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FOCUS ON RESPONSIBILITY RATHER THAN DISCLOSURE: AI ETHICS IN SOUTH AFRICAN LEGAL PRACTICE

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A recent proposal by Van Eck (2025 TSAR *454) would amend the Code of Conduct for Legal Practitioners to require prior disclosure to, and prior consent of, the client before any use of generative artificial intelligence ('AI') in legal practice. The case against that proposal is set out in this note: it mischaracterises the international landscape, has no support in South African jurisprudence on the duty of honesty and integrity, cannot be enforced as a policy, and would chill precisely the use of generative AI that s 34 of the Constitution most plainly favours. An affirmative responsibility-centred alternative is developed, drawing on the recently revised ethics guidelines for legal practitioners on the use of generative AI; three reactive carve-outs are identified to address the cases that the contrary view is right to worry about.*

Generative AI – client consent – legal ethics – responsibility

I INTRODUCTION

Generative artificial intelligence ('AI') has arrived in South African legal practice without any regulatory architecture to receive it. The profession has responded with enthusiasm, confusion, and cases in which practitioners have learned — at their clients' expense — that a technology capable of producing persuasive text is not the same as a technology capable of producing reliable law. *Parker v Forsyth NO* [2023] ZAGPRD 1 (available at *https://lawlibrary.org.za/judgments/ZAGPRD/* ('*Parker*')) and *Mavundla v MEC: Department of Co-operative Government and Traditional Affairs KwaZulu-Natal* 2025 (3) SA 534 (KZP) ('*Mavundla*') have established that generative AI cannot be trusted without verification, and that the legal practitioner who relies on unchecked AI output faces the ordinary consequences of filing anything else unchecked. Those cases, however, resolve only one part of the regulatory question. They do not address the distinct question whether the practitioner must tell the client that AI has been used, or must obtain the client's consent before using it. That question is now being debated. It is the subject of this note.

† *https://orcid.org/0000-0002-7346-3490*. This note was prepared with the iterative drafting assistance of generative AI. The author takes full responsibility for the final text and arguments advanced. This acknowledgement reflects the prevailing norms of scholarly publication and research and should not be read as implying any general duty of disclosure in legal practice. The author would also like to express his gratitude to Dr Siddharthiya Pillay for the technical editing of this manuscript. Any remaining errors are the author's responsibility.

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Three South African voices have so far made a direct case on the point. Two have argued for some form of consent-and-disclosure obligation: Michele van Eck in a recent *TSAR* article (M van Eck 'An ethical framework for the use of artificial intelligence in the legal profession' 2025 *TSAR* 454 ('Van Eck 2025 *TSAR*')) and Conrad van der Vyver in *De Rebus* (Conrad van der Vyver 'Guidelines for responsible AI integration in legal practice' 2025 (May) *De Rebus*). The third is my own position, developed with co-authors in *De Rebus* (Donrich Thaldar, Siphesihle Mbatha, Marietjie Botes & Paul Esselaar 'Responsible AI use in South African legal practice: A call for ethical guidelines' 2025 (July) *De Rebus*; and the same authors 'Responsible AI use in South African legal practice: Our revised guidelines and the consultation that shaped them' 2026 (July) *De Rebus* (July 2026) (together, 'the Guidelines')). The Guidelines take the opposite view: there is no general duty of proactive disclosure of generative AI use to clients; the ethical anchor is responsibility, not disclosure.

I defend the latter position. I address the most ambitious of the contrary proposals — Van Eck's, which would require prior disclosure and prior client consent before any use of AI technology — and argue that the proposal rests on an overbroad conception of transparency, is unsupported by South African jurisprudence, cannot be enforced, and would harm access to justice in a country in which s 34 of the Constitution of the Republic of South Africa, 1996 makes that access a substantive right. The argument proceeds in five steps. In part II I sketch the international landscape. In part III I set out Van Eck's proposal. Part IV develops a concentrated rebuttal. Part V advances the affirmative case for a responsibility-centred architecture. Part VI concludes the note.

II THE INTERNATIONAL LANDSCAPE

Van Eck (op cit) is not alone in appearing to advocate a universal mandate for lawyers to disclose AI use to their clients (see for example D Hricik, A-L S Morgan & K H Williams 'The ethics of using Artificial Intelligence to augment drafting legal documents' (2018) 4 *Texas A&M Journal of Property Law* 465 at 477 (a lawyer 'may need to inform the client' of AI use, and where the service is new and unproven a lawyer 'should consider carefully whether disclosure is, even if not required, good practice'); J L Jacobowitz & J Ortiz 'Happy birthday Siri! Dialing in legal ethics for artificial intelligence, smartphones, and real time lawyers' (2018) 4 *Texas A&M Journal of Property Law* 407 at 417–18 (endorsing client consent for AI outsourcing on the ground that 'AI outsourcing may necessitate a more detailed explanation than the outsourcing of legal research or document review to other humans')). But that characterisation is not an accurate one of the current international professional-conduct landscape, which is nuanced and contested, not uniform, and whose dominant position sits at some distance from the strict-consent rule that Van Eck proposes.

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The most authoritative foreign source in the field is the American Bar Association's Standing Committee on Ethics and Professional Responsibility 'Formal Opinion 512 on generative artificial intelligence tools' (29 July 2024) ('ABA Opinion 512'). That opinion does not require general client disclosure. It triggers informed consent or disclosure in specific circumstances, including where a client's confidential information is input into a self-learning AI tool; where the retainer requires it; where AI use is material to the basis or reasonableness of the lawyer's fee; where the client asks (a circumstance that maps onto the first reactive carve-out defended in part V below); and where the use of AI will influence a significant decision in the representation. The State Bar of California's 'Practical guidance for the use of generative artificial intelligence in the practice of law' (2026 revision, replacing the November 2023 original, at 7) provides that the practitioner 'must consider' disclosure — permissive framing, not a mandate. The Queensland Law Society's Guidance Statement No 37 'Artificial intelligence in legal practice' provides that '[w]here feasible, clients should be advised' if AI will be used, with the stringency of the obligation tied to the significance of the contribution. The New Zealand Law Society's 'Lawyers and generative AI' (March 2024) is similar in tone. The Solicitors Regulation Authority of England and Wales ('SRA') ('Compliance tips for solicitors regarding the use of AI and technology' updated 9 February 2026) has issued no rule requiring general disclosure; its guidance requires that clients be told where they are interfacing with AI, with confidentiality a parallel governance concern. The 'CCBE guide on the use of generative AI by lawyers' (Council of Bars and Law Societies of Europe, 2 October 2025) is principles-based; it imposes no blanket client-consent rule, though it requires transparency with the client where it can reasonably be assumed that the client would object or have reservations.

A minority of foreign bodies do require consent, but not as a general rule. The Law Society of British Columbia's 'Guidance on professional responsibility and generative AI' (12 October 2023) contemplates prior consent where AI is used in relation to client data that cannot be redacted, not for any AI use whatsoever. The Law Society of Manitoba's 'Generative artificial intelligence: Guidelines for use in the practice of law' (April 2024), at Guideline 2, provides that informed consent should be sought where confidentiality or privilege cannot be adequately protected by anonymisation. These are stricter positions than those of the ABA and the CCBE, but even they are narrower than the rule Van Eck proposes: none requires consent for any use of AI in the event that confidential client information is not involved.

A further complication produces frequent misdescription of the international position. Many of the most-cited 'AI disclosure' instruments are standing orders of individual courts, not professional-conduct rules.

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Examples include the standing orders of Judge Nina Y Wang in the District of Colorado (1 December 2025) and Judge Michael M Baylson in the Eastern District of Pennsylvania (6 June 2023), and the Supreme Court of New South Wales Practice Note SC Gen 23 (28 January 2025). All three impose court-facing certification obligations on counsel to secure the integrity of court filings; they do not impose fiduciary disclosure obligations to clients. (The Wang order's model AI certification illustratively includes a client-consent form of certification, but its mandatory content is verification of the accuracy of drafting and of citations, not client consent.) Conflating these instruments with client-facing rules produces the false impression that consent is internationally standard. It is not.

The academic literature is equally contested. A pro-disclosure camp, represented by Hricik et al (op cit) and Jacobowitz (op cit), favours some form of client disclosure or consent when AI is used, generally tied to the risk profile of the tool or the significance of the AI contribution. The responsibility-centred counter-position is well represented in the academic literature by J M Garon 'Ethics 3.0 — Attorney responsibility in the age of generative AI' (2023–24) 79 *The Business Lawyer* 209, whose treatment analyses generative AI through the lawyer's existing duties of competence, confidentiality, supervision and verification, and which does not identify client-facing disclosure of AI use as an ethical obligation. It finds broader expression in the practical and professional literature that treats AI as integrated into the lawyer's craft rather than as a separate object of disclosure-centred regulation (Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* 3 ed (2023); Michael D Murray 'When the tools begin to act: Agentic artificial intelligence and the new risk surface of legal practice' available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7201719*). A nuanced middle ground, which emphasises access to justice and risk-tiered approaches, is reflected in Drew Simshaw 'Access to A.I. justice: Avoiding an inequitable two-tiered system of legal services' (2022) 24 *Yale Journal of Law & Technology* 150, and the transparency architecture of art 50 of Regulation (EU) 2024/1689 ('the EU Artificial Intelligence Act'). The field is live. It is not resolved.

The picture that emerges is this. Three families of regulatory architecture are visible internationally. The first, *strict consent*, requires disclosure and consent before any AI use. Van Eck's proposal sits here, and no foreign professional-conduct rule fully inhabits this register. The second, *risk-based contextual disclosure*, requires disclosure or consent where a client's confidential information is at risk, where fees are materially affected, or where a court specifically orders it; this is the position of ABA Opinion 512, the California Practical Guidance, the Queensland Guidance, the CCBE Guide and the British Columbia and Manitoba rules (each with its own trigger configuration). The third, *responsibility-centred*, places the

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ethical anchor on the lawyer's duties of competence, the duty currently framed in professional rules as verification, and confidentiality, treating disclosure as reactive rather than proactive; the Guidelines sit in this third family, and so, on the fairest reading, do the SRA's position in England and Wales and the New Zealand Law Society guidance. The choice that the South African profession faces is therefore not binary but triangular. As part V will develop, the Guidelines' three reactive carve-outs functionally capture the strongest features of the risk-based middle, while avoiding the unenforceability and access-to-justice harms of the strict-consent position. To describe Van Eck's proposal as the South African implementation of an international consensus is to misstate the international position; the more candid description is that the proposal selects the strictest of three live architectures and proposes its adoption.

III VAN ECK'S PROPOSAL

Van Eck's argument, developed across her 2024 and 2025 contributions to *TSAR* (M van Eck 'Error 404 or an error in judgment? An ethical framework for the use of ChatGPT in the legal profession' 2024 *TSAR* 469 ('Van Eck 2024 *TSAR*'); Van Eck 2025 *TSAR*), is that the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (GN 168 in *GG* 42337 of 29 March 2019) ('the Code of Conduct') should be amended to include a proposed new Part VIII on the use of technology in legal practice. The operative provisions of her proposed new para 64.2.4 suggest:

> '(i) Prior disclosure must be made to a client and the client's consent must be obtained prior to using the AI technology; … (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.' (Van Eck 2025 *TSAR* op cit at 470–1.)

The rule is unqualified. It applies to any AI use, without materiality threshold, carve-out, or definition of what counts as 'AI technology'. It is the strictest rule among those surveyed in Van Eck 2025 *TSAR*, and it is stricter than the foreign guidelines on which she principally relies, on the reading of those guidelines that I defend below. (On Van Eck's own reading of California and British Columbia her rule would match, rather than exceed, the British Columbia position; rebuttal (a) in part IV explains why the more modest reading is preferable.)

Her supporting reasoning is developed across five ethical categories: competence; confidentiality; supervision; honesty and integrity; and fees. The consent rule draws primarily on honesty and integrity, confidentiality and public confidence; competence, supervision and fees provide context but are not load-bearing. The argumentative strands of the consent rule, fairly summarised, are seven: that her rule reflects 'international best

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practice'; that *Parker* and *Mavundla* demonstrate the need for regulatory intervention of which her rule forms part; that the existing para 3.1 duty of honesty and integrity is properly expanded into an affirmative duty of methodological disclosure; that client confidentiality requires a suite of protective measures — anonymisation, security safeguards, POPIA-equivalent protection and supplier undertakings — together with prior consent before client information enters an AI tool; that third-party ownership of AI systems could create a latent conflict of interest that may require additional 'processes, procedures and policies' to mitigate; that self-regulation is problematic, as *Parker* and *Mavundla* demonstrate; and that public confidence in the profession may erode unless the Code of Conduct is updated. Van der Vyver's parallel proposal (Van der Vyver op cit) is narrower: consent captured in the power of attorney or a separate informed-consent document. The underlying fiduciary premise is common to both.

IV REBUTTAL

Each of the seven strands of Van Eck's argument is susceptible to a specific objection. Taken together, the objections establish that the proposal is indefensible on the terms that she herself sets. Two further objections — one of drafting, one of internal contradiction — complete the rebuttal.

(a) The international consensus claim does not survive its own citations

The foreign guidelines that Van Eck cites are permissive, contextual, or narrower than her proposed rule. Two distinctions matter here. On Queensland, her own quoted language is undermining: the Guidance says 'where feasible', which is itself a contextual qualifier inconsistent with the blanket rule that she proposes. On California and British Columbia, the disagreement is one step removed: I read California's Practical Guidance as 'must consider' (permissive framing) and the British Columbia Guidance as triggered by AI use with unredactable client data, rather than by all AI use; Van Eck reads California as expecting disclosure of any AI use, and reads British Columbia as requiring prior consent. Direct reference to the underlying instruments supports the reading advanced here. The point is not merely that her footnotes do not deliver an international consensus on strict consent; it is also that her own characterisation of the more demanding of those foreign sources overstates them. ABA Opinion 512, on either reading, conditions consent on specific triggers rather than imposing a general rule. Van Eck's rule is triggered by all AI use whatsoever. Importing it into South Africa would not be in alignment with international practice; it would be the adoption of an outlier position.

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(b) Parker *and* Mavundla *prove the opposite of what Van Eck claims*

Parker and *Mavundla* turned on verification failures, not disclosure failures. The offending practitioners were not criticised for failing to tell their clients about AI use; they were criticised for failing to check that the cases that they cited actually existed. A prior-consent rule would have prevented nothing: a client who had consented would still have been prejudiced by fabricated citations advanced in the litigation. The ethical pathology was an abdication of the non-delegable duty of verification — a duty grounded in the Code of Conduct's duties to the court at ss 3.3, 57.1 and 22.3.2 (counsel), reinforced by the competence duties at ss 3.11 and 18.14. *Parker* and *Mavundla* demonstrate a breakdown in the existing verification architecture, not a gap in a disclosure architecture that does not yet exist. (Whether the human-checks-AI verification paradigm itself remains the right long-term architecture as AI capability advances is a separate question, which I take up elsewhere and where I argue for a partnership architecture in which verification is reciprocal rather than one-directional (see Donrich Thaldar 'Legal centaurs' (2026) 18 *Law, Innovation and Technology* (forthcoming)). That question does not bear on the present argument: even on the verification-centred view that contemporary professional rules currently embody, *Parker* and *Mavundla* are properly classified as failures of verification, not failures of disclosure.)

(c) The expansion of 'honesty' has no South African jurisprudential basis

Van Eck's attempt to derive an affirmative duty of methodological disclosure from para 3.1 of the Code of Conduct is unsupported by the authorities that she herself cites. *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) concerns affirmative professional dishonesty. *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) concerns perjury and subornation of perjury. *Visser v Visser* 1974 (3) SA 356 (W) extends the duty not to mislead to the opponent. *Ulde v Minister of Home Affairs* 2008 (6) SA 483 (W) addresses the tacit representation that no contradictory authority is known to counsel. Each authority concerns active misrepresentation or the suppression of legal authority. None supports a duty to volunteer information about the method by which a document was drafted. Legal practitioners are not required to disclose which legal research database they used, which candidate attorney drafted the first version, which word-processor they employed, whether the letter of demand was polished by a grammar tool, or where their case-management data is stored. These are matters of professional technique, not matters material to the client's decision-making. Nothing in the cited jurisprudence elevates generative AI above the other instruments of method.

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(d) Confidentiality is a duty of protection, and Van Eck's draft overshoots her own confidentiality analysis

Van Eck's substantive confidentiality discussion is, in fact, largely a protection analysis: she canvasses anonymisation, redaction, supplier confidentiality undertakings, security safeguards and POPIA-equivalent protection, with consent presented alongside these measures rather than as the protective mechanism. On that analysis we are closer to agreement than divergence: confidentiality, under para 3.6 of the Code of Conduct, the common law (*Gamiet v Cape Law Society* 1950 (2) SA 706 (C)), and the Protection of Personal Information Act 4 of 2013, is a duty of protection. The Guidelines that I draw on here address the same question through the same kinds of measures: free and consumer-tier AI services that retain user inputs for training are not to be used with confidential client information; paid subscription, professional, and enterprise-tier services offering contractual non-training guarantees, encryption, and controlled retention can, if properly configured, be consistent with confidentiality obligations.

Where the argument bites is at the level of Van Eck's proposed addition to the Code of Conduct (see 2025 *TSAR* op cit), not her confidentiality analysis. The proposed new para 64.2.4(i) converts consent into a freestanding precondition for *all* AI use, decoupled from whether any client information is even involved. That is an over-generalisation of what the underlying confidentiality analysis supports: a client cannot consent her way out of the lawyer's duty to select secure tools, and the lawyer cannot discharge that duty by obtaining consent to use insecure ones. Anchoring a blanket client-facing consent requirement in confidentiality collapses the question into the wrong doctrinal category — producing the illusion of client protection while the substantive duty (which Van Eck herself substantially identifies) is left unaltered.

(e) The conflict-of-interest framing is marginal to the consent rule and overstated even in its own terms

The conflict-of-interest strand is, on a fair reading of Van Eck's 2025 text, marginal to her consent rule: it is raised in a single sentence borrowed from the Nigerian Bar Association's Draft Guidelines and answered by 'processes, procedures and policies', not by consent (Van Eck's draft contains no conflict-of-interest provision tied to consent). To that extent the strand cannot do the work of supporting client-facing consent. But it is also overstated even in its own register. The commercial interest of a third-party AI vendor is not a conflict of interest in the sense that the Code of Conduct uses the concept. A conflict of interest requires a specific adverse interest between the lawyer and the client, or between the lawyer's duty to this client and her duty to another client. The profit motive of a tool provider is not that. If it were, Westlaw, LexisNexis, Jutastat, SAFLII,

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Microsoft, Apple, Google, every cloud-based email provider, every case management system and every accounting package would trigger the same concern. Procedural and policy-based mitigation of the kind Van Eck contemplates is more proportionate than treating each instance of AI-vendor commerce as a distinct conflict; and on neither characterisation does the conflict-of-interest concern translate into a freestanding client-facing consent rule.

(f) The 'self-regulatory' framing of the AI gap, and the deeper problem that the proposed rule cannot be enforced

Van Eck is right that the South African profession is regulated rather than self-regulated, and explicitly says so in her conclusion. Her narrower claim is that the absence of AI-specific guidance has 'effectively left legal practitioners to act within a self-regulatory manner' in respect of AI specifically — a diagnosis that the Guidelines I draw on here are themselves designed to answer. But even allowing the diagnosis, the rule she proposes has a structural defect that is independent of its merits: it cannot be enforced. There is no reliable technical means that will stand up in court of establishing, in the face of a practitioner's denial, that generative AI was used in the drafting of an opinion, a set of heads of argument or a letter of demand. A rule whose breach cannot be established is not a rule; it is a gesture. The enforcement of an unenforceable rule breeds the worst kind of compliance culture — one that relies on suspicion, informal policing and the speculative attribution of AI use based on stylistic cues. The South African profession should resist that culture, and should resist it particularly firmly at this moment.

(g) The public-confidence argument needs more careful framing than Van Eck's version supplies

Van Eck offers no empirical basis — no survey, no client research, no comparative study — for the claim that a failure to update the Code of Conduct along the lines that she proposes may erode public confidence. There is a fair counter-point: an evidence-based requirement, applied symmetrically, can also defend the regulatory status quo against any change, and broader studies do suggest a general public distrust of AI as a category. I take both points. What the broader studies do not establish, however, is the specific causal claim on which Van Eck's argument depends: that *non-disclosure by a lawyer of AI use in a specific matter* erodes trust in a way that *generic disclosure* will correct. The inverse claim is at least as plausible: a practitioner who announces that 'AI has been used' in every matter communicates nothing of substance about the tool, the task or the safeguards, while risking the impression that legal judgement has been delegated to a machine. Many clients have no framework within which

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to interpret such a notice (a point to which part V returns). Disclosure of a technology that the client does not understand can generate confusion as readily as it generates confidence. Transparency is instrumental, not intrinsic — its ethical purpose is to enable accountability and informed decision-making, which a generic AI-use notice does not by itself achieve. The honest conclusion is that public-confidence considerations cannot bear the weight that Van Eck places on them, leaving the access-to-justice and unenforceability points (developed in (f) above and part V below) decisive on the materials available.

(h) The rule is under-specified to the point of being unworkable

Even if the seven pillars could individually withstand the above, the rule as drafted is unworkable. Van Eck's proposed para 64.2.4(i) does not define 'AI technology'. Does it cover an AI-inflected legal research platform? A spellchecker powered by a language model? An email client with autocomplete? A search engine with an AI-generated summary card? A word-processor grammar feature? Under the rule as drafted, each of these triggers a prior-consent requirement before any letter of demand may be dictated. Nor does the rule specify the form of consent (oral or written, boilerplate or specific, one-off or per-matter), the timing in repeat engagements, what counts as 'prior' use of a tool already in place before the mandate, or the remedy for breach. A rule this under-specified cannot be applied consistently; applied inconsistently, it becomes an instrument of selective enforcement that will fall hardest on the practitioners least able to resist it.

(i) The fees framework reveals quality, not speed, as the principal locus of AI value

Van Eck's discussion of fees, which leads into her proposed para 64.2.6, asserts that 'AI technology inherently increases the efficiency and speed at which work can be produced' (Van Eck 2025 *TSAR* op cit at 469). She then endorses the California rule permitting practitioners to 'charge for actual time spent' (State Bar of California op cit at 8, endorsed by Van Eck 2025 *TSAR* op cit at 465–6) on prompt-crafting, reviewing, editing and refining AI output, and the Manitoba rule permitting charges 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' (Law Society of Manitoba op cit, Guideline 8 at 6, endorsed by Van Eck 2025 *TSAR* op cit at 465–6). Read together with her endorsement of the Kentucky reduced-time-reduced-fee principle (Van Eck ibid at 465), her position is coherent: do not bill phantom hours that AI has saved, but bill the actual hours that prompt-crafting, reviewing, editing and refining take. The deeper point that the rule reveals, however, is that on her own billing architecture AI's principal contribution in complex legal

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work is not raw speed but quality — it is the time that the lawyer spends in critical engagement with AI output that justifies the billable hour, not the time that AI has displaced. This is the position that the Guidelines on which I draw embrace openly, and one that Van Eck's own billing rule implicitly entails.

V THE AFFIRMATIVE CASE: FOCUS ON RESPONSIBILITY RATHER THAN DISCLOSURE

The rebuttal establishes that Van Eck's proposal cannot be adopted as drafted. A separate question is what should be adopted in its place. The answer given in the Guidelines is that the ethical focus should fall on responsibility, not disclosure. Five reasons support this view.

First, transparency is instrumental. The appeal to transparency is rhetorically powerful but analytically incomplete. Transparency serves accountability and informed decision-making. Disclosure that achieves neither is performative. A generic AI-use notice communicates nothing of substance about the tool, the task or the safeguards, and risks the impression that legal judgement has been delegated. The client's legitimate interest lies not in an inventory of instruments used but in the quality of the work and in knowing that the lawyer takes full personal responsibility for it. The lawyer–client relationship is fiduciary, not inventorial.

Secondly, clients are entitled to results, not methods. The instruments-of-method list developed at greater length in part IV(c) above applies here: a client is not told which research database was used, which candidate attorney drafted the first version, or where the case-management data is stored. These are matters of professional method, governed by the lawyer's duties of competence and confidentiality, not of client-facing disclosure. Even granting the elevated philosophical status of AI developed below, South African jurisprudence does not single out the lawyer's choice of instrument or partner as a matter of client-facing disclosure. The elevated status raises the *responsibility*-side of the architecture — the standards of selection, configuration, verification and judgement that the practitioner must bring — without thereby converting those standards into a disclosure duty.

Thirdly, existing duties already address the genuine risks. The Code of Conduct and the common law supply the architecture: competence (s 3.11); verification (reflected in *Parker* and *Mavundla*); confidentiality (s 3.6; *Gamiet*); candour to the court (*Ulde*, *Vassen*, *Jasat*, *Visser*); the non-delegability of professional judgement. POPIA supplies the statutory data-protection framework. Nothing in the existing architecture fails in the AI context. The *Parker* and *Mavundla* failures were verification failures under existing duties, not disclosure failures for which new duties are needed. The Guidelines give these existing duties AI-specific content — for example, in para 5, distinguishing consumer-tier AI services (which

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retain inputs for training and cannot be used with confidential data) from subscription-tier and enterprise-grade tools (which offer contractual non-training guarantees). This is operational guidance under existing doctrine, not doctrinal innovation.

Fourthly, a mandatory consent regime is unenforceable and produces a policing culture. The point bears repeating as a positive reason against disclosure, not only as an objection to Van Eck. There is no reliable means of establishing AI use against a practitioner who denies it. Enforcement of an unenforceable rule produces suspicion-based compliance: informal policing, stylistic attribution, selective discipline. The South African profession should be architected around duties that can be discharged and breaches that can be identified. Responsibility-centred duties meet that standard. A proactive disclosure duty does not.

Fifthly, access to justice tips the constitutional scale decisively. Section 34 of the Constitution guarantees the right of access to courts. The general scholarship on access to justice has long emphasised that the cost and supply of legal services are the principal structural constraints on the realization of that right (Deborah L Rhode *Access to Justice* (2004)). Generative AI — sensibly used by a practitioner who selects competent tools, configures them for confidentiality, and takes responsibility for the joint output — is among the most promising contemporary levers for relieving those constraints. It has the capacity to lower the cost and raise the quality of legal services for those who have historically been excluded from them. A rule requiring prior disclosure and consent before every use of such technology imposes a procedural toll that conscientious practitioners will pay and careless ones will not. The result is a system in which the careful are penalised for doing what is expected of them, and the covert are rewarded for doing less. More importantly, the rule chills adoption by precisely the practitioners — small-firm, rural, legal-aid — who serve the populations where access to justice is most constrained. A regulatory architecture for a new technology in a state of South Africa's constitutional character must account for its impact on access to justice: a responsibility-centred architecture does this; a proactive-consent architecture does not.

The Guidelines implement this architecture in para 4 by providing that there is no general duty of proactive disclosure of generative AI use to clients, while preserving three carve-outs that address the specific cases which pro-disclosure scholarship is right to worry about: if a client asks whether AI has been used, the practitioner must answer truthfully; if a court or other competent authority requires disclosure, the practitioner must comply; and if the client's mandate excludes AI, that mandate forms part of the engagement and must be honoured. These are reactive obligations, not proactive duties. They resolve Van Eck's and Van der Vyver's hypotheticals without importing a contextual disclosure regime with the pathologies the rebuttal has identified.

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(a) The judicial-disclosure trajectory

A question naturally arises about the relation between the second carve-out and the disclosure architecture now emerging in the courts internationally. Court-facing AI directives have been issued by individual courts in the United States (the Wang standing order in the District of Colorado; the Baylson standing order in the Eastern District of Pennsylvania), in Australia (the NSW Supreme Court practice note), and in Canada (the Court of King's Bench of Manitoba Practice Direction 'Re: Use of artificial intelligence in court submissions' 23 June 2023), while other common-law jurisdictions have explicitly taken the verification-not-disclosure approach instead (Alberta Courts of Appeal, King's Bench, and Justice 'Notice to the public and legal profession: Ensuring the integrity of court submissions when using large language models' 6 October 2023). In South Africa, the Office of the Chief Justice's Sub-Committee on Artificial Intelligence has prepared a 'Draft policy on artificial intelligence for the judiciary in South Africa' (6 March 2026 version), paras 3 and 7.1 of which empower the Chief Justice and heads of court to issue practice directives requiring legal practitioners to disclose AI use in documents filed for court purposes. If such directives are in due course issued — and the architecture of paras 3 and 7.1 makes that outcome plausible — a duty of disclosure to the court will obtain in those respects.

Two qualifications about scope are necessary here. First, the purpose of this note is not to critique the draft policy or to develop the question whether mandatory court-facing disclosure of AI use is itself a wise regulatory choice. That question raises considerations of its own. These include whether such a rule would in fact be enforceable against a practitioner who denies using AI, whether it would have a disparate impact on practitioners whose first language is not English, and whether court-facing declarations would promote the integrity of proceedings or instead foster a suspicion-based culture of AI scrutiny in a judicial setting where the underlying technology, like most participants, is imperfectly understood. These are distinct from client-facing considerations that are at stake here and require their own treatment.

For my own part I would record, without arguing it here, that the case for a general mandatory court-facing disclosure rule of the kind that paras 3 and 7.1 of the draft policy contemplate is not, in my respectful view, a strong one, for reasons distinct from those that bear on client-facing disclosure. That argument can be made on another occasion. Secondly, what does need to be addressed here is whether the emergence of a court-facing duty would destabilise the responsibility-centred client-facing architecture defended in this note. It would not.

The argument here is that court-facing disclosure is properly distinguished from client-facing disclosure rather than collapsed into it. The distinction is one that Van Eck herself half-concedes: in part 3.5 of

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her 2025 article she treats court practice directives as 'not part of the scope of this article' while still endorsing a future practice directive — which is exactly the client-facing/court-facing separation defended here. The two duties operate on different doctrinal hooks. The duty to the court concerns the integrity of proceedings and the candour owed to the tribunal — a duty whose roots lie in the law of legal practice and the inherent jurisdiction of the court over the conduct of officers appearing before it. The duty to the client concerns the fiduciary relationship between practitioner and client — a different doctrinal category, governed by competence, confidentiality and the proper limits of the principal–agent relation. That a court directive may require a declaration in filings does not entail that the practitioner must obtain prior consent from the client before any use of AI in any matter. The second carve-out in the Guidelines — 'if a court or other competent authority requires disclosure, the practitioner must comply' — absorbs the court-facing duty without converting it into a general client-facing one. The responsibility-centred architecture is therefore not destabilised by the judicial trajectory; it accommodates it.

(b) Disclosure as an independent value: the consumer-choice and informed-discussion arguments

A more demanding objection holds that disclosure has a value independent of consent: it enables consumer choice and creates an opening for informed discussion about risks and costs as between AI and alternative representation. This is the framing of the SRA's compliance-tips guidance in England and Wales, and it has a respectable precedent in the costs-disclosure architecture already familiar in legal-professional regulation.

The objection's strongest version separates into two distinct claims. The first is a *cost-disclosure* claim: clients are entitled to know how the matter is being staffed and resourced because that information bears on the fee. The second is an *informed-discussion* claim: clients are entitled to information that enables them to weigh AI-augmented representation against alternatives.

On the first objection, the cost-disclosure architecture is already in place and does the relevant work. The Legal Practice Council's rules on fee agreements, retainers and disclosure of charging structures impose specific disclosure duties tied to the fee. Generative AI use that materially affects the fee — whether by reducing it (where efficiency gains are passed to the client) or by altering its structure (where the billing model shifts from time to value) — already falls within the existing fee-disclosure architecture. What is not in place, and what this article does not propose, is a generic AI-use disclosure divorced from fee impact. The cost-disclosure value is honoured within existing architecture, without a generic rule.

On the second objection, the informed-discussion value is better served by the first reactive carve-out (truthful answer when the client

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asks) than by proactive disclosure. An informed discussion requires a client who can interrogate the lawyer's use of AI; the client who can interrogate is the client who asks; the practitioner is then obliged to answer truthfully and substantively. A blanket proactive disclosure delivers a generic notice that the client has neither prompted nor framed — and which, for reasons developed below, the client may have no equipment to evaluate. The informed-discussion value, in other words, is delivered by an architecture that responds to client engagement, not by one that manufactures ritual disclosures that the client has not requested.

(c) The 'just another tool' premise and the public-understanding gap

A deeper philosophical challenge questions whether generative AI is properly assimilated to other instruments of legal method at all. The philosophy-of-technology literature provides good reasons to think it is not: information technologies, on Floridi's account, reshape self-understanding rather than merely extend instrumental reach (Luciano Floridi *The Fourth Revolution: How the Infosphere is Reshaping Human Reality* (2014)), and on Verbeek's postphenomenology account, these technologies actively shape perception, intentionality and moral action rather than serving as neutral conduits for prior dispositions (P-P Verbeek *Moralizing Technology: Understanding and Designing the Morality of Things* (2011)). Empirical and philosophical work has begun to examine concrete cognitive and moral consequences — cognitive offloading (E F Risko & S J Gilbert 'Cognitive offloading' (2016) 20 *Trends in Cognitive Sciences* 676; M Gerlich 'AI tools in society: Impacts on cognitive offloading and the future of critical thinking' (2025) 15 *Societies* 6 (as corrected (2025) 15 *Societies* 252), though the literature is at an early stage and findings are contested), moral deskilling under automation (S Vallor 'Moral deskilling and upskilling in a new machine age: Reflections on the ambiguous future of character' (2015) 28 *Philosophy & Technology* 107), automation bias, and the displacement of professional judgement. The challenge is fair. The position I take here, which is consistent with the wider partnership architecture that I have developed elsewhere (Thaldar 2026 *Law, Innovation and Technology* op cit), is that generative AI is *not* just another tool in any straightforward sense. In its most ambitious use, it does not merely accelerate work the lawyer would have done unaided. It participates in legal research, in drafting, in argument generation and in strategic analysis in ways that approach what we would call partnership rather than instrumentation.

Acknowledging the partnership character of AI does not, however, support compulsory disclosure. It complicates compulsory disclosure. This is so for three reasons.

First, there is no evidence that the South African legal public has a sufficiently well-developed conceptual framework to interpret what 'AI was used in your matter' actually denotes. The same form of words

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can describe a spell-checker run over a letter, a research database with an AI-generated summary card, and a partner in legal strategy operating across the entire matter. Absent evidence that the typical client can distinguish these, the most likely consequence of compulsory generic disclosure is not informed client choice but client decisions made in uninformed fear of AI as a category — decisions contrary to clients' own best interests where, as is increasingly common, the alternative to AI-augmented representation is more expensive, less rigorous, or unavailable altogether. The lawyer who tries to explain the relevant distinctions must first educate the client in the architecture of contemporary AI — something neither the lawyer–client engagement nor the typical retainer is equipped to do at scale. The argument is not that the public is incapable of understanding; it is that the public has not yet been given the framework, and a compulsory regime imposed in advance risks producing fear-based rather than informed decision-making.

Secondly, the recent empirical record is that contemporary AI tools have performed competitively with practising lawyers on selected benchmark tasks — the Vals Legal AI Report 2025 (available at *https://www.vals.ai/industry-reports/vlair-2-27-25*, accessed on 27 July 2026) documents this across document Q&A, summarisation and data extraction (though the lawyer baseline remained ahead on other tasks, and the lawyer participants, who were unaware that they were being benchmarked, may not have been strongly incentivised). The benchmark design is contested and capability is moving rapidly, but the trajectory is one in which the gap between average-practitioner performance and AI performance has narrowed across a range of legal tasks — as further indicated, in a different evaluative register, by Katz et al's demonstration that GPT-4 passed the Uniform Bar Examination at what was originally reported as the 90th percentile (D M Katz et al 'GPT-4 passes the bar exam' (2024) 382 *Philosophical Transactions of the Royal Society A* 20230254; contested in E Martínez 'Re-evaluating GPT-4's bar exam performance' (2025) 33 *Artificial Intelligence and Law* 581). That this is so is, candidly, not obvious to most lawyers and not at all obvious to most clients. A compulsory disclosure regime imposed in a profession where practitioners often do not understand the tools that they are required to declare, and in a client population that understands them even less, produces declarations that the disclosers cannot frame and the recipients cannot interpret. This is not a defence of ignorance but an observation that disclosure has preconditions not currently in place.

Thirdly, the partnership conception focuses ethical attention where it properly belongs. If the lawyer in an AI-augmented matter is best understood as one half of a partnership, the lawyer's accountability for the output of that partnership is the substantive ethical question. That accountability runs through competence, professional judgement and the duty of attention to the AI partner's output that contemporary professional rules currently

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frame as verification — the existing architecture, given AI-specific specification in the Guidelines. It does not run through a disclosure that the client cannot situate. Yuvaraj's 'verification–value paradox' — that the verification cost imposed on lawyers using generative AI threatens to cancel the efficiency gain (J Yuvaraj 'The verification–value paradox: A normative critique of gen AI use in legal practice' (2026) 52 *Monash University LR* 1) — is a serious worry for the supervisory architecture, but it is also a reason to prefer the partnership architecture, in which verification is reciprocal and the principal value of AI is to quality of legal work rather than to raw speed.

(d) Cork v Smith *and the architecture of regulatory absorption*

The very recent decision of Insolvency and Companies Court Judge Mullen in *Cork v Smith* [2026] EWHC 1199 (Ch) in England and Wales is instructive on exactly this point. The case concerned a very junior solicitor at Pinsent Masons LLP (referred to in the judgment as 'LA') who used the firm's generative AI tool to research whether the court could release outgoing liquidators. The AI produced fabricated text attributed to an existing rule (a 'Purported Text' of IR 12.37(5)), which LA included in a letter sent in the firm's name, with the supervising senior associate as the named contact and the partner having approved the letter without checking the wording. When queried by the court, LA used the AI again to draft a response which the judge regarded as an attempt 'to explain it away in what appeared to be an untruthful manner' (Mullen ICCJ in *Cork v Smith* (supra) para 25). The judge made no final findings of fact in respect of any of the lawyers (ibid para 69) and expressly left the honesty question in respect of LA open for the SRA (ibid paras 85 and 91). What he was prepared to say, in declining to initiate contempt proceedings, was that the conduct 'may well have resulted from a serious lack of care and of judgment on the part of LA rather than a want of honesty' (ibid para 87). The 'no intention to mislead' and honest-belief findings apply to the supervising solicitor and partner, not to LA (ibid paras 77 and 82). The case is a clear instance of the pathology that pro-disclosure scholarship is right to worry about. It is also, on closer reading, a clear case of *verification* failure rather than a failure to obtain client consent.

The Pinsent Masons team used a tool that hallucinated and produced fabricated authority; filed that authority unchecked; and, when challenged, produced a further response that the court read as itself misleading. *Cork v Smith* makes the verification point with unusual force because the AI tool itself repeatedly warned LA to verify the wording against *legislation.gov.uk* or Westlaw/LexisNexis, and even told LA candidly that the quoted text 'came from your own message' rather than from any primary source (ibid paras 40, 46–9). The judge noted that LA 'did not check its references, even when told to do so by the AI itself' (ibid para 71). The pathology was

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therefore a pure human-verification failure that persisted against the tool's own express instructions to verify — about as clean a demonstration as the literature provides that the right response is verification discipline, not a client-facing disclosure rule or a ban on AI use. A rule of prior consent would not have prevented any of this from happening. A client who had consented would still have been prejudiced by fabricated authority and would still have witnessed the subsequent mishandling. *Cork v Smith* therefore confirms what *Parker* and *Mavundla* indicated in the South African context: the existing duty architecture — now articulated with AI-specific content in the Guidelines, including the distinction between consumer-tier and enterprise-grade tools and the verification expectation — has the structural resources to absorb the new technology's distinctive cognitive risks (see also R Moorhead 'Pinsent Masons: LA AI, MVB and NVB' *Lawyer Watch* (28 May 2026) and R Moorhead 'After MVB, addiction or understanding?' *Lawyer Watch* (29 May 2026)).

VI CONCLUSION

Van Eck's call for a more articulated ethical architecture for AI use in legal practice is right on the first question and wrong on the second. The profession does need more articulated guidance, and the Guidelines, together with the consultation that produced them, attempt to provide it. But the articulated guidance should be anchored in responsibility, not in disclosure. Disclosure, as Van Eck proposes it, is unsupported by South African jurisprudence, cannot be enforced, is stricter than the dominant international position, including the jurisdictions she cites, and would damage access to justice in a constitutional state in which s 34 makes that access a substantive right. The profession is entitled — and indeed obliged — to use the tools that enable it to do its work more rigorously. Clients are entitled to results, not methods. Provided that practitioners take full professional responsibility for their work, they need not confess every tool in their toolkit, whether the tool is generative AI, a research database, or a quill pen.

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