select the service provider with regard to its professional competence and reliability.[46] Fulfilling such a requirement when using AI systems, lawyers face several major obstacles, such as systems still being prone to error when used for legal services.[47] A lawyer would need a certain degree of technological knowledge to safely assess the quality of a system's degree of competence.[48] Furthermore, if the AI system is operated abroad, its potential use as a service provider requires a comparable level regarding the protection of secrets in the foreign country as that found in Germany (section 43e (4) of the BRAO).[49]

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[43] According to the legal definition of a "service provider," this is another person or authority that the lawyer within the frame of his profession delegates services to.

[44] Deutscher Bundestag, *Entwurf eines Gesetzes zur Neuregelung des Schutzes von Geheimnissen bei der Mitwirkung Dritter an der Berufsausübung schweigepflichtiger Personen*, Bundestag-Drucksache 18/11936, p. 34.

[45] M.S. Haase, H. Heiss, op. cit., p. 166; B. Quarch, S. Thomas, op. cit., p. 247.

[46] M.S. Haase, H. Heiss, op. cit., p. 166; T. Yuan, *Künstliche Intelligenz*, in: *Legal Tech: Recht, Geschäftsmodelle, Technik: alphabetische Gesamtdarstellung*, ed. M. Ebers, Baden-Baden 2023, recital 55.

[47] See, for example, the hallucination rates described in n. 9.

[48] B. Quarch, S. Thomas, op. cit., p. 246.

[49] Ibidem, p. 247.

2.2.3. General duty to act faithfully, section 43 of the BRAO

While the professional code is neutral with regard to technology used by lawyers, the more specific professional duties that have been introduced in response to the above-mentioned "Bastille decisions" are not sufficient to answer all the questions raised by the ABA: Is the lawyer obliged to disclose the use of (g)AI systems to the client? To what degree is a lawyer obliged to review the output generated by the AI system? One is tempted to use the general duty of acting faithfully as a 'catch-all duty': after all, the provision is formulated in a way that leaves it open to interpretation. There is, however, a disagreement regarding the stand-alone meaning of section 43 of the BRAO. Some commentators interpret the "Bastille decisions" in such a way that the general duty to act faithfully can be used exclusively to transfer the violation of other legislation like criminal or administrative law to the professional code for lawyers, making the violation a breach of professional duties at the same time.[50] For example, the criminal embezzlement (section 266 of the German Criminal Code, "Strafgesetzbuch," StGB) of client funds would therefore also be classified as a violation of professional duties. Meanwhile, others still deem section 43 of the BRAO to be applicable on its own.[51] Even in this case, the interpretation of the rule must be restrictive to ensure adherence to the constitutional principle of legal certainty ("Bestimmtheitsgrundsatz," article 20 (3) of the Grundgesetz).[52] While this shows that even the most basic application conditions surrounding the general duty to act faithfully cannot be assessed safely, the subsequent question of when and under which conditions the use of AI is faithful in this sense has yet to be touched upon. It seems possible that lawyer courts responsible for litigating violations of professional duties utilise this room for interpretation to develop principles regarding the

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[50] See, for example, H. Prütting, in: *Bundesrechtsanwaltsordnung*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, section 43 of the BRAO, recital 21; W. Hartung, *Sanktionsfähige Berufspflichten aus einer Generalklausel? Keine speziellen Pflichten aus der allgemeinen Pflicht des § 43 BRAO*, "Anwaltsblatt" 2008, p. 783; F. Busse, *Anwaltsethik unter der Geltung des neuen Berufsrechts*, "Anwaltsblatt" 1998, p. 232.

[51] For example, M. Kleine-Cosack, *Bundesrechtsanwaltsordnung mit Berufs- und Fachanwaltsordnung*, 9th ed., München 2022, section 43 of the BRAO, recital 9; Lawyers Court of North Rhine-Westphalia "Neue Juristische Wochenschrift Rechtsprechungs-Report" 2013, p. 624.

[52] M.S. Haase, H. Heiss, op. cit., p. 166.

use of AI.[53] As the general duty laid down in section 43 of the BRAO has been ignored since the introduction of the more specific professional duties, the challenges of the use of AI and technology by lawyers may lead to its "revival."[54]

However, section 43 of the BRAO is generally interpreted to include the duty for lawyers to provide services *in person*, which is obviously affected when lawyers make use of AI technology.[55] Accordingly, if one assumes that the general duty is independently applicable and therefore has stand-alone meaning, it can result in the duty to notify clients about the use of AI. Article 50 of the AI Act lays down comparable obligations of transparency for providers and deployers of certain AI systems, which might also apply to lawyers who use AI systems in the sense of article 3 no. 1 of the AI Act.[56] As section 43 of the BRAO is universally seen as a transitional provision, which allows other legislation to be incorporated into the professional conduct rules, a violation of article 50 of the AI Act could at the same time be considered a violation of professional duties, making the discussions on the independent meaning of section 43 of the BRAO redundant.[57]

2.3. Non-compliance with professional duties and possible sanctions

The violation of professional duties can be addressed by a multitude of legal consequences, which can result in major repercussions affecting the lawyer professionally and personally. As an example, the violation of the confidentiality obligation of section 43a (2) of the BRAO can be sanctioned as a criminal offence pursuant to section 203 (1) of the StGB. In other instances, sections 113 to 115b of the BRAO contain provisions that specify possible professional consequences. Pursuant to section 113 (1) of the BRAO, a violation of professional duties is penalised by lawyer courts through the imposition of a so-called "lawyer court measure" ("anwaltsgerichtliche Maßnahme"). These measures are specified in section 114 of the BRAO and include warning the lawyer

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[53] Ibidem.
[54] This possibility is put forward by F. Remmertz, *Rechtsanwalt*…, recital 9.
[55] F. Remmertz, *Rechtsanwalt*…, recital 9; B. Quarch, S. Thomas, op. cit., p. 246.
[56] F. Remmertz, *Legal Tech-Update*…, p. 100.
[57] Ibidem.

or law-firm, monetary penalties or even the lawyer's expulsion from the advocacy or revocation of a law firm's permission to offer legal services. Minor infringements can also be met by a reprimand issued by the board of the regional bar association (section 74 of the BRAO). It is widely disregarded that professional duties have a direct impact on the contractual relationship between lawyer and client.[58]

Conclusion

The application of professional conduct rules is only one of several legal challenges to be overcome with regard to the use of AI in legal services. However, as an ideal type of a lawyer is defined by these duties and AI is here to stay, it is important to face the questions resulting from this interaction. The good news is that professional duties deriving from the German Professional Code for Lawyers can be used when AI is involved because of these duties being technologically neutral. However, this requires the interpretation of legal provisions and therefore results in a high degree of legal uncertainty. Therefore, it seems almost certain that the regulatory landscape will be subject to substantial developments through efforts by the legislator or (which is more likely) through further concretisations of professional duties in the BORA itself put forward by the federal bar chamber BRAK. In the meantime, lawyers who are using AI are strongly advised to act with caution, especially with regard to protecting their clients' information if they do not want to risk drastic sanctions. Even when using new technology, the old saying of being 'better safe than sorry' seems to be a good rule of thumb.

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[58] For example by M. Heese, *Beratungspflichten*, Tübingen 2015, p. 345 et seq.

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