

MEMORANDUM

TO: Chief Justice Collins J. Seitz, Jr.

FROM: Justice Karen L. Valihura
Judge Sean P. Lugg

DATE: March 31, 2025

RE: Delaware Commission on Law and Technology – 2024 Report

Introduction

The Delaware Supreme Court, by order dated August 26, 2013, created the Delaware Commission on Law and Technology (“DCLT”) as an arm of the Court charged with “provid[ing] Delaware Lawyers with sufficient guidance and education in the aspects of technology and the practice of law so as to facilitate compliance with the Delaware Lawyers’ Rules of Professional Responsibility.” Shortly thereafter, on November 13, 2013, the Court created the Delaware Access to Justice Commission (“DATJC”) to gather “information to determine the critical needs and gaps relating to access to justice in Delaware” and to develop “recommendations for comprehensive and coordinated responses to those identified needs.” For the next decade, the DCLT and DATJC worked to meet their respective missions. The DATJC’s subcommittees made various recommendations as to how technology could be used to improve efficiency, assist pro se litigants, and otherwise enhance access to justice.

On November 27, 2023, recognizing the rapid growth of new technologies, the continually expanding use of technology in Delaware courts and the practice of law more generally, and the need for “a coordinated approach to today’s (and tomorrow’s) issues surrounding the use of technology in the practice of law in Delaware,” the Court “expand[ed] the mission of the DCLT to address lawyer competency and access to justice concerns.” Under this expanded mission, the DCLT convened in December of 2023 to assess its membership and to develop a committee structure. Membership increased to 18, and five committees were formed: Information Governance, Risk Management, Courtroom Technology,

Emerging Technology, and Rules and Professionalism. Chairs for each committee were selected and each group prioritized its work to assess areas identified by the DCLT. Each committee reported regularly to the DCLT; the DCLT, in turn, is charged with providing an annual update to the Court. This is the DCLT's 2024 annual report.

DCLT Work

The DCLT established a quarterly meeting schedule. Each meeting addressed two core areas: committee reports and technology review. The committee reports are discussed in a separate section below. Because the DCLT is comprised of a diverse group of lawyers and technologists with vastly different backgrounds, the commission sought to use a portion of each meeting to address technological developments touching on most, if not all, of the members' focus areas. The 2024 presentations covered the use of developing generative artificial intelligence applications in law practice, an overview of statewide technology resources in the judicial branch, a forward-looking assessment of courtroom technology, and a review of synthetic audio and video technology (commonly referred to as "deepfakes"). These presentations served to educate commission members and helped guide the focus of various committees.

DCLT Committee Work

Emerging Technologies Committee

The Emerging Technologies ("EmTech") Committee focused heavily on artificial intelligence ("AI"), with a particular focus on generative AI. The EmTech Committee published an article about AI in The Journal of the Delaware State Bar Association ("DSBA Journal"), offered an AI presentation to the JP Court judges at their annual conference in June 2024, and, in conjunction with the Office of Disciplinary Counsel ("ODC"), discussed AI with Delaware lawyers at a DSBA Fundamentals CLE.

To improve the EmTech Committee's and the DCLT's practical knowledge about AI, in June 2024 the EmTech Committee's Co-Chairs reviewed new, law practice focused, generative AI software and identified strengths and weaknesses of

various platforms. The EmTech Committee will continue to examine and review AI tools designed for the legal profession.

The EmTech and Rules and Professionalism Committees worked throughout the year to develop guidelines for the Judiciary's use of AI. This work resulted in the Supreme Court's adoption in October 2024 of an interim policy to guide judicial officers and court personnel on the use of generative AI tools within the courts.

To ensure the sharing of ideas and information pertaining to this rapidly developing technology, a member of the EmTech Committee was also asked to join the Delaware AI Commission created by House Bill 333. The Delaware AI Commission is charged with making recommendations about AI utilization and safety to the legislature and the State's Department of Technology and Information.

In 2025, the EmTech Committee will continue to monitor judicial developments and ethics advisory opinions issued in other jurisdictions; develop and present CLEs; draft and publish educational articles; obtain further information about state-court adoption and/or consideration of AI tools; work with the Rules and Professionalism Committee to assess AI's application to law practice and legal ethics; and update, as needed, standard operating procedures for the courts' use of generative AI.

Courtroom Technology Committee

The Courtroom Technology Committee ("CTC") focused its efforts on litigant technology, courtroom technology resources, and courtroom connectivity. The CTC expanded its membership to include civil and criminal litigation specialists and actively worked to assess extant resources and inform the bar on how to best use these resources in case preparation and presentation.

The CTC received regular updates from Deputy State Court Administrator and Information Systems Manager Kenneth Kelemen. Mr. Kelemen informed the CTC of various technology upgrades and improvements installed in courtrooms throughout the State and demonstrated the upgraded courtrooms to members of the committee. Mr. Kelemen emphasized that his team will continue to deploy upgrades and improvements over time and that he regularly publishes a list of resources on the Delaware Judiciary website. These discussions also revealed some fundamental challenges in the Justice of the Peace Courts. A subgroup of the CTC will meet with

JP Court representatives to determine whether any immediate improvements can be made, and Mr. Kelemen will continue to work on providing appropriate tools to the various JP Court locations.

The CTC learned that, even in 2024, practitioners remain unfamiliar with courtroom capabilities. To address the deployment and use of technology in Delaware courts statewide, the CTC focused its efforts on presenting a CLE program to demonstrate courtroom technology tools. On October 25, 2024, the CTC offered a 2.5 hour session in the New Castle County Courthouse to highlight the ease of using courtroom presentation technology. The presenters stressed the need to engage in some minimal front-end preparation to best use existing resources. Performed “live with a studio audience” (at maximum capacity), the program also revealed some needed adjustments. Following the program, Mr. Kelemen upgraded many of the courtrooms to allow access to color printers (for printing highlighted exhibits, so that markings made in the courtroom are preserved for the record) and is securing updated audio technology (headphones) that are more conducive to regular use.

The CTC arranged for the recording of the October 25, 2024, seminar and is evaluating the footage to isolate short segments for publication on the DCLT website. The CTC intends to publish these short “snippets” as part of a learning library to allow users to review and relearn various skills prior to or during courtroom events. The CTC plans to continue its training and education efforts into 2025, including by offering a similar program in Kent County and Sussex County.

Information Governance Committee

The Information Governance Committee (the “Governance Committee”) is preparing a CLE to address recent judicial opinions addressing eDiscovery. The Governance Committee plans to capture this training by video recording. The committee intends to offer the recorded material on the DCLT website and to repurpose the video and audio (e.g., vignettes for social media or email blasts). The Governance Committee intends to offer this CLE in the spring of 2025 and will then work with the raw footage to isolate the most useful training vignettes.

Governance Committee members are preparing an article to address ISO Certification for law firms (certification that a firm’s data security systems meet international standards) and, for firms that may not have the resources or need for that level of certification, guidelines and recommended practices to achieve similar safeguards. The article will explore different considerations facing large and small

firms and offices when exploring ISO Certification. The Governance Committee intends to offer this article for publication during the winter of 2025.

To assess the needs of the bar, the Governance Committee is drafting a survey to determine Delaware lawyers' concerns relating to eDiscovery, data privacy, and law firm IT. The consensus of the committee is that a brief email survey is the best medium to secure this information. The Governance Committee intends to circulate this survey in early 2025.

Rules and Professionalism Committee

The Rules and Professionalism Committee ("Rules Committee") collaborated with the EmTech Committee on the Interim Policy on the Use of Generative AI by Judicial Officers and Court Personnel. The Rules Committee participated in joint meetings with the EmTech Committee with presenters about new technology. As the legal profession continues to discover the strengths and weaknesses of generative AI technology, the coming year should provide additional evidence of whether current rules and policies need to be revised or reinforced.

The Rules Committee found that it can best fulfill its function by collaborating with other committees. The Rules Committee believes that by partnering with other committees, it will be best positioned to address discrete rules or professionalism issues identified by those committees. Generative AI technology continues to develop and its impact on the legal profession continues to expand; for this reason, the Rules Committee will continue working directly with the EmTech Committee, but remains available as a resource to other committees and the DCLT.

Risk Management Committee

The Risk Management Committee reported to the DCLT on the Judicial Information Center's ("JIC") completion of various cybersecurity and resilience projects; enhancements to JIC's resources; and risk-management work relating to the courts' CASCADE project.

Conclusion

In 2024, the DCLT's work emphasized analysis of emerging technologies, especially generative AI; information governance and cybersecurity; evaluation of courtroom technologies; and increasing educational resources for members of the Delaware bar in these areas, including through publications and CLE presentations. Looking forward to 2025, the DCLT intends to survey members of the bar to assess relevant areas of interest and need; continue educational efforts; evaluate and address hardware and software needs in the Delaware courts; and monitor technological developments and judicial responses to such developments, in Delaware and other jurisdictions.

TO: Delaware Supreme Court

FROM: Emerging Technologies Committee of the Delaware Supreme Court
Commission on Law and Technology

DATE: January 10, 2025

SUBJECT: Annual Report

This is the first annual report summarizing the work of the Emerging Technologies Committee (the “Committee”) of the Delaware Supreme Court Commission on Law and Technology (the “Commission”). This memorandum covers the first year of the Committee’s work. As directed by the Commission, the Committee’s focus has been on artificial intelligence (“AI”).

EDUCATIONAL EFFORTS

The Committee has worked hard to further the mission of the Commission with efforts to educate lawyers and judges about artificial intelligence and its implications in the legal field through the publication of numerous articles¹ and the presentation of several CLEs.²

¹ See Exhibit 1 (collection of articles).

² The Committee presented to the JP Court judges at their annual conference in June 2024 and has presented twice with the Office of Disciplinary Counsel, once at a Fundamentals CLE in June 2024, and for the DSBA in November 2024.

The Committee also sought to improve the Commission members' working knowledge about AI. The Committee's co-chairs hosted a presentation of an AI platform marketed to lawyers, called "Harvey," and arranged for a demonstration of Thomson Reuters' AI tool, CoCounsel for the Committee and the Rules and Professionalism Committee. Finally, the Committee arranged for a presentation to the Commission about deep fakes by an information-security expert in the financial-services industry.

INTERNAL COURT GUIDELINES

The Committee, along with the Rules and Professionalism Committee, drafted an Interim Policy on the Use of GenAI by Judicial Officers and Personnel (the "Interim GenAI Policy"), which was approved by the Commission and was adopted and published by the Supreme Court.

AI IN OTHER JURISDICTIONS

The Committee monitored and reported on the adoption and restrictions on use of AI by lawyers and judges in numerous other jurisdictions. Notable topics included state-court adoption of AI tools and policies, advisory ethics opinions on AI use by lawyers and judges, and courts' individual standing orders on the use of AI. What follows are some of the developments reported to the Commission.

State-Court Adoption of AI Tools & Policies

First, it appears that Michigan's state-court system is testing portions of the CoCounsel platform by Thompson Reuters. On July 23, 2024, the Committee's Co-Chairs and Ken Kelemen spoke with the General Counsel of the Michigan Supreme Court about Michigan's AI journey and its process and anticipated use cases for the CoCounsel platform. Further, according to a representative of the vendor, at least two other states are currently evaluating the product for their courts, as well.

Second, Utah issued Interim Rules on the Use of Generative AI, which addresses the "authorized use" of generative AI tools for court-related work or on court-owned devices. Once court employees complete certain training, they are permitted to use ChatGPT (version 3 or 4), Claude.ai and/or Bard.³ The Interim Rules note that the Court's IT department "is also reviewing Casetext CoCounsel."

³ Exhibit 2 (UT Interim Rules on Generative AI) (Oct. 2023). In April 2024, Utah passed legislation requiring disclosure of the use of Generative AI ("GenAI") in commercial activities when a consumer prompts or asks the GenAI whether the consumer is interacting with a human. Additional disclosure obligations apply to certain "regulated industries," like clinical mental health, dentistry, and medicine. *See* Exhibit 3 (Utah Enacts First AI-Focused Consumer Protection Legislation in US, *Nat'l Law Rev.*, Vol. XIV, No. 92) (June 28, 2024); Exhibit 4 (S.B. 149 (Artificial Intelligence Policy Act)) (effective May 1, 2024).

Finally, several jurisdictions have adopted internal policies and procedures for the use of AI.⁴ The State of Connecticut’s Judicial Branch issued one of the more detailed policies, titled *Artificial Intelligence Responsible Use Framework*.⁵

Ethics Advisory Opinions

Michigan and West Virginia have issued advisory opinions involving AI and judicial ethics.⁶ West Virginia advised that a judge may use AI for research but should never use it to reach a conclusion on the outcome of a case and should exercise “extreme caution” in the “gray area” of using AI to prepare an order or opinion. Both opinions emphasized the duty of a judicial officer to maintain a reasonable level of competency with regard to “advancing technology,” including AI.

Several states, including California, Florida, Kentucky, and Missouri have issued advisory opinions about AI and attorney ethics.⁷ The opinions generally

⁴ Exhibit 5 (State Court Orders, Rules, and Proposed Rules | NCSC).

⁵ Exhibit 6 (CT Judicial Branch, JBAPPM Policy 1013) (AI Responsible Use Framework, v.1.0) (Feb. 1, 2024).

⁶ Exhibit 7 (MI Advisory Op. JI-155) (2023); Exhibit 8 (WV Adv. Op. 2023- 22); Exhibit 9 (article from the NCSC website summarizing the two opinions).

⁷ Exhibit 10 (Ky. Bar Ass’n Ethics Op. KBA E-457) (Mar. 15, 2024); Exhibit 11 (Office of Legal Ethics Counsel & Adv. Comm. of S. Ct. of Mo., Inf. Op. 2024-11) (Apr. 25, 2024); Exhibit 12 (State Bar of CA Standing Comm. on Prof’l Resp. & Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law); Exhibit 13 (FL Bar Ethics Op. 24-1, Use of AI) (Jan. 19, 2024).

address confidentiality, oversight, and supervisory obligations, as well as the duty of competency. The Supreme Court of Louisiana issued a letter to the Bar Association stating that the ethics rules sufficiently address the risks associated with AI.⁸

West Virginia has published a proposed (draft) advisory opinion, which would advise that lawyers are obligated to disclose to clients in writing, and to get informed consent for, any use of AI in the representation and, in some settings, would require the lawyer to disclose to the client that the lawyer is not using AI “if using AI would benefit the client.”

The Pennsylvania Bar Association’s Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee issued a Joint Formal Opinion on the Ethical Issues Regarding the Use of AI (the “Pennsylvania Opinion”).⁹ The key conclusions from that Pennsylvania Opinion include:

- Lawyers are ultimately responsible for their work product and for the advice they provide;
- Lawyers must be competent in their use of AI and must continue to stay informed about ethical issues and best practices;
- Lawyers must protect confidential information;

⁸ Exhibit 14 (La. S. Ct. Ltr., The Emergence of AI) (Jan. 22, 2024).

⁹ Exhibit 15 (Jt. Formal Op. 2024-200) (May 22, 2024).

- Lawyers must identify and address potential conflicts of interest arising from the use of AI; and
- Lawyers must communicate with clients about how AI is used in the representation and about AI-related expenses.

Additionally, the ABA issued its first advisory opinion regarding generative AI (“Gen AI”) on July 29, 2024.¹⁰ Many of the ABA’s conclusions overlapped with those of the Pennsylvania Opinion. Additionally, the ABA specifically advised:

- Lawyers may not rely solely on the output of Gen AI;
- The duty of candor applies to Gen AI “mistakes”;
- The duty to supervise requires lawyers to ensure that subordinate lawyers and nonlawyers are trained in Gen AI; and
- Lawyers must obtain a client’s “informed consent” for use of Gen AI and that consent may not be obtained through boilerplate language in an engagement letter.

Court Orders

The National Center for State Courts reports at least twenty (20) individual standing orders on the use of AI adopted by federal judges.¹¹ One approach has been to require lawyers to certify AI use when filing. For example, the U.S. Court of Appeals for the Fifth Circuit has given notice of a proposed amendment to its Rules to provide that filers must certify that no generative AI was used in drafting the document or, to the extent it was used, that all generated text, including legal

¹⁰ Exhibit 16 (ABA Op.) (July 29, 2024).

¹¹ Exhibit 17 (Nat’l Ctr. for State Cts).

citations, “have been reviewed for accuracy and approved by a human.”¹² The Court of Common Pleas of Hamilton County, Ohio adopted a local rule that requires lawyers to disclose in a certification:

Attorneys and/or parties must disclose the use of AI-assisted technology in the creation or editing of any document or evidence submitted to the court. Such disclosure should include a general description of the AI technology used and its role in the preparation of the materials. The disclosure must be made at the time of submission through a certification attached to the document or evidence, indicating the type of AI used and certifying the attorney’s final review and approval of the AI-assisted material.¹³

California has seen the introduction of a proposed bill that would require lawyers to certify about their use of AI in court submissions and to maintain that certification for seven (7) years.¹⁴

¹² Exhibit 18 (Not. of Proposed Am. to 5th Cir. R. 32.3).

¹³ Exhibit 19 (Local Rule 49 (Use of AI in Court Submissions)), available at <https://hamiltoncountycourts.org/wp-content/uploads/2024/07/Local-Rule-49-AI.pdf> (last accessed Oct. 8, 2024).

¹⁴ Exhibit 20 (CA AB-2811 Attorneys: court filings: artificial intelligence).

AI in the Law: The Current Landscape at a State Level¹

States around the country have begun to adopt more formal strategies for the use of artificial intelligence (AI) in the legal profession.²

Taskforces and Committees

Several jurisdictions, including in Arizona, Florida, New York, and Texas, have created taskforces or committees to proactively study, monitor, and report on the use of AI by the bar and bench. In Delaware, the Supreme Court's Commission on Law and Technology has a group dedicated to emerging technologies, including AI.

Guidance for Lawyers

California and New Jersey have issued written guidance on the use of AI by lawyers. The State Bar of California Standing Committee on Professional Responsibility and Conduct's "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law," tracks specific risks to the state's professional-responsibility rules.³ For example, the Guidance provides that lawyers may not charge clients for time "saved" (i.e., not worked) by using generative AI and that costs associated with generative AI may be charged to clients in compliance with applicable law. With regard to the duty of candor to the tribunal, the Guidance provides that lawyers "must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court."

New Jersey's "Preliminary Guidelines on New Jersey Lawyers' Use of Artificial Intelligence" emphasizes that lawyers' core ethical obligations remain the same regardless of the technology used.⁴ The Guidelines also provide that a lawyer must comply with a client's directive not to use AI but do not impose an affirmative obligation to disclose such use to clients.

Florida Bar Ethics Opinion 24-1, issued in January 2024, advises lawyers to adhere to all rules when using AI in the practice of law. The opinion reminds lawyers of the duties of confidentiality, of providing accurate and competent services, compliance with advertising rules, and the duty to avoid "improper billing practices." The opinion also advises that a disclaimer must be used with chatbots to inform users that the program is AI and not a lawyer or employee of the law firm.

Policies for Judiciary and Court Employees

¹ Molly DiBianca is a commercial and employment lawyer and mediator. She is the Managing Member of the Wilmington, DE office of Clark Hill, PLC, and serves as Co-Chair of the Emerging Technologies Group of the Commission on Law and Technology.

² The National Center for State Courts maintains a database on state-level initiatives. The information in that database is publicly available and served as the main resource for this article. It can be found here: <https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/state-activities>.

³ Available at <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>

⁴ Available at <https://www.njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey>

The Connecticut Judicial Branch’s Policy, “Artificial Intelligence Response Use Framework” is a comprehensive, 21-page document that addresses multiple aspects of use of AI by court officers and employees.⁵ New Jersey has issued a “Statement of Principles,” which identifies the core principles of independence, integrity, fairness, and quality as guideposts for the use of AI by the state’s judiciary

Utah and Kansas have issued policies for the use of generative AI by court employees, including judges. Interestingly, Utah has approved the use of three (3) large language models (LLMs)—Chat-GPT, Baird.ai, and Bard—for use by court personnel and is in the process of evaluating the CaseText product, Co-Counsel, as well.

Certification Requirements

On a local level, some courts and individual judges have instituted rules or requirements that counsel make certain certifications regarding the use of AI when filing documents with the court. The California Guidance reminds lawyers to check for such requirements “that may necessitate the disclosure of the use of generative AI.”

For example, U.S. District Judge Michael M. Baylson, of the Eastern District of Pennsylvania, has a standing order that requires attorneys who use AI (which is not defined in the order) in the preparation of a court filing to disclose, “in a clear and plain factual statement” that AI has been used and to certify that “each and every citation to the law or the record in the paper, has been verified as accurate.”

Delaware

As of today, Delaware state courts do not (yet) require certifications by lawyers regarding the use of AI. Nor do we (yet) have published guidance from an ethics perspective. But the rules of professional responsibility remain in place and are equally applicable in the context of AI. Practitioners in Delaware are obligated to be knowledgeable of the risks *and* benefits associated with technology and should look to the uses of AI with those obligations in mind.

⁵

Available at <https://www.jud.ct.gov/fag/CTJBResponsibleAIPolicyFramework2.1.24.pdf>

INTERIM RULES ON THE USE OF GENERATIVE AI October 25, 2023

These rules set forth the only authorized use of generative AI tools for court-related work or on court-owned devices.¹ Any use not expressly permitted herein will be considered a violation of court policies. Deviations must be pre-approved by the state court administrator.

Judges and court employees should recognize the limitations of generative AI and may not rely solely on AI-generated content. Generative AI tools are intended to provide assistance and are not a substitute for judicial, legal, or other professional expertise. It is also important to remember that AI models learn from vast datasets of text, images, and other content created by humans. As a result, generative AI tools have been known to produce outputs that inadvertently promote stereotypes, reinforce prejudices, or exhibit unfair biases.

RULES

1. **You are responsible:** Any use of AI-generated content is ultimately the responsibility of the person who uses it.
2. **You may only use approved tools:** Judicial officers and court employees may only use the following generative AI tools for court-related work or on court-owned devices:²
 - ChatGPT (version 3 or 4)
 - Claude.ai (Beta)
 - Bard (Experiment)
3. **You must complete court-approved training prior to use:** Prior to using generative AI tools for court-related work or on court-owned devices, you must complete court-approved training posted on LMS.”³ The Judicial Council may impose additional education requirements at any time.
4. **Employees must disclose use to judicial officers:** With the exception of attorneys in the General Counsel’s Office, if an employee is preparing work or completing a task for a judicial officer, the court employee must get pre-approval from the judicial officer before using a generative AI tool to complete the work or task.
5. **Do not disclose non-public, personally-identifying, or case-related information:** Records, data, or information classified as non-public under the Code of Judicial Administration or the Government Records Access Management Act, personally-identifying information, and any information from a case that could lead someone to identify the specific case in question or individuals involved in that case may not be entered, submitted, or otherwise disclosed to any generative AI tool.

¹ “Court-owned devices” includes personal devices for which you are receiving a stipend from the court.

² The IT department is also reviewing Casetext CoCounsel.

³ The Judicial Institute is developing tailored education and will notify everyone when it is available.

6. **Do not disclose documents from cases:** Documents filed in a case or submitted for filing may not be shared through generative AI tools, even if the document is classified as public.
7. **You may only use generative AI for these purposes:**
 - Preparing educational materials
 - Legal research
 - Preparing draft documents
 - Preparing surveys
 - Testing reading comprehension of public documents (e.g., to ensure a document is accessible to a self-represented litigant)
 - Instructions on how to use a new piece of software (e.g., Adobe Captivate)
8. **Case-related content should be reviewed by a judicial officer:** AI-generated content used for case-related purposes should be thoroughly reviewed by a judicial officer to ensure the information is accurate, the law is applied properly, and application of the law is consistent with the facts of the case.
9. **You must comply with legal and ethical obligations:** When using generative AI, judicial officers and court employees must comply with all relevant laws, legal standards, court policies, and ethical and professional conduct rules, including but not limited to [Section 9](#) of the Human Resource Policy Manual.
10. **You must report inadvertent disclosures:** Judicial officers and court employees must immediately report any data breaches or inadvertent disclosures in violation of paragraphs 5 or 6 to the Office of General Counsel.

Utah Enacts First AI-Focused Consumer Protection Legislation in US

Article By:

Reena R. Bajowala

Arda Goker

Making Utah the first U.S. state to enact a major artificial intelligence (AI) statute governing private-sector AI usage, on March 13, 2024—coincidentally, the same day the European Parliament adopted the [EU AI Act](#)¹—Utah Gov. Cox signed into law [S.B. 149](#) (AI Law). The AI Law, set to take effect May 1, 2024, was incorporated into Utah’s consumer protection statutes. Its key elements include establishing liability for inadequate/improper disclosure of generative AI (GenAI)² use and creating the Office of Artificial Intelligence Policy (Office) to administer a state AI program.

Disclosures

While technically not the first U.S. law to address a consumer’s interaction with GenAI—at least in certain narrow circumstances³—Utah’s AI Law is the most far-reaching and comprehensive. Under the AI Law, if a business or natural person uses GenAI to interact with an individual in connection with commercial activities regulated by Utah’s Division of Consumer Protection (Division), it must clearly and conspicuously disclose to the individual that he or she is interacting with GenAI and not a human. This requirement applies only if the individual interacting with the GenAI prompts or asks the GenAI to disclose whether the individual is interacting with a human.

The AI Law also sets forth more restrictive disclosure obligations on persons providing the services of “regulated occupations” such as clinical mental health, dentistry, and medicine.⁴ Such persons must, when using GenAI in providing the regulated services, prominently disclose that an individual is interacting with GenAI. In contrast to the provisions addressing GenAI disclosure in contexts outside professional occupations/services, this disclosure obligation *applies regardless of whether the individual interacting with the GenAI has asked the GenAI if he or she is interacting with a human*. Additionally, for regulated service-related GenAI disclosures, the AI Law specifically requires the disclosure to be provided verbally when oral exchanges or conversations commence and via electronic messaging prior to written exchanges.

In a novel preemptive maneuver, the AI Law expressly prohibits attempting to avoid consumer protection/fraud liability by blaming GenAI itself as an intervening factor.

Enforcement

The AI Law grants the Division enforcement authority for violations, allowing the Division director to impose administrative fines of up to \$2,500 per violation. It further permits the Division to seek in court the remedies of a judgment declaring that a particular act or practice violates the AI Law, injunctive relief, fines of up to \$2,500 per violation, in addition to any administrative fines, disgorgement, and payment of disgorged sums to the individuals harmed by the violation. In such actions, the Division is entitled to prevailing party attorneys' and investigative fees, as well as court costs.

The Office of Artificial Intelligence Policy

The AI Law includes the Artificial Intelligence Policy Act (AIPA), which creates the Office within the Department of Commerce. The AIPA sets forth the Office's duties as follows:

- (a) running the AI Learning Laboratory Program (Learning Lab);
- (b) consulting with state businesses and stakeholders about regulatory proposals;
- (c) engaging in rulemaking concerning, among other things, application fees and procedures for participation in, criteria for invitation to, acceptance in, and removal from, data usage limitations and cybersecurity criteria for participation in, and consumer disclosures for participants in the Learning Lab; and
- (d) annually reporting to the Business and Labor Interim Committee the Learning Lab's proposed agenda, its outcomes and related findings, and recommended legislation arising from such findings.

The AI Learning Laboratory Program

The Learning Lab's purpose is to analyze and research AI risks, benefits, impacts, and policy implications to produce findings and legislative recommendations to inform Utah's regulatory framework. It also aims to promote AI technology development in Utah and evaluate with AI companies the effectiveness/viability of current, potential, and proposed AI legislation.

A benefit of acceptance to the Learning Lab is that participants using or seeking to use AI technology in Utah may apply to enter into a "regulatory mitigation agreement" with the Office and other relevant state agencies for a 12-month period (with a single 12-month extension available under certain circumstances). Entering into a regulatory mitigation agreement essentially allows a Learning Lab participant to develop and test AI technology while enjoying certain benefits as to potential liability arising from the AI testing (e.g., delayed restitution payments, a cure period before penalties are

assessed, and reduced civil fines during the participation term).

Conclusion

The AI Law's provisions proscribing the deceptive use of GenAI may result in large monetary penalties if businesses do not comply with the applicable disclosure requirements. However, unlike the EU AI Act, the AI Law has little impact on the regulation of the *development* of AI technology.⁵ Rather, the focus is on the end use of an already-developed technology. Nevertheless, the AI Law's enactment may signal a coming wave of state-level AI regulation, with numerous AI bills already introduced in state legislatures across the nation.⁶

¹ See [GT Alert](#).

² The AI Law defines “[g]enerative artificial intelligence” to “mean[] an artificial system that: (i) is trained on data; (ii) interacts with a person using text, audio, or visual communication; and (iii) generates non-scripted outputs similar to outputs created by a human, with limited or no human oversight.”

³ Note that in 2018, California enacted the Bolstering Online Transparency Act (BOT Act), which allows businesses and individuals to avoid liability for deceptive “bot” usage by posting a clear, conspicuous disclosure reasonably designed to inform users that they are interacting with the bot. Cal. Bus. & Prof. Code § 17941 (eff. Jan. 1, 2019). However, compared to the AI Law, the Bot Act is narrow in that it makes unlawful only bot usage “to communicate or interact with [a] person in California online, with the intent to mislead the ... person about [the bot’s] artificial identity *for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election.*” Cal. Bus. & Prof. Code, § 17941(a) (emphasis added).

⁴ The AI Law defines “[r]egulated occupation” to “mean[] an occupation regulated by the Department of Commerce that requires a person to obtain a license or state certification to practice the occupation.”

⁵ See generally Utah S.B. 149; Caitlin Andrews, [Private-sector AI bill clears Utah Legislature](#), IAPP, March 6, 2024 (last visited March 29, 2024).

⁶ See, e.g., CA AB 2013 (2024) (concerning AI training data transparency); CA AB 2930 (2024) (concerning requirements for deployers of automated decision tools); CA SB 970 (2024) (concerning deepfakes); VA HB 747 (2024) (concerning AI development); CO HB 24-1147 (2024) (concerning the use of a deepfake in communication related to a candidate for elected office); NY AB 7106 (2023) (requiring political communications to disclose their creation with the assistance of AI).

Enrolled Copy

S.B. 149

ARTIFICIAL INTELLIGENCE AMENDMENTS

2024 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kirk A. Cullimore

House Sponsor: Jefferson Moss

LONG TITLE**General Description:**

This bill creates the Artificial Intelligence Policy Act.

Highlighted Provisions:

This bill:

- defines terms;
- establishes liability for use of artificial intelligence (AI) that violates consumer protection laws if not properly disclosed;
- creates the Office of Artificial Intelligence Policy (office) and a regulatory AI analysis program;
- enables temporary mitigation of regulatory impacts during AI pilot testing;
- establishes the Artificial Intelligence Learning Laboratory Program to assess technologies, risks, and policy;
- requires disclosure when an individual interacts with AI in a regulated occupation; and
- grants the office rulemaking authority over AI programs and regulatory exemptions.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

13-11-4, as last amended by Laws of Utah 2021, Chapters 138, 154

13-61-101, as last amended by Laws of Utah 2023, Chapter 327

63I-2-213, as last amended by Laws of Utah 2023, Chapter 33

ENACTS:

13-2-12, as Utah Code Annotated 1953
13-70-101, as Utah Code Annotated 1953
13-70-201, as Utah Code Annotated 1953
13-70-301, as Utah Code Annotated 1953
13-70-302, as Utah Code Annotated 1953
13-70-303, as Utah Code Annotated 1953
13-70-304, as Utah Code Annotated 1953
13-70-305, as Utah Code Annotated 1953
76-2-107, as Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 13-2-12 is enacted to read:

13-2-12 . Generative artificial intelligence -- Impact on liability for violation of consumer protection law.

(1) As used in this section:

(a) "Generative artificial intelligence" means an artificial system that:

(i) is trained on data;

(ii) interacts with a person using text, audio, or visual communication; and

(iii) generates non-scripted outputs similar to outputs created by a human, with limited or no human oversight.

(b) "License" means a state-granted authorization for a person to engage in a specified occupation:

(i) based on the person meeting personal qualifications established under state law;
and

(ii) where state law requires the authorization before the person may lawfully engage in the occupation for compensation.

(c) "Regulated occupation" means an occupation regulated by the Department of Commerce that requires a person to obtain a license or state certification to practice the occupation.

(d) "State certification" means a state-granted authorization given to a person to use the term "state certified" as part of a designated title related to engaging in a specified occupation:

(i) based on the person meeting personal qualifications established under state law;
and

- (ii) where state law prohibits a noncertified person from using the term "state certified" as part of a designated title but does not otherwise prohibit a noncertified person from engaging in the occupation for compensation.
- (2) It is not a defense to the violation of any statute administered and enforced by the division, as described in Section 13-2-1, that generative artificial intelligence:
- (a) made the violative statement;
- (b) undertook the violative act; or
- (c) was used in furtherance of the violation.
- (3) A person who uses, prompts, or otherwise causes generative artificial intelligence to interact with a person in connection with any act administered and enforced by the division, as described in Section 13-2-1, shall clearly and conspicuously disclose to the person with whom the generative artificial intelligence interacts, if asked or prompted by the person, that the person is interacting with generative artificial intelligence and not a human.
- (4) (a) A person who provides the services of a regulated occupation shall prominently disclose when a person is interacting with a generative artificial intelligence in the provision of regulated services.
- (b) Nothing in this section permits a person to provide the services of a regulated occupation through generative artificial intelligence without meeting the requirements of the regulated occupation.
- (5) A disclosure described Subsection (4)(a) shall be provided:
- (a) verbally at the start of an oral exchange or conversation; and
- (b) through electronic messaging before a written exchange.
- (6) The division shall administer and enforce the provisions of this section in accordance with Chapter 2, Division of Consumer Protection.
- (7) In addition to the division's enforcement powers described by Chapter 2, Division of Consumer Protection:
- (a) the division director may impose an administrative fine for up to \$2,500 for each violation of this section; and
- (b) the division may bring an action in court to enforce a provision of this section.
- (8) In a court action by the division to enforce a provision of this section, the court may:
- (a) declare that an act or practice violates a provision of this section;
- (b) issue an injunction for a violation of this section;
- (c) order disgorgement of any money received in violation of this section;

- (d) order payment of disgorged money to a person injured by a violation of this section;
- (e) impose a fine of up to \$2,500 for each violation of this section; or
- (f) award any other relief that the court deems reasonable and necessary.

(9) If a court of competent jurisdiction grants judgment or injunctive relief to the division, the court shall award the division:

- (a) reasonable attorney fees;
- (b) court costs; and
- (c) investigative fees.

- (10) (a) A person who violates an administrative or court order issued for a violation of this chapter is subject to a civil penalty of no more than \$5,000 for each violation.
- (b) A civil penalty authorized under this section may be imposed in any civil action brought by the attorney general on behalf of the division.

Section 2. Section 13-11-4 is amended to read:

13-11-4 . Deceptive act or practice by supplier.

- (1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.
- (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:
- (a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;
 - (b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;
 - (c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;
 - (d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist, including any of the following reasons falsely used in an advertisement:
 - (i) "going out of business";
 - (ii) "bankruptcy sale";
 - (iii) "lost our lease";
 - (iv) "building coming down";
 - (v) "forced out of business";
 - (vi) "final days";
 - (vii) "liquidation sale";

- 130 (viii) "fire sale";
131 (ix) "quitting business"; or
132 (x) an expression similar to any of the expressions in Subsections (2)(d)(i) through
133 (ix);
- 134 (e) indicates that the subject of a consumer transaction has been supplied in accordance
135 with a previous representation, if it has not;
- 136 (f) indicates that the subject of a consumer transaction will be supplied in greater
137 quantity than the supplier intends;
- 138 (g) indicates that replacement or repair is needed, if it is not;
- 139 (h) indicates that a specific price advantage exists, if it does not;
- 140 (i) indicates that the supplier has a sponsorship, approval, license, certification, or
141 affiliation the supplier does not have;
- 142 (j) (i) indicates that a consumer transaction involves or does not involve a warranty, a
143 disclaimer of warranties, particular warranty terms, or other rights, remedies, or
144 obligations, if the representation is false; or
145 (ii) fails to honor a warranty or a particular warranty term;
- 146 (k) indicates that the consumer will receive a rebate, discount, or other benefit as an
147 inducement for entering into a consumer transaction in return for giving the supplier
148 the names of prospective consumers or otherwise helping the supplier to enter into
149 other consumer transactions, if receipt of the benefit is contingent on an event
150 occurring after the consumer enters into the transaction;
- 151 (l) after receipt of payment for goods or services, fails to ship the goods or furnish the
152 services within the time advertised or otherwise represented or, if no specific time is
153 advertised or represented, fails to ship the goods or furnish the services within 30
154 days, unless within the applicable time period the supplier provides the buyer with
155 the option to:
- 156 (i) cancel the sales agreement and receive a refund of all previous payments to the
157 supplier if the refund is mailed or delivered to the buyer within 10 business days
158 after the day on which the seller receives written notification from the buyer of the
159 buyer's intent to cancel the sales agreement and receive the refund; or
160 (ii) extend the shipping date to a specific date proposed by the supplier;
- 161 (m) except as provided in Subsection (3)(b), fails to furnish a notice meeting the
162 requirements of Subsection (3)(a) of the purchaser's right to cancel a direct
163 solicitation sale within three business days of the time of purchase if:

- 164 (i) the sale is made other than at the supplier's established place of business pursuant
165 to the supplier's personal contact, whether through mail, electronic mail, facsimile
166 transmission, telephone, or any other form of direct solicitation; and
- 167 (ii) the sale price exceeds \$25;
- 168 (n) promotes, offers, or grants participation in a pyramid scheme as defined under Title
169 76, Chapter 6a, Pyramid Scheme Act;
- 170 (o) represents that the funds or property conveyed in response to a charitable solicitation
171 will be donated or used for a particular purpose or will be donated to or used by a
172 particular organization, if the representation is false;
- 173 (p) if a consumer indicates the consumer's intention of making a claim for a motor
174 vehicle repair against the consumer's motor vehicle insurance policy:
- 175 (i) commences the repair without first giving the consumer oral and written notice of:
- 176 (A) the total estimated cost of the repair; and
- 177 (B) the total dollar amount the consumer is responsible to pay for the repair,
178 which dollar amount may not exceed the applicable deductible or other copay
179 arrangement in the consumer's insurance policy; or
- 180 (ii) requests or collects from a consumer an amount that exceeds the dollar amount a
181 consumer was initially told the consumer was responsible to pay as an insurance
182 deductible or other copay arrangement for a motor vehicle repair under Subsection
183 (2)(p)(i), even if that amount is less than the full amount the motor vehicle
184 insurance policy requires the insured to pay as a deductible or other copay
185 arrangement, unless:
- 186 (A) the consumer's insurance company denies that coverage exists for the repair,
187 in which case, the full amount of the repair may be charged and collected from
188 the consumer; or
- 189 (B) the consumer misstates, before the repair is commenced, the amount of money
190 the insurance policy requires the consumer to pay as a deductible or other
191 copay arrangement, in which case, the supplier may charge and collect from
192 the consumer an amount that does not exceed the amount the insurance policy
193 requires the consumer to pay as a deductible or other copay arrangement;
- 194 (q) includes in any contract, receipt, or other written documentation of a consumer
195 transaction, or any addendum to any contract, receipt, or other written documentation
196 of a consumer transaction, any confession of judgment or any waiver of any of the
197 rights to which a consumer is entitled under this chapter;

- 198 (r) charges a consumer for a consumer transaction or a portion of a consumer transaction
199 that has not previously been agreed to by the consumer;
- 200 (s) solicits or enters into a consumer transaction with a person who lacks the mental
201 ability to comprehend the nature and consequences of:
202 (i) the consumer transaction; or
203 (ii) the person's ability to benefit from the consumer transaction;
- 204 (t) solicits for the sale of a product or service by providing a consumer with an
205 unsolicited check or negotiable instrument the presentment or negotiation of which
206 obligates the consumer to purchase a product or service, unless the supplier is:
207 (i) a depository institution under Section 7-1-103;
208 (ii) an affiliate of a depository institution; or
209 (iii) an entity regulated under Title 7, Financial Institutions Act;
- 210 (u) sends an unsolicited mailing to a person that appears to be a billing, statement, or
211 request for payment for a product or service the person has not ordered or used, or
212 that implies that the mailing requests payment for an ongoing product or service the
213 person has not received or requested;
- 214 (v) issues a gift certificate, instrument, or other record in exchange for payment to
215 provide the bearer, upon presentation, goods or services in a specified amount
216 without printing in a readable manner on the gift certificate, instrument, packaging,
217 or record any expiration date or information concerning a fee to be charged and
218 deducted from the balance of the gift certificate, instrument, or other record;
- 219 (w) misrepresents the geographical origin or location of the supplier's business;
- 220 (x) fails to comply with the restrictions of Section 15-10-201 on automatic renewal
221 provisions;
- 222 (y) violates Section 13-59-201; or
- 223 (z) fails to comply with the restrictions of Subsection 13-54-202(2).
- 224 (3) (a) The notice required by Subsection (2)(m) shall:
225 (i) be a conspicuous statement written in dark bold with at least 12-point type on the
226 first page of the purchase documentation; and
227 (ii) read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT
228 ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time
229 period reflecting the supplier's cancellation policy but not less than three business
230 days) AFTER THE DATE OF THE TRANSACTION OR RECEIPT OF THE
231 PRODUCT, WHICHEVER IS LATER."

(b) A supplier is exempt from the requirements of Subsection (2)(m) if the supplier's cancellation policy:

(i) is communicated to the buyer; and

(ii) offers greater rights to the buyer than Subsection (2)(m).

(4) (a) A gift certificate, instrument, or other record that does not print an expiration date in accordance with Subsection (2)(v) does not expire.

(b) A gift certificate, instrument, or other record that does not include printed information concerning a fee to be charged and deducted from the balance of the gift certificate, instrument, or other record is not subject to the charging and deduction of the fee.

(c) Subsections (2)(v) and (4)(b) do not apply to a gift certificate, instrument, or other record useable at multiple, unaffiliated sellers of goods or services if an expiration date is printed on the gift certificate, instrument, or other record.

Section 3. Section **13-61-101** is amended to read:

13-61-101 . Definitions.

As used in this chapter:

(1) "Account" means the Consumer Privacy Restricted Account established in Section 13-61-403.

(2) "Affiliate" means an entity that:

(a) controls, is controlled by, or is under common control with another entity; or

(b) shares common branding with another entity.

(3) "Aggregated data" means information that relates to a group or category of consumers:

(a) from which individual consumer identities have been removed; and

(b) that is not linked or reasonably linkable to any consumer.

(4) "Air carrier" means the same as that term is defined in 49 U.S.C. Sec. 40102.

(5) "Authenticate" means to use reasonable means to determine that a consumer's request to exercise the rights described in Section 13-61-201 is made by the consumer who is entitled to exercise those rights.

(6) (a) "Biometric data" means data generated by automatic measurements of an individual's unique biological characteristics.

(b) "Biometric data" includes data described in Subsection (6)(a) that are generated by automatic measurements of an individual's fingerprint, voiceprint, eye retinas, irises, or any other unique biological pattern or characteristic that is used to identify a specific individual.

(c) "Biometric data" does not include:

(i) a physical or digital photograph;

(ii) a video or audio recording;

(iii) data generated from an item described in Subsection (6)(c)(i) or (ii);

(iv) information captured from a patient in a health care setting; or

(v) information collected, used, or stored for treatment, payment, or health care operations as those terms are defined in 45 C.F.R. Parts 160, 162, and 164.

(7) "Business associate" means the same as that term is defined in 45 C.F.R. Sec. 160.103.

(8) "Child" means an individual younger than 13 years old.

(9) "Consent" means an affirmative act by a consumer that unambiguously indicates the consumer's voluntary and informed agreement to allow a person to process personal data related to the consumer.

(10) (a) "Consumer" means an individual who is a resident of the state acting in an individual or household context.

(b) "Consumer" does not include an individual acting in an employment or commercial context.

(11) "Control" or "controlled" as used in Subsection (2) means:

(a) ownership of, or the power to vote, more than 50% of the outstanding shares of any class of voting securities of an entity;

(b) control in any manner over the election of a majority of the directors or of the individuals exercising similar functions; or

(c) the power to exercise controlling influence of the management of an entity.

(12) "Controller" means a person doing business in the state who determines the purposes for which and the means by which personal data are processed, regardless of whether the person makes the determination alone or with others.

(13) "Covered entity" means the same as that term is defined in 45 C.F.R. Sec. 160.103.

(14) (a) "Deidentified data" means data that:

~~[(a)]~~ (i) cannot reasonably be linked to an identified individual or an identifiable individual; and

~~[(b)]~~ (ii) are possessed by a controller who:

~~[(i)]~~ (A) takes reasonable measures to ensure that a person cannot associate the data with an individual;

~~[(ii)]~~ (B) publicly commits to maintain and use the data only in deidentified form and not attempt to reidentify the data; and

- 300 [(iii)] (C) contractually obligates any recipients of the data to comply with the
301 requirements described in Subsections (14)(b)(i) and (ii).
- 302 (b) "Deidentified data" includes synthetic data.
- 303 (15) "Director" means the director of the Division of Consumer Protection.
- 304 (16) "Division" means the Division of Consumer Protection created in Section 13-2-1.
- 305 (17) "Governmental entity" means the same as that term is defined in Section 63G-2-103.
- 306 (18) "Health care facility" means the same as that term is defined in Section 26B-2-201.
- 307 (19) "Health care provider" means the same as that term is defined in Section 78B-3-403.
- 308 (20) "Identifiable individual" means an individual who can be readily identified, directly or
309 indirectly.
- 310 (21) "Institution of higher education" means a public or private institution of higher
311 education.
- 312 (22) "Local political subdivision" means the same as that term is defined in Section
313 11-14-102.
- 314 (23) "Nonprofit corporation" means:
- 315 (a) the same as that term is defined in Section 16-6a-102; or
- 316 (b) a foreign nonprofit corporation as defined in Section 16-6a-102.
- 317 (24) (a) "Personal data" means information that is linked or reasonably linkable to an
318 identified individual or an identifiable individual.
- 319 (b) "Personal data" does not include deidentified data, aggregated data, or publicly
320 available information.
- 321 (25) "Process" means an operation or set of operations performed on personal data,
322 including collection, use, storage, disclosure, analysis, deletion, or modification of
323 personal data.
- 324 (26) "Processor" means a person who processes personal data on behalf of a controller.
- 325 (27) "Protected health information" means the same as that term is defined in 45 C.F.R.
326 Sec. 160.103.
- 327 (28) "Pseudonymous data" means personal data that cannot be attributed to a specific
328 individual without the use of additional information, if the additional information is:
- 329 (a) kept separate from the consumer's personal data; and
- 330 (b) subject to appropriate technical and organizational measures to ensure that the
331 personal data are not attributable to an identified individual or an identifiable
332 individual.
- 333 (29) "Publicly available information" means information that a person:

- 334 (a) lawfully obtains from a record of a governmental entity;
- 335 (b) reasonably believes a consumer or widely distributed media has lawfully made
- 336 available to the general public; or
- 337 (c) if the consumer has not restricted the information to a specific audience, obtains from
- 338 a person to whom the consumer disclosed the information.
- 339 (30) "Right" means a consumer right described in Section 13-61-201.
- 340 (31) (a) "Sale," "sell," or "sold" means the exchange of personal data for monetary
- 341 consideration by a controller to a third party.
- 342 (b) "Sale," "sell," or "sold" does not include:
- 343 (i) a controller's disclosure of personal data to a processor who processes the personal
- 344 data on behalf of the controller;
- 345 (ii) a controller's disclosure of personal data to an affiliate of the controller;
- 346 (iii) considering the context in which the consumer provided the personal data to the
- 347 controller, a controller's disclosure of personal data to a third party if the purpose
- 348 is consistent with a consumer's reasonable expectations;
- 349 (iv) the disclosure or transfer of personal data when a consumer directs a controller to:
- 350 (A) disclose the personal data; or
- 351 (B) interact with one or more third parties;
- 352 (v) a consumer's disclosure of personal data to a third party for the purpose of
- 353 providing a product or service requested by the consumer or a parent or legal
- 354 guardian of a child;
- 355 (vi) the disclosure of information that the consumer:
- 356 (A) intentionally makes available to the general public via a channel of mass
- 357 media; and
- 358 (B) does not restrict to a specific audience; or
- 359 (vii) a controller's transfer of personal data to a third party as an asset that is part of a
- 360 proposed or actual merger, an acquisition, or a bankruptcy in which the third party
- 361 assumes control of all or part of the controller's assets.

362 (32) (a) "Sensitive data" means:

- 363 (i) personal data that reveals:
- 364 (A) an individual's racial or ethnic origin;
- 365 (B) an individual's religious beliefs;
- 366 (C) an individual's sexual orientation;
- 367 (D) an individual's citizenship or immigration status; or

- 368 (E) information regarding an individual's medical history, mental or physical
369 health condition, or medical treatment or diagnosis by a health care
370 professional;
- 371 (ii) the processing of genetic personal data or biometric data, if the processing is for
372 the purpose of identifying a specific individual; or
373 (iii) specific geolocation data.
- 374 (b) "Sensitive data" does not include personal data that reveals an individual's:
375 (i) racial or ethnic origin, if the personal data are processed by a video
376 communication service; or
377 (ii) if the personal data are processed by a person licensed to provide health care
378 under Title 26B, Chapter 2, Part 2, Health Care Facility Licensing and Inspection,
379 or Title 58, Occupations and Professions, information regarding an individual's
380 medical history, mental or physical health condition, or medical treatment or
381 diagnosis by a health care professional.
- 382 (33) (a) "Specific geolocation data" means information derived from technology,
383 including global position system level latitude and longitude coordinates, that directly
384 identifies an individual's specific location, accurate within a radius of 1,750 feet or
385 less.
- 386 (b) "Specific geolocation data" does not include:
387 (i) the content of a communication; or
388 (ii) any data generated by or connected to advanced utility metering infrastructure
389 systems or equipment for use by a utility.
- 390 (34) "Synthetic data" means data that has been generated by computer algorithms or
391 statistical models and does not contain personal data.
- 392 [(34)] (35) (a) "Targeted advertising" means displaying an advertisement to a consumer
393 where the advertisement is selected based on personal data obtained from the
394 consumer's activities over time and across nonaffiliated websites or online
395 applications to predict the consumer's preferences or interests.
- 396 (b) "Targeted advertising" does not include advertising:
397 (i) based on a consumer's activities within a controller's website or online application
398 or any affiliated website or online application;
399 (ii) based on the context of a consumer's current search query or visit to a website or
400 online application;
401 (iii) directed to a consumer in response to the consumer's request for information,

- product, a service, or feedback; or
- (iv) processing personal data solely to measure or report advertising:
- (A) performance;
- (B) reach; or
- (C) frequency.

[(35)] (36) "Third party" means a person other than:

- (a) the consumer, controller, or processor; or
- (b) an affiliate or contractor of the controller or the processor.

[(36)] (37) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from the information's disclosure or use; and
- (b) is the subject of efforts that are reasonable under the circumstances to maintain the information's secrecy.

Section 4. Section **13-70-101** is enacted to read:

CHAPTER 70. ARTIFICIAL INTELLIGENCE POLICY ACT

Part 1. General Provisions

13-70-101 . Definitions.

As used in this chapter:

- (1) "Applicant" means a person that applies for participation in the regulatory learning laboratory.
- (2) "Artificial intelligence" means a machine-based system that makes predictions, recommendations, or decisions influencing real or virtual environments.
- (3) "Artificial intelligence technology" means a computer system, application, or other product that uses or incorporates one or more forms of artificial intelligence.
- (4) "Department" means the Department of Commerce.
- (5) "Director" means the director of the office.
- (6) "Executive director" means the executive director of the Department of Commerce.
- (7) "Learning agenda" means the areas of artificial intelligence applications, risks, and policy considerations selected by the office for focus by the learning laboratory.
- (8) "Learning laboratory" means the artificial intelligence analysis and research program created in Section 13-70-301.

(9) "Office" means the Office of Artificial Intelligence Policy created in Section 13-70-201.

(10) "Participant" means a person that is accepted to participate in the learning laboratory.

(11) "Regulatory mitigation agreement" means an agreement between a participant, the office, and relevant state agencies described in Section 13-70-302.

(12) "Regulatory mitigation" means:

(a) when restitution to users may be required;

(b) terms and conditions related to any cure period before penalties may be assessed;

(c) any reduced civil fines during the participation term; and

(d) other terms tailored to identified issues of the artificial intelligence technology.

Section 5. Section **13-70-201** is enacted to read:

Part 2. Office of Artificial Intelligence Policy

13-70-201 . Creation of Office of Artificial Intelligence Policy -- Director appointed -- Duties and authority.

(1) There is created in the department the Office of Artificial Intelligence Policy.

(2) The executive director of the department shall appoint a director to oversee the management and operations of the office.

(3) The office shall:

(a) create and administer an artificial intelligence learning laboratory program;

(b) consult with businesses and other stakeholders in the state about potential regulatory proposals;

(c) make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, establishing:

(i) procedures, requirements, and fees to apply to participate in the learning laboratory program;

(ii) criteria for invitation, acceptance, denial, or removal of participants;

(iii) data usage limitations and cybersecurity criteria for participants;

(iv) required participant disclosures to consumers;

(v) reporting requirements for participants to the office;

(vi) criteria for limited extension of the participation period; and

(vii) other requirements necessary to administer the learning laboratory; and

(d) report annually, before November 30, to the Business and Labor Interim Committee regarding:

(i) the proposed learning agenda for the learning laboratory;

- (ii) the findings, participation, and outcomes of the learning laboratory; and
- (iii) recommended legislation from findings from the learning laboratory.

Section 6. Section **13-70-301** is enacted to read:

Part 3. Artificial Intelligence Learning Laboratory Program

13-70-301 . Artificial Intelligence Learning Laboratory Program.

- (1) There is established the Artificial Intelligence Learning Laboratory Program, to be administered by the office.
- (2) The purpose of the learning laboratory is to:
 - (a) analyze and research the risks, benefits, impacts, and policy implications of artificial intelligence technologies to inform the state regulatory framework;
 - (b) encourage development of artificial intelligence technologies in the state;
 - (c) evaluate the effectiveness and viability of current, potential, or proposed regulation on artificial intelligence technologies with artificial intelligence companies; and
 - (d) produce findings and recommendations for legislation and regulation of artificial intelligence.
- (3) (a) The office shall periodically set a learning agenda for the learning laboratory that establishes the specific areas of artificial intelligence policy the office intends to study.
(b) In establishing the learning agenda, the office may consult with:
 - (i) relevant agencies;
 - (ii) industry leaders;
 - (iii) academic institutions in the state; and
 - (iv) key stakeholders with relevant knowledge, experience, or expertise in the area.
- (4) The office may invite and receive an application from a person to participate in the learning laboratory.
- (5) The office shall establish the procedures and requirements for sending an invitation and receiving requests to participate in the learning laboratory in accordance with the purposes of the learning laboratory.
- (6) In selecting participants for the learning laboratory, the office shall consider:
 - (a) the relevance and utility of an invitee or applicant's artificial intelligence technology to the learning agenda;
 - (b) the invitee or applicant's expertise and knowledge specific to the learning agenda; and
 - (c) other factors identified by the office as relevant to participation in the learning

laboratory.

- (7) The office shall work with participants to establish benchmarks and assess outcomes of participation in the learning laboratory.

Section 7. Section **13-70-302** is enacted to read:

13-70-302 . Regulatory mitigation agreements.

- (1) A participant who uses or wants to utilize an artificial intelligence technology in the state may apply for regulatory mitigation according to criteria and procedures outlined by the office by rule made under Section 13-70-201.
- (2) The office may grant, on a temporary basis, regulatory mitigation to a participant by entering into a regulatory mitigation agreement with the office and relevant agencies.
- (3) To receive regulatory mitigation, a participant must demonstrate that the applicant meets eligibility criteria established in Section 13-70-303.
- (4) A regulatory mitigation agreement between a participant and the office and relevant agencies shall specify:
- (a) limitations on scope of the use of the participant's artificial intelligence technology, including:
 - (i) the number and types of users;
 - (ii) geographic limitations; and
 - (iii) other limitations to implementation;
 - (b) safeguards to be implemented; and
 - (c) any regulatory mitigation granted to the applicant.
- (5) The office shall consult with relevant agencies regarding appropriate terms in a regulatory mitigation agreement.
- (6) A participant remains subject to all legal and regulatory requirements not expressly waived or modified by the terms of the regulatory mitigation agreement.
- (7) (a) The office may remove a participant at any time and for any reason, and the participant does not have an expectation of a property right or license to participate in the learning laboratory.
- (b) A participant demonstrating an artificial intelligence technology that violates legal or regulatory requirements or the terms of the participation agreement may be immediately removed from further participation and subject to all applicable civil and criminal penalties.
- (8) Participation in the learning laboratory does not constitute an endorsement or approval from the state.

- (9) The state shall not be responsible for any claims, liabilities, damages, losses, or expenses arising out of a participant's involvement in the learning laboratory.

Section 8. Section **13-70-303** is enacted to read:

13-70-303 . Regulatory mitigation eligibility requirements -- Application evaluation and admission.

- (1) To be eligible for regulatory mitigation, a participant shall demonstrate to the office that:

- (a) the participant has the technical expertise and capability to responsibly develop and test the proposed artificial intelligence technology;
- (b) the participant has sufficient financial resources to meet obligations during testing;
- (c) the artificial intelligence technology provides potential substantial consumer benefits that may outweigh identified risks from mitigated enforcement of regulations;
- (d) the participant has an effective plan to monitor and minimize identified risks from testing; and
- (e) the scale, scope, and duration of proposed testing is appropriately limited based on risk assessments.

- (2) To evaluate whether an applicant meets eligibility criteria to receive regulatory mitigation, the office may consult with relevant agencies and outside experts regarding the application.

Section 9. Section **13-70-304** is enacted to read:

13-70-304 . Participation in Artificial Intelligence Learning Laboratory.

- (1) (a) The office may approve an applicant to participate in the program.

- (b) An approved applicant becomes a participant by entering into a participation agreement with the office and relevant state agencies.

- (2) A participant shall:

- (a) provide required information to state agencies in accordance with the terms of the participation agreement; and
- (b) report to the office as required in the participation agreement.

- (3) The office may establish additional cybersecurity auditing procedures applicable to participants demonstrating artificial intelligence technologies that the office considers higher risk.

- (4) A participant shall retain records as required by office rule or the participation agreement.

- (5) A participant shall immediately report to the office any incidents resulting in consumer harm, privacy breach, or unauthorized data usage, which may result in removal of the

participant from the learning laboratory.

Section 10. Section **13-70-305** is enacted to read:

13-70-305 . Program extension.

(1) An initial regulatory mitigation agreement shall be in force for no longer than 12 months.

(2) A participant may request a single 12-month extension for participation in the learning laboratory period no later than 30 days before the end of the initial 12-month period.

(3) The office shall grant or deny an extension request before expiration of the initial demonstration period.

Section 11. Section **63I-2-213** is amended to read:

63I-2-213 . Repeal dates: Title 13.

(1) Section 13-1-16 is repealed on July 1, 2024.

(2) Title 13, Chapter 47, Private Employer Verification Act, is repealed on the program start date, as defined in Section 63G-12-102.

(3) Title 13, Chapter 70, Artificial Intelligence Act, is repealed on May 1, 2025.

Section 12. Section **76-2-107** is enacted to read:

76-2-107 . Commission of offense with aid of generative artificial intelligence.

(1) As used in this section, "generative artificial intelligence" means the same as that term is defined in Section 13-2-12.

(2) An actor may be found guilty of an offense if:

(a) the actor commits the offense with the aid of a generative artificial intelligence; or

(b) the actor intentionally prompts or otherwise causes a generative artificial intelligence to commit the offense.

Section 13. **Effective date.**

This bill takes effect on May 1, 2024.



State Court Orders, Rules, and Proposed Rules

- [Texas - TX R BEXAR CTY LOC RULES DIST CT Rule 3 - Nonjury Docket](#)
- [Connecticut Judicial Branch -The Judicial Branch’s Policies and Procedures Concerning Artificial Intelligence](#)
- [Statement of Principles for the New Jersey Judiciary’s Ongoing Use of Artificial Intelligence, Including Generative Artificial Intelligence](#)
- [Notice – Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers](#)
- [Utah, Interim Rules on the Use of Generative AI, October 25, 2023](#)
- [Kansas Office of Information Technology Services, Generative Artificial Intelligence Policy \(Applies to the Executive Branch but included here since some administrative offices have to comply with Executive Branch requirements on networks.\)](#)
- [National Conference of State Legislatures - Artificial Intelligence 2023 Legislation](#)



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State of Connecticut Judicial Branch
JBAPPM Policy 1013
Artificial Intelligence Responsible Use
Framework

**Meaningful Guardrails + Workforce Empowerment and Education + Purposeful Use =
Responsible AI Innovation**



Version 1.0

February 1, 2024

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Responsible AI Framework for the State of Connecticut Judicial Branch

Acknowledgement

The Connecticut Judicial Branch is thankful to the Executive Branch for making its AI policy and framework available to the Branch and for encouraging the Branch to adopt this policy and framework. The Judicial Branch, in turn, has adopted much of the framework and policy. Moving forward, however, the Judicial Branch's Artificial Intelligence Committee will take on the role that the AI Advisory Board has for the Executive Branch.

Connecticut's AI Framework outlines meaningful guardrails to empower our workforce to drive responsible AI innovation.

1.0 Artificial Intelligence (AI) Vision for State of Connecticut Judicial Branch

The Connecticut Judicial Branch has embraced emerging technologies to: (1) advance its mission which is to serve the interests of justice and the public by resolving matters brought before it in a fair, timely, efficient, and open manner, and (2) to empower its workforce to better serve the residents who use the court system. Fostering an AI-friendly mindset will position the Judicial Branch as a national leader and will play a key role in shaping the Judicial Branch's ability and capacity to continue innovating with intent.

We believe we can accomplish this vision internally through workforce empowerment and education and externally through inclusion, accountability, and transparency.

2.0 Purpose

This policy and the collection of procedures listed below seek to establish an (AI) framework that upholds the ethical use of AI in the Judicial Branch, and prioritizes fairness, privacy, transparency, accountability, and security. This is an organic framework intended to evolve in tandem with technological advancements, future iterations of relevant legislation at the state and federal levels, societal needs, and government operational necessities.

3.0 Framework Elements

- Policy AI-01 – AI Responsible Use Policy
- Procedure AI-01 – AI Determination Characteristics
- Procedure AI-02 – AI Intake and Inventory
- Procedure AI-03 – AI Impact Assessment
- Procedure AI-04 – AI Procurement Due Diligence Checklist

4.0 Scope

This policy applies to AI software, hardware, services, and appliances. It also applies to developed, procured, and embedded AI and covers the CT Judicial Branch employees and affiliated entities. Affiliated entities are defined as all consultants and contractors performing work for the Judicial Branch, and all vendors and third-party stakeholders who are extensions of services offered by the Judicial Branch.

5.0 Enabling Legislation

Public Act 23-16, *An Act Concerning Artificial Intelligence, Automated Decision-Making and Personal Data Privacy*, requires the Judicial Branch to, not later than February 1, 2024, develop and establish policies and procedures concerning the development, procurement, implementation, utilization, and ongoing assessment of systems that employ AI.

6.0 Terminology

6.1 Terminology Related to AI

- **Artificial Intelligence** – As per PA 23-16, AI means an AI system that:
 - performs tasks under varying and unpredictable circumstances without significant human oversight or can learn from experience and improve such performance when exposed to data sets,
 - is developed in any context, including, but not limited to, software or physical hardware, and solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action,
 - is designed to: think or act like a human. For example, and not limited to, displaying a cognitive architecture or neural network that through intelligence software agent or embodied robot, achieves goals using perception, planning, reasoning, learning, communication, decision-making or action,
 - is made up of a set of techniques, including, but not limited to, machine learning, that is designed to approximate a cognitive task.
- **Explain-ability** – The property of an AI system to express essential factors influencing the AI system resulting in a way that humans can understand.
- **Large Language Model (LLM)** – A type of AI program that can recognize and generate text, among other tasks. LLMs are trained on huge sets of data — hence the name "large." LLMs are built on machine learning: specifically, a type of neural network called a transformer model.
- **Machine Learning** – The use and development of computer systems that are able to learn and adapt without following explicit instructions, by using algorithms and statistical models to analyze and draw inferences from patterns in data.

- **Training / Test Data** – A dataset from which a model learns / is tested.

6.2 Terminology Related to Bias and Fairness

- **Algorithmic discrimination** – Occurs when automated systems contribute to unjustified different treatment or impacts disfavoring people based on their race, gender, age, religion, disability, or sexual orientation.
- **Bias** – In the context of fairness, bias is an unwanted characteristic that places one group at a systematic advantage and another group at a systematic disadvantage in comparison to another group.
- **Bias mitigation process** – A process for reducing unwanted bias in training data, models, or decisions. This process should be developed and informed by a diverse group of stakeholders with lived experience.
- **Fairness** – the process of correcting and eliminating algorithmic bias (of race and ethnicity, gender, sexual orientation, disability, and class) from machine learning models.
- **Human Rights** – The human rights to privacy and data protection, equality and non-discrimination are key to the governance of AI, as are human rights' protection of autonomy and of economic, social, and cultural rights in ensuring that AI will benefit everyone.
- **Individual Rights** – Under data protection law individuals have a number of rights relating to their personal data. Within AI, these rights apply wherever personal data is used at any of the various points in the development and deployment lifecycle of an AI system.
- **Protected Classes** – Groups of people who are legally protected from being harmed or harassed by laws, practices, and policies that discriminate against them due to a shared characteristic (e.g., race, gender, age, religion, disability, or sexual orientation).

7.0 AI Policy Guiding Principles

7.1 Purposeful – When using AI, the Judicial Branch shall ensure that it is used in service of its core mission to serve the interests of justice and the public by resolving matters brought before it in a fair, timely, efficient, and open manner. Data collected for the purpose of testing and training AI systems shall not be used for other purposes outside of the Branch's responsibility. The use of AI shall be aligned with the mission and goals of the Branch, properly documented, and well-vetted by Branch leadership.

7.2 Accuracy – When using AI, the Judicial Branch shall confirm that the AI produces accurate and verifiable information. This framework includes procedures on how best to audit and verify AI outputs to ensure clear and accurate information. AI is considered "accurate" to the extent that the AI-provided result is correct and expected.

7.3 Privacy – The design, development, procurement, and deployment of AI by the Judicial Branch must not adversely affect the privacy rights of users. The Branch shall ensure that training related to the use of AI and the input of data into those tools complies with applicable laws, regulations, and policies concerning the privacy rights of users.

7.4 Equity and Fairness – The Judicial Branch shall use AI in a way that does not unlawfully discriminate against or disparately impact individuals or communities based on or due to race, gender, age, religion, disability, or sexual orientation. The Branch shall use AI in a human-centered and equitable manner testing for and protecting against bias so that its use does not favor or disadvantage any demographic group over others.

7.5 Transparency – The Judicial Branch shall ensure transparency and accountability in the design, development, procurement, deployment, and ongoing monitoring of AI in a manner that respects and strengthens public trust. When using AI tools to create content, agency external-facing services or dataset inputs or outputs shall disclose the use of AI; and what bias testing was done, if any.

7.6 Understandable – The Branch’s use of AI shall be documented in ways that ensure the technology is understood by those that make decisions, monitor outcomes, or explain results.

7.7 Accountability – The Branch is responsible and accountable for AI-related decisions, through its Judicial Branch Artificial Intelligence Committee as described in Section 10.

7.8 Adaptability – The fast-evolving nature of AI and its potential use requires the Judicial Branch to establish and maintain an ability and willingness to recognize and adapt to shifting risks and opportunities. Staying current and relevant requires the Branch to make investments that promote continued research and diligence; engage with external stakeholders and subject matter experts; and learn from other government partners.

7.9 Aligned to Standards – Connecticut operates within a connected global economy. The ability to harness these technologies for sustained benefits means sharing the support of the broader community. Connecticut will monitor emerging AI standards and adhere to those that facilitate interoperability and adoption of AI technology and are in alignment with this policy.

7.10 Human Enhancing – Those organizations that benefit from using AI will be those that have personnel trained on using it safely and whose employees’ skills are enriched through their use. The Judicial Branch shall create training opportunities for employees to grow their skills in utilizing, understanding, and managing AI tools or technology. The use of AI tools shall be to enhance and improve the value added by our Judicial Branch employees.

7.11 Safety and Security – The CT Judicial Branch’s Artificial Intelligence Committee shall lead the development and implementation of standards, procedures, and policies to safeguard and secure the data provided to the Judicial Branch. The CT Judicial Branch’s Artificial Intelligence Committee shall collaborate with the Executive Branch’s AI Advisory Board and the state’s Artificial Intelligence Working Group, established pursuant to Section 5 of Public Act 23-16.

8.0 AI Implementation Phases

The “procurement, implementation and ongoing assessment” of artificial intelligence systems, as required under Public Act 23-16, must be done in accordance with the Policy Guiding Principles outlined in Section 7 of this policy and the procedures defined as part of the overall AI Framework. The policy segments implementation into four distinct phases, and applies the principles to each:

- Intake and exploration

- Impact assessment
- Procurement
- Implementation

Each distinct phase is described below and includes reference to specific AI procedures to promote consistency in interpretation and application across agencies.

8.1 Intake and exploration

Prior to implementation, Judicial Branch divisions or units that are considering an AI system should submit documentation to the Judicial Branch's Artificial Intelligence Committee addressing the purpose for the system and the relevant considerations for procurement, implementation, or assessment. Since AI technology is changing rapidly, coordination with the Judicial Branch's Artificial Intelligence Committee will enable the Judicial Branch to identify emerging use cases and opportunities for knowledge sharing.

The Judicial Branch's Artificial Intelligence Committee will develop and maintain an intake form for new AI systems that will cover the AI Guiding Principles for AI, which will be posted on the Judicial Branch's intranet site, known as Zeus. The Committee will engage the division or unit to better understand and to provide recommendations on how to move forward.

The intake form will serve to document the purpose for the AI system upfront, so that the intended purpose is clear and transparent. The intake form will also cover considerations related to architecture, procurement, any requirements for vendors, security / privacy considerations, and potential for intellectual property or copyright concerns.

8.2 Impact Assessment

In addition, the Judicial Branch's Artificial Intelligence Committee will maintain tools to assist the Branch in assessing the impact of AI systems and to identify the potential impacts from an AI system. The Committee will undertake an initial impact assessment before implementing an AI system and will be prepared to undertake assessments on an ongoing basis during utilization of the system.

8.3 Procurement

Procurement will follow Judicial Branch policies and procedures, and state statute, with a few important additions based on the unique requirements for AI systems.

- When the Judicial Branch partners with third parties or external vendors for AI systems, vendors should explicitly agree to ongoing monitoring and assessment. Contract language shall be included to ensure that the product or service will not result in unlawful discrimination or create disparate impact.
- Contracts shall require notice and allow for amendment if a vendor introduces AI functionality into a system after implementation. Contracts shall ensure that the Branch is not required to use

or deploy embedded AI functionality, without the ability to opt in or opt out of such functionality after an impact assessment and review by AI Board.

Public Act 23-16 requires the Judicial Branch to assess the likely impact of any such system before implementing such system. Consequently, the Branch anticipates additional time will be needed for impact assessment during the contracting phase and will plan accordingly with contracting staff and other stakeholders.

8.4 Implementation

As the Judicial Branch moves to implementation for a new AI system, whether embedded within a solution, procured from a vendor, or developed in-house, the Judicial Branch shall review technical parameters to ensure responsible use of the AI system. While some assessment can be undertaken during the intake and procurement phases, there is potential for in-house or no-cost solutions or embedded AI functionality in legacy systems that may skip intake or procurement. The Judicial Branch is responsible for ensuring that implementation of AI systems remains aligned with the guiding principles described in Section 7 of this policy. Particular attention during implementation should be paid to:

- **Data stewardship** – Any AI system that uses state data or other data sources for training needs to consider the source and provenance of data and the quality, including the potential for bias in the dataset. Regular review of the data sources and impact on the model shall be part of the regular assessment process. Changes in policies or in other systems can impact data quality and data elements in a way that has unpredictable effects for an AI system. (For instance, changes in affirmative action policies may affect demographic data that Judicial Branch employees provide. This could then impact any system built to use or reference state employee or hiring data.)
- **Security / privacy considerations** – Information related to safety and security of Judicial Branch systems shall be collected, however it will not be published if such disclosure would compromise the security or integrity of an information technology system.
- **Documentation** – The utilization of AI systems must be thoroughly documented. This documentation shall include a comprehensive description of the system's general capabilities, the intended scope of its use, effective date, and any relevant contractual agreements. Particular attention should be given to the methods used for the AI system to understand the ways in which Judicial Branch data is used and the potential inputs and outputs for the system.

9.0 Guidelines Specific to Large Language Models (LLMs) and Generative AI

Currently available Large Language Models (LLMs), such as ChatGPT, Bard, Bing and Chat, offer potential opportunities to improve service delivery and enhance workforce productivity. LLM capabilities could assist with research, generating text and visual content, creating and editing documents, correspondence, and other useful applications. The Judicial Branch may explore those capabilities first because the market is more mature with readily available tools and products.

Use of LLMs and generative AI for official duties shall be conducted in accordance with the following usage guidelines:

- Employees and affiliated entities must use LLMs in accordance with these guidelines.
- Employees must secure supervisory approval before using LLMs for each use. Supervisors may consult with the Judicial Branch’s Artificial Intelligence Committee to help decide acceptable use.
- Employees shall not input non-public information into LLMs. All information entered into an LLM becomes public. The following is a non-exhaustive list of information that shall not be used in LLMs:
 - Confidential or privileged information or communications.
 - Personally identifying information (PII).
 - Protected health information (PHI).
 - Justice and public safety information.
 - Code containing passwords or other security-related information.
 - Information that is in conflict with Connecticut’s Code of Ethics, Judicial Branch Administrative Policies and Procedures, the Connecticut Practice Book or has the potential to erode public trust.
- Employees may not pay for LLM software or sign up for services requiring payment. These purchases usually come with click-through terms and conditions that can potentially bind the state to unacceptable use.
- Any purchase of such products must go through the mandated Judicial Branch procurement processes.
- LLMs may generate content that is incorrect or fictitious. This content may seem reasonable and not be readily distinguishable from factual information. Employees and affiliated entities using an LLM must review all information obtained from the LLM for accuracy, veracity and completeness.
- Employees and affiliated entities using LLMs are responsible for their work product, regardless of what portion of it is produced by the LLM.
- Employees using an LLM for official Judicial Branch business must log in and create an account using their state email address only. Official business may not be conducted using an account established with a personal email address.
- LLMs shall not be used in a way that could cause reputational harm to the Judicial Branch.
- While it is acceptable to use LLMs to perform official job duties. These tools must be used to augment/assist and not replace common sense.
- If there is an opportunity to make Generative AI or LLMs a part of a standard work process, the Judicial Branch’s Artificial Intelligence Committee will provide additional guidelines to procure, develop and implement.
- Employees and affiliated entities must not use LLMs in any way that infringes copyrights or on the intellectual property rights of others.
- Employees and affiliated entities must appropriately cite the use of AI where required by law. Standard citation formats are as follows:
 - **Standard Format** – “This content was [drafted, edited, translated] with the assistance of a generative artificial intelligence, [Bard, ChatGPT]. The content has been reviewed and verified to be accurate and complete, and represents the intent of [office, department, division, the Judicial Branch, or a person's name].”
 - **Emergency Format** – “This content was translated with the assistance of a generative artificial intelligence [Google Translate, Azure AI]. The content has NOT YET been reviewed and verified but will be as soon as possible. This notice will be updated once the

review is complete. For any questions about this content or to report confusing or conflicting text, please contact [Judicial Branch’s Artificial Intelligence Committee].”

10.0 The Judicial Branch’s Artificial Intelligence Committee

To help navigate the implementation of AI policy and provide consultative services to Judicial Branch divisions and offices, the Judicial Branch established the Judicial Branch’s Artificial Intelligence Committee. The Committee is internally focused and is made up of representatives from all the Branch’s administrative divisions. The Judicial Branch’s Artificial Intelligence Committee shall have the responsibility to:

- Take advantage of innovative opportunities that could help with Judicial Branch operations, particularly those which will make the process easier for users.
- Guard against or be prepared for abuse that will come from artificial intelligence.
- Conduct an inventory of any systems that employ artificial intelligence and make the inventory publicly available on the Judicial Branch’s website.
- Develop and establish policies and procedures concerning the development, procurement, implementation, utilization, and ongoing assessment of systems that employ artificial intelligence.
- Make recommendations regarding division or unit requests to utilize AI technology, based upon a review process that evaluates the technology’s bias and security, and whether the division or unit’s requested use of AI adheres to the guiding principles.
- Encourage Judicial Branch divisions and units to utilize AI when it improves service delivery and service administration and leads the process to identify the most efficient use cases for the implementation of AI.
- Collaborate with the Executive Branch’s Artificial Intelligence Advisory Board, the state’s Artificial Intelligence working groups established pursuant to Section 5 of Public Act 23-16, and other stakeholders to develop AI government procurement recommendations that outline additional guidelines, identify opportunities, balance the public benefits of using AI against potential risks, assess the accessibility, limitations, and potential historical bias of available sources to be used by AI, and ensure the procurement process maintains a level playing field for AI providers.
- Recommend training and instruction to employees who utilize AI to ensure the employees are using AI tools responsibly and are prepared for the changing skills demanded of our workforce due to AI.
- Establish approaches and best practices for AI impact assessment.
- Establish a procedure for exemption considerations.

The composition of the Judicial Branch’s Artificial Intelligence Committee, meeting schedule, and additional relevant details are posted on the Judicial Branch’s website.

11. Resources

- **CGA Public Act 23-16**
<https://www.cga.ct.gov/2023/act/Pa/pdf/2023PA-00016-R00SB-01103-PA.PDF>
- **NIST Trustworthy & Responsible AI Resource Center**
<https://airc.nist.gov/home>
- **White House AI Bill of Rights**
<https://www.whitehouse.gov/ostp/ai-bill-of-rights/>
- **White House AI Executive Order**
<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>
- **NASCIO AI Blueprint**
<https://www.nascio.org/resource-center/resources/your-ai-blueprint-12-key-considerations-as-states-develop-their-artificial-intelligence-roadmaps/>
- **European Union AI Act**
<https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>
- **Singapore's Approach to AI Governance**
<https://www.pdpc.gov.sg/Help-and-Resources/2020/01/Model-AI-Governance-Framework>
- **Framework for Fairness Assessment**
https://www.tec.gov.in/pdf/Whatsnew/Letter%20TEC%20AI%20Fairness%20Assessment%20seeking%20inputs%202022_02_22.pdf
- **Canada Human Rights and AI**
<https://www.torontodeclaration.org/about/human-rights-and-ai/>
- **EU AI Regulations Should Ban Social Scoring**
<https://www.hrw.org/news/2023/10/09/eu-artificial-intelligence-regulation-should-ban-social-scoring>
- **Goldman Sachs on Artificial Intelligence**
<https://www.goldmansachs.com/intelligence/artificial-intelligence/index.html?chl=ps&plt=bi&cid=638280346&agp=1316117710182195&kid=artificial%20intelligence%20impact&mtype=p&msclkid=d546209b4e3f1ba55413453fe8>

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- **McKinsey's Insight on Generative AI**

<https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai-in-2023-generative-AI-breakout-year>

- **Singapore's Approach to AI Governance**

<https://www.pdpc.gov.sg/Help-and-Resources/2020/01/Model-AI-Governance-Framework>

- **State of California AI Executive Order**

<https://www.gov.ca.gov/wp-content/uploads/2023/09/AI-EO-No.12--GGN-Signed.pdf>

- **ISO 42001:2023 AI Management**

<https://www.iso.org/standard/81230.html>

- **Canadian Algorithmic Impact Assessment Tool**

[Algorithmic Impact Assessment Tool - Canada.ca](https://www.algorithmscanada.ca/)

- **United States Chief Information Officers Council Algorithmic Impact Assessment**

[Algorithmic Impact Assessment \(cio.gov\)](https://www.cio.gov/algorithmic-impact-assessment/)

- **Microsoft Responsible AI Impact Assessment Template**

[Microsoft-RAI-Impact-Assessment-Template.pdf](https://www.microsoft.com/en-us/ai/responsible-ai-impact-assessment-template)

- **State of Connecticut Policy A1-01 AI Responsible Use Framework**

[Microsoft Responsible AI Impact Assessment Template](https://www.ct.gov/deep/ai/policy-a1-01-ai-responsible-use-framework)

1.0 Procedure AI-01 – AI Determination Characteristics

1.1 Purpose – This document outlines the procedures and criteria for determining whether a system employs AI for decision-making. The procedure involves a multifaceted approach that assesses various aspects of the system’s functioning, data processing, and decision-making processes.

1.2 Key Indicators of an AI Decision Making System

Determining whether a system is an AI system without knowing its development process can be challenging, but there are some general indicators that can provide clues. Here are some factors to consider when reviewing a system:

1.2.1 Adaptive behavior: AI systems often exhibit adaptive behavior, meaning they can adjust their responses based on new information or experiences. For instance, an AI chatbot might learn to personalize interactions based on past conversations or an AI recommendation system might adapt its suggestions based on user preferences.

1.2.2 Pattern recognition: AI systems are often designed to identify patterns in data, whether it's text, images, or other forms of input. This ability to recognize patterns can be used for tasks like image classification, natural language processing, and anomaly detection.

1.2.3 Non-deterministic behavior: Unlike traditional software, AI systems can sometimes produce non-deterministic outputs, meaning they may generate different results for the same input under certain conditions. This is due to the probabilistic nature of AI algorithms and their ability to learn from data.

1.2.4 Predictive capabilities: AI systems can often make predictions based on historical data or current trends. This predictive ability can be used for tasks like forecasting revenue, predicting customer behavior, or identifying potential risks.

1.2.5 Explain-ability and transparency: While some AI systems may operate as black boxes, making it difficult to understand their decision-making process, others are designed to be more explainable and transparent. This means they can provide insights into how they arrived at a particular output, allowing for better understanding and evaluation.

1.2.6 Context and limitations: AI systems are typically designed for specific tasks and domains, and their performance may vary depending on the context and limitations of their application. Understanding the intended use case and the system's capabilities can help determine whether it's an AI system.

1.2.7 Human intervention: Some AI systems may require human intervention or oversight to function effectively, while others may operate more autonomously. The level of human involvement can provide an indication of the system's intelligence and decision-making capacity.

1.2.8 Continuous improvement: AI systems are often designed to learn and improve over time as they are exposed to more data and feedback. This continuous improvement is a hallmark of AI systems, as they adapt and refine their performance based on new information.

While these indicators can provide clues, it's important to note that there is no single definitive way to determine whether a system is an AI system without knowing its development process. The field of AI is constantly evolving, and new techniques and capabilities are emerging all the time.

Judicial Branch divisions and units interested in assessing whether a solution is AI enabled are encouraged to use the eight (8) characteristics above to arrive at a conclusion. Triggering one indicator does not mean it is AI; however, the more indicators triggered, the higher the likelihood that the solution is AI enabled.

If in doubt, consult with the Judicial Branch's Artificial Intelligence Committee for further analysis and confirmation.

2.0 Procedure AI-02 AI Intake and Inventory

2.1 Purpose

Public Act 23-16 directs the Judicial Branch to conduct an annual inventory of all systems that employ AI and are used by the Branch. Judicial Branch's Artificial Intelligence Committee shall consult with the Branch's administrative divisions to conduct the inventory. When conducting the inventory, the Committee will consider:

- The name of the system and the name of the vendor who supplies the system (if applicable).
- The purpose and a description of the general capabilities and use of the system.
- Whether such a system is used to independently make, inform, or materially support a decision.
- Whether such a system has undergone an impact assessment prior to implementation.

2.2 Inventory Transparency

The Judicial Branch shall publish the annual inventory on the Judicial Branch's website. Information related to the safety and security of Judicial Branch systems will be collected. However, it will not be published if such disclosure would compromise the security or integrity of an information technology system.

2.3 Inventory Scope

The inventory collected will not include commodity products embedded in other systems that pose little risk to the Judicial Branch or its residents. Examples of commodity products include auto-complete functionality in email clients, smart virtual assistants embedded in smartphones, and email spam filters. While these technologies make use of AI and machine learning, their use is limited in nature and poses little risk.

2.4 Inventory Frequency

Information regarding AI systems shall be submitted to the Judicial Branch's Artificial Intelligence Committee prior to deployment and updated each year once deployed. Any updates to the AI system that result in a material change to the original purpose and intent of the AI system shall be submitted prior to redeployment.

3.0 Procedure A1-03 AI Impact Assessment Procedure

3.1 Purpose – This document outlines the procedures and criteria for conducting an impact assessment for AI systems deployed by the Judicial Branch. The aim is to identify and mitigate potential biases and discriminatory impacts, ensuring fairness and equity in AI-driven decision-making processes. Refer to Section 6.2 for definition of terms related to Fairness in AI.

Under PA 23-16, beginning on February 1, 2024, the Judicial Branch shall not implement any system that employs AI unless the Branch has performed an impact assessment, in accordance with the policies and procedures established in this policy. The Judicial Branch will ensure that such system will not result in any unlawful discrimination or disparate impact.

Over time, the Judicial Branch’s Artificial Intelligence Committee will further refine standard policies, procedures for impact assessments, recommend best practices, and assist the Branch to identify an appropriate impact assessment methodology based on the specific use case and recommend a process to follow and document results.

3.2 Approach to Assessment, Testing and Monitoring

New systems are required to undertake an impact assessment before implementation, such assessment should cover each of the AI Guiding Principles identified in Section 7 of the AI Policy. The impact assessments can be carried out by a division, unit, a vendor or a third party. The assessment process should actively involve policy, program, and legal expertise as it is not just a technical review.

All AI systems must be deployed with a plan to conduct regular monitoring through a yearly impact assessment. The results of impact assessments should be reported to the Judicial Branch’s Artificial Intelligence Committee. Ongoing monitoring should include human review of system input, output, decision-making logic, errors, accuracy, and appropriateness. The Judicial Branch’s Artificial Intelligence Committee reserves the right to request new or updated assessments based on changes in the system or other changes in policies at any time.

The Judicial Branch Artificial Intelligence Committee will review and utilize strategies for mitigating adverse impact, such as:

- Be aware of common biases that may be present in AI systems, such as data bias, algorithmic bias, and confirmation bias.
- Regularly review and evaluate AI-generated outputs for potential biases and inaccuracies, seeking input from diverse perspectives and stakeholder groups.
- Use AI tools with transparent methodologies and documentation to better understand their decision-making processes.
- Collaborate with AI vendors and developers to improve AI systems and address identified biases, reporting any issues, and working together to develop solutions.
- Document and communicate any identified biases and mitigation efforts to relevant stakeholders.
- Maintain assessment records for the duration of implementation of the AI system, in addition to any record retention requirements.

3.3 AI Impact Assessment Risk Tiers

The impact assessment process will produce measures of both risk and potential impact. However, due to the requirement to avoid adverse impacts and the potential for risk with emerging technology, AI systems will be categorized into risk tiers based on potential risks, with the presumption that divisions or units have evaluated potential positive impacts before pursuing implementation of an AI system:

Tier	Description	Self-Assessment	AI Board	Peer Review	Human Involvement
1 Low	Minimal individualized risk or adverse impact	✓			Primarily automated with human oversight procedures, checklists and decision trees.
2 Medium	Moderate risk or adverse impact affecting subsets of people		✓		Use case review by team. Human reviews of high-risk decisions.
3 High	Significant risks or widespread adverse impact		✓	✓	Human maintains authority over all consequential decisions.
4 Severe	Severe or irreversible consequences		✓	✓	Presumption against deployment without full human control, peer review, and AI Board's approval.

The impact assessment process should influence division-level implementation of AI systems, especially for the appropriate level of human involvement in AI system functioning, oversight, and decision-making. The appropriate level depends on the risk tier.

3.4 Resources for Assessing AI Impact

The Judicial Branch's Artificial Intelligence Committee will utilize the following prompts to guide its decision making in developing, procuring, or considering the use of AI systems. The following list of prompts is meant to provide a starting point. Each prompt represents a characteristic of an AI system, which is aligned with one or more of the guiding principles for responsible AI.

Artificial Intelligence Impact Assessment Review Prompts	Guiding Principle(s)
The AI System is built or implemented to enhance a key function or interest of the Judicial Branch.	Purposeful
The AI system will be used to help make decisions that impact the lives of parties, clients, constituents, or Judicial Branch employees.	Purposeful, Transparency, Human Enhancing
The AI system will be used to help make decisions that impact the lives of parties, clients, or constituents from historically marginalized populations.	Transparency, Equity & Fairness, Human Enhancing

The AI system does not appear to disproportionately harm, burden, or disadvantage any population served by the Judicial Branch.	Transparency, Equity & Fairness, Accountability
The AI system has a plan in place for regular monitoring for accuracy and fairness, including human review of system input, output, decision-making logic, errors, bias, and appropriateness.	Equity & Fairness, Accountability, Accuracy
The AI system does not have the ability to share learning data with other systems or third parties.	Privacy, Safety & Security
The AI system's data storage is secure for learning data at rest and in motion.	Safety & Security
The AI system has a plan in place for destruction of data after a given period of time. (Data retention policy)	Privacy, Safety & Security
The AI system has the ability to be disabled and have data removed at any given point in time after its implementation.	Adaptability, Privacy, Safety & Security
The AI system is adaptable and responsive to evolving business requirements.	Adaptability
The AI system's learning methodology, training, and testing models are thoroughly documented and explainable.	Understandable, Transparency, Accountability
The AI system has been developed and reviewed by a diverse and multi-disciplinary, internal review board.	Equity & Fairness, Accountability
The AI system will learn from sensitive financial data, personal health information, or personal identifiable information of constituents or Judicial Branch employees.	Privacy, Safety & Security, Equity & Fairness
The AI system will learn from demographic data of constituents or Judicial Branch employees.	Privacy, Safety & Security, Equity & Fairness
The AI system can be prompted to provide context information about its output or recommendations in uses for decision-making.	Accuracy, Transparency
The AI system will ingest, connect to, or share data with other State entity data sources.	Privacy, Safety & Security
The AI system will ingest, connect to, or share data from sources outside of the State.	Privacy, Safety & Security
The AI system has been reviewed for compliance with other existing state, federal, international, or industry standards.	Aligned to Standards

The Judicial Branch Artificial Intelligence Committee will reference the following external resources to aid in their review of AI systems as well as algorithmic models.

The Judicial Branch Artificial Intelligence Committee will reference the **Microsoft Responsible AI Impact Assessment Template** to aid in its review of AI systems as well as algorithmic models.

- The Responsible AI Impact Assessment Template is the product of a multi-year effort at Microsoft to define a process for assessing the impact an AI system may have on people, organizations, and society. Microsoft has published their Impact Assessment Template externally to share what they have learned, invite feedback from others, and contribute to the discussion about building better norms and practices around AI.

The Judicial Branch Artificial Intelligence Committee may reference the following two external resources (and others) to aid in its review of AI systems as well as algorithmic models.

- **Canadian Algorithmic Impact Assessment Tool** – The Algorithmic Impact Assessment (AIA) is a mandatory risk assessment tool intended to support the Treasury Board’s *Directive on Automated Decision-Making*. The tool is a questionnaire that determines the impact level of an automated decision-system. It is composed of 51 risk and 34 mitigation questions. Assessment scores are based on many factors, including the system's design, algorithm, decision type, impact, and data. The AIA was developed based on best practices in consultation with both internal and external stakeholders. It was developed in the open and is available to the public for sharing and reuse under an open license.
- **United States Chief Information Officers Council Algorithmic Impact Assessment** – The AIA is a questionnaire designed to help you assess and mitigate the impacts associated with deploying an automated decision system. The questions are focused on your business processes, your data, and your system design decisions. The questionnaire includes 62-78 questions related to business process, data, and system designed decisions.

4.0 Procedure AI-04 Procurement of AI Solutions and Tools

4.1 Purpose – This document outlines the due diligence process that divisions and units shall follow to procure AI solutions and tools. This procedure is a crucial step to ensure that the chosen solution meets the requirements of the AI policy, aligns with ethical considerations, and is sanctioned by the State of Connecticut Judicial Branch. This procedure applies to all AI software, hardware, appliances, and services.

4.2 Access to AI Models

Within the context of the Judicial Branch’s AI policy and this procedure, there are three (3) types of access to AI models:

1. **Open-Box Model** – Access to the internal logic, parameters, and training data is available.
2. **Closed-Box Model** – Access to the internal logic, parameters, and training data is not available, and only the input and output behavior of the model is known.
3. **Grey-Box Model** – The training data is known but the model internals are unknown.

4.3 Types of AI Software/Hardware

Within the context of the Judicial Branch’s AI policy and this procedure, there are four (4) types of AI software:

1. **Developed AI** – Custom built AI systems where the Judicial Branch is involved in the development and implementation of the system to solve a discrete use case. Developed AI is generally Open-Box because the Judicial Branch can access internal logic, parameters, and training data is available.
2. **Embedded AI** – Solution or tools that are embedded in a software system that the Judicial Branch owns or subscribes to but one where the Branch did not have a role in developing. Embedded AI is generally Closed Box because the Branch does not have access to internal logic, parameters, and training data is not available. Only input and output behavior of the model is known.
3. **Open-Source AI** – Open-source AI is the application of open-source practices to the development of AI systems and tools. Many open-source AI products are variations of other existing tools and technologies which have been shared as open-source software by private companies or a development community or consortium.
4. **Procured AI** – A standalone AI solution or tool that is purchased or licensed by the Judicial Branch for the purpose of developing AI systems.

4.4 Procurement Due Diligence Checklist

Item Description	Check when completed
All AI solutions, regardless of type, must be reviewed and approved by the Judicial Branch’s Artificial Intelligence committee to verify purposeful use and ensure compliance with AI policy.	✓

Judicial Branch divisions and units shall not procure an AI solution unless an evaluation has been conducted to assess impact. Divisions and units shall assess the training data, algorithms, and models for any unintended biases that may impact decision-making and ensure that the solution promotes fairness and inclusivity.	✓
Divisions and units shall not procure an AI solution without verifying that the vendor has conducted an annual certification of their AI solution according to PA 23-16.	✓
Divisions and units shall verify the transparency of the AI solution's decision-making process. Ensure that the solution provides a clear explanation for its outputs, especially in applications such as health, safety, employment, economic opportunity, benefits determination, and other critical public-facing applications.	✓
Divisions and units shall assess the training programs offered by the AI supplier to ensure that staff can effectively use the AI solution. Evaluate the support mechanisms, including response times for issue resolution and ongoing maintenance.	✓

Procuring an AI-based solution requires a systematic and thorough approach to ensure that the chosen solution is in compliance with the AI policy, aligns with purposeful need, and meets ethical standards. This procedure will be reviewed periodically by the Judicial Branch's Artificial Intelligence Committee to adjust for market maturation, divisional feedback, and industry best practices.

Jl-155

October 27, 2023

SYLLABUS

Judicial officers must maintain competence with advancing technology, including but not limited to artificial intelligence.

References: MCJC 2(B), (C), MCJC 3(A)(1), (B)(1), **RI-381**, *Mata v Avianca, Inc.*, 1:22-cv-01461 (S.D.N.Y.), July 7, 2023.

TEXT

Judicial officers, like lawyers, have an ethical obligation to maintain competence with and further educate themselves on advancing technology, including but not limited to artificial intelligence (AI). Rule 1.1 of the Michigan Rules of Professional Conduct (MRPC) provides that “[a] lawyer shall provide competent representation to a client.” The comment to MRPC 1.1 expressly references technological competence.^[1] This need for competence applies to judicial officers as well. Specifically, Canon 3(A)(1) of the Michigan Code of Judicial Conduct provides that “[a] judge should be faithful to the law and maintain professional competence in it.” As the use of technology increases, so does the requirement to maintain competence in what is available, how it is used, and whether the use of the technology in question would affect a judicial decision.

Relevant Code Provisions

Canon 2. A judge should avoid impropriety and the appearance of impropriety in all activities.

- B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person’s race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.
- C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others, but participation in activities allowed in Canon 4 is not a violation of this principle.

Canon 3. A judge should perform the duties of office impartially and diligently. The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- i. A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism. ...

B. Administrative Responsibilities.

- i. A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

DISCUSSION

Artificial intelligence (AI) is not a single piece of hardware or software but a multitude of technologies that provide a computer system with the ability to perform tasks, solve problems, or draft documents that would otherwise require human intelligence. The increasing use of AI and other technological programs and devices requires judicial officers to understand how these tools will affect their conduct and docket in accordance with Canon 3(A)(1). Canon 2(B) provides that, in relevant part (emphasis added):

... At all times, the conduct and manner of a judge should promote public confidence in the integrity and **impartiality** of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person **fairly**, with courtesy and respect.

Further, Canon 2(C) provides that, in relevant part (emphasis added):

A judge should not allow family, social, or other relationships to **influence** judicial conduct or judgment. ...

Canon 2(B) and (C) could be triggered, for example, if a judicial officer uses an AI solution that is considered partial or unfair and may influence the judicial officer's judgment.^[2] This could occur if the tool's algorithm or training data creates bias. Specifically, if an AI tool's algorithm's output deviates from accepted norms, would the output influence judicial decisions in violation of Canon 2(C)? An algorithm may weigh factors that the law or society deem inappropriate or do so with a weight that is inappropriate in the context presented. This is but one example of why knowledge of technology and AI is essential. AI does not understand the world as humans do, and unless instructed otherwise, its results may reflect an ignorance of norms or case law precedent. Competency with advancing technology is further required by Canon 3(B), which requires judicial officers to "maintain professional competence in judicial administration." Legal knowledge, skills, thoroughness, and preparation are required for judicial officers to perform their duties. This includes

knowing the benefits and risks associated with the technology that judicial officers and their staff use daily, as well as the technology used by lawyers who come before the bench.

As the legal community has seen, there are times when AI may be used improperly, i.e., when a lawyer submits AI-generated filings that are found to be incorrect.^[3] Judicial officers have expressed the need to parse cases and rules to ensure that filed pleadings are accurate for them to rely on and to ensure their judgments and orders are issued based on truthful pleadings and arguments. To ensure this, some courts^[4] have issued rulings or orders regarding the use of AI, such as requiring attorney review, placing the responsibility on lawyers to notify the court when using AI, and provide confirmation of the accuracy of the work done by the AI tool. Other judges have gone further and required that attorneys certify that confidential information was not disseminated to an AI tool and that lawyers outline each section that uses generative AI.^[5] However, there are times when, properly used, AI is an asset for the legal community, such as creating accurate content for pleadings and legal summaries, providing efficiency in docket management and legal research, and supplying answers to questions based on algorithms used by technological programs. Judges must determine the best course of action for their courts with the ever-expanding use of AI. As stated in *The Judge's Journal*, "[w]hat all experts agree is that artificial intelligence is not equivalent to human intelligence – and especially the intelligence that we expect from judges."^[6]

Judges need to understand artificial intelligence and the deep learning it eventually acquires for the following reasons:

- Advancing AI will eventually lead to inquiry and adjudication of AI-related technologies and their use in other matters before the court.
- Most artificial intelligence programs continue to learn, which requires adjustments in algorithms and formulas as they receive new and additional data. Due to this learning capacity, AI applications may need to be re-litigated or re-evaluated on an ongoing basis, even when there is precedent addressing the same AI tool.
- Due process will be a challenge when dealing with AI tools, as a litigant cannot question the algorithms and the deep learning the AI tool acquires over time.

Judges must not only understand the legal, regulatory, ethical, and access challenges associated with AI, but they will need to continually evaluate how they or parties before them are using AI technology tools in their own docket.^[7] This could include the use of basic docket management and courtroom tools (AI transcribing tools) and risk assessment tools (in making decisions on sentencing, pretrial release/bond conditions, probation, and parole). Judges must also understand the science and law relating to electronically stored information and e-discovery. Judicial use of AI must distinguish between using an AI application to decide and using AI to inform a decision.

AI is becoming more advanced every day and is rapidly integrating within the judicial system, which requires continual thought and ethical assessment of the use, risks, and benefits of each tool. The most important thing courts can do today is to ask the right questions and place their analysis and application of how they reached their conclusion on the record.

CONCLUSION

Judicial officers have an ethical obligation to understand technology, including artificial intelligence, and take reasonable steps to ensure that AI tools on which their judgment will be based are used properly and that the AI tools are utilized within the confines of the law and court rules. Further, as AI rapidly advances, judicial officers have an ethical duty to maintain technological competence and understand AI's ethical implications to ensure efficiency and quality of justice.

[1] See Ethics Opinion [RI-381](#) for the analysis regarding lawyers having an ethical obligation to understand technology.

[2] See *Artificial Intelligence: Examples of Ethical Dilemmas*, United Nations Educational, Scientific and Cultural Organization (UNESCO), (April 21, 2023)

[3] *Mata v Avianca, Inc.*, 1:22-cv-01461 (S.D.N.Y.), July 7, 2023.

[4] See examples in [Texas](#) and [Illinois](#).

[5] See Judge Stephen Vaden of the U.S. Court of International Trade's [Order](#).

[6] Greenstein, *AI and a Judge's Ethical Obligations*, The Judge's Journal (February 3, 2020).

[7] See American Bar Association, House of Delegates, Resolution 112 (Aug. 12-13, 2019) (urging courts "to address the emerging ethical and legal issues related to the usage of artificial intelligence ('AI') in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI").



JUDICIAL INVESTIGATION COMMISSION

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October 13, 2023

Re: JIC Advisory Opinion 2023-22

Dear _____ :

Your request for an advisory opinion to Counsel was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows:

You have received several inquiries from judges about the use of emerging artificial intelligence (AI) technology and the potential use thereof in the performance of their duties. You believe the appropriate use of AI could be a “workflow gamechanger” that leads to “greater efficiency in the courts.” You acknowledge that much of the available technology is “new, still under development and largely untested.” You are concerned about the ethical implications concerning a judge’s use and application of AI. Specifically, you want to know if a judge can use AI to conduct legal research and to draft documents such as orders and opinions. You also want to know if a judge can use AI to reach decisions in cases? Lastly, you want to know whether there are other ethical issues a judge should consider before utilizing AI?

To address your question, the Commission has reviewed Rules 1.2, 2.1, 2.2, 2.4(B), 2.5(A) and 2.7 of the Code of Judicial Conduct which state:

Rule 1.2 – Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.1 – Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge’s personal and extrajudicial activities.

Rule 2.2 – Impartiality and Fairness

A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartiality.

Rule 2.4 – External Influences on Judicial Conduct

- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.

Rule 2.5 – Competence, Diligence, and Cooperation

- (A) A judge shall perform judicial and administrative duties, competently and diligently.

Rule 2.7 – Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

The Comments to the various Rules provide some instruction to the issues at hand. The Comments to Rule 1.2 state:

- [1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.
- [2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.
- [3] Conduct that compromises or appears to compromise the independence, integrity and impartiality of a judge undermines public confidence in the judiciary. . . .

- [4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.
- [5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Comment [1] to Rule 2.2 states that “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded. Comment [2] provides that “a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.” Comment [3] notes that “a judge sometimes may make good faith errors of fact or law. Errors of this kind do not violate this Rule.” Comment [1] to Rule 2.4 states:

An independent judiciary requires that judges decide cases according to the law and facts without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Comment [1] to Rule 2.5 provides that “[c]ompetence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.” Comment [2] states that “[a] judge should seek the necessary docket time, court staff, expertise and resources to discharge all adjudicative and administrative responsibilities.” Comment [3] states that “[p]rompt disposition of the court's business requires a judge to devote adequate time to judicial duties . . . and expeditious in determining matters under submission.”

Black's Online Law Dictionary 2nd Edition defines “AI” as “a software used to make computers and robots work better than humans. The systems are rule based or neutral networks. It is used to help make new products, robotics, [and] human language understanding.” Webster's Online Dictionary gives two definitions for the term “AI” The first is “a branch of computer science dealing with the simulation of intelligent behaviors in computers.” The second definition, which is the most instructive, states that AI is the “capability of a machine to imitate intelligent human behavior.”

Whether you realize it or not, you already use some form of artificial intelligence in your everyday life: facial recognition on your cell phone; smart email categorization; suggestions from Facebook of new friends; recommendations for what to watch on streaming apps; and navigation sites such as Google Maps. The list is endless. AI has even taken hold within the legal community. In April 2023, it was announced that GPT-4, an AI component, took and passed all parts of the Uniform Bar Exam. The pass rate was in the 90th percentile. Legal search engines like Westlaw, LexisNexis or casetext use AI to let lawyers find more relevant case law for their briefs or correct case sites. The use of E-discovery is just another example of AI encroachment in the law.

So, what does the use of AI mean for judges? Judges have a duty to remain competent in technology, including AI. The duty is ongoing. A judge may use AI for research purposes. Judges must realize though that no AI program is perfect. Older models that rely on keywords to conduct a search only produce results that include the keyword itself. It does not consider concepts or context. Such searches may also fail to produce some relevant results. Keyword searches, while proper and useful, can result in false positives (irrelevant documents flagged because they can contain a search term) or false negatives “relevant documents not flagged since they do not contain a search term. Newer models which rely on concepts instead of words fall into two categories, general use AI and specific use AI. General use AI may produce inaccurate or offensive information. Specific use AI is much better. It reads and understands domain-specific content and usually has verifiable responses. It also tends to be private and secure while general use AI is not. However, specific use AI may have downsides if used for other than its intended purpose.

A judge should **NEVER** use AI to reach a conclusion on the outcome of a case. This is because of perceived biases that may be built into the program. Judges should think of AI as a law clerk, who is often responsible for doing a judge’s research. Importantly, the law clerk never decides the case. The judge alone is responsible for determining the outcome of all proceedings. At the end of the day if the judge somehow violates the Code of Judicial Conduct in reaching a conclusion on the case, he/she cannot say, “the law clerk made me do it” nor can he/she say, “AI made me do it.” The responsibility for the finished product rests solely with the judge. Therefore, just as a judge would do with a law clerk’s work, he/she must check the final draft of any written decision to make sure it contains the most current case law and is error free.

The gray area revolves around the use of drafting AI to prepare an opinion or order. It is one thing to use a product like Microsoft Word that corrects spelling, punctuation, grammar, maintains a built-in thesaurus and provides an editor’s score for the finished document. Those products are perfectly acceptable. However, the use of an AI product to actually draft the findings, conclusions and ultimate decision should be met with extreme caution. The drafting product may have built in biases or over time may

develop perceived biases based on the judge's thought process. AI should never decide the conclusion. As he/she would with a law clerk, the judge must decide which way he/she wants to rule and let the program know in advance to ensure that the product conforms with the decision rendered by the judge. Like the final draft of the law clerk, the judge must review it to ensure that it is what the judge wishes to convey to the parties in any given case and make changes where needed.

Ongoing ethical concerns involve confidentiality pertaining to certain cases like juvenile or abuse and neglect matters. Judges are responsible for ensuring confidentiality and should research the AI product with that in mind and refrain from inputting information that may retain and/or disclose private information. The potential for plagiarism is another possible concern when using AI, so again, it is important to use AI cautiously when drafting documents and to double check the finished product. The time saved by using AI may be non-existent if the judge must spend hours ensuring appropriate attribution has been given.

Based upon the foregoing, the Commission is of the opinion that a judge may use AI for research purposes but may not use it to decide the outcome of a case. The use of AI in drafting opinions or orders should be done with extreme caution. The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,



Alan D. Moats, Chairperson
Judicial Investigation Commission

Artificial intelligence and judicial ethics

March 14, 2024

By [Cynthia Gray](#)

In 2023 the ethical issues raised for judges by the use of artificial intelligence were addressed for the first time in advisory opinions from



The Michigan opinion explains that “artificial intelligence (AI) is not a single piece of hardware or software but a multitude of technologies that provide a computer system with the ability to perform tasks, solve problems, or draft documents that would otherwise require human intelligence.” The West Virginia opinion notes that whether judges realize it or not, they already use some form of AI in their everyday life, citing facial recognition on their cell phone, smart email categorization, friend suggestions from Facebook, recommendations on streaming apps, and navigation sites such as Google Maps.

Both opinions conclude that judges have a duty to maintain competence in technology, including AI.

The Michigan opinion describes why knowledge of AI technology is essential to ensure that a judge’s use of AI does not conflict with the code of judicial conduct. For example, code requirements could be implicated if the algorithm or training data for an AI tool is biased.

Specifically, if an AI tool’s algorithm’s output deviates from accepted norms, would the output influence judicial decisions . . . ? An algorithm may weigh factors that the law or society deem inappropriate or do so with a weight that is inappropriate in the context presented AI does not understand the world as humans do, and unless instructed otherwise, its results may reflect an ignorance of norms or case law precedent.

Further, Michigan stresses the ethics requirement that judicial officers have “competency with advancing technology,” such as “knowing the benefits and risks associated with the technology that judicial officers and their staff use daily, as well as the technology used by lawyers who come before the bench.”

West Virginia advises that a judge may use AI for research but “because of perceived bias that may be built into the program,” “a judge should **NEVER** use AI to reach a conclusion on the outcome of a case” (emphasis in original). The opinion also states that using AI to prepare an opinion or order is “a gray area” that requires “extreme caution.” Thus, the opinion advises judges to think of AI as a “law clerk,” adding that just like a judge “cannot say, ‘the law clerk made me do it,’” they cannot “say, ‘AI made me do it.’” Likewise, the judge must decide which way he/she wants to rule and let the program know in advance to ensure that the product conforms with the decision rendered by the judge. As with the law clerk’s final draft, the judge must review it to ensure accuracy and make changes where needed.

The Michigan opinion concludes: AI is becoming more advanced every day and is rapidly integrating within the judicial system, which requires continual thought and ethical assessment of the use, risks, and benefits of each tool. The most important thing courts can do today is to ask the right questions and place their analysis and application of how they reached their conclusion on the record.

Interested in judicial ethics? Sign up for the [Judicial Conduct Reporter](#) and the [Center for Judicial Ethics blog](#). Does your court have experience with AI? For more information, contact Knowledge@ncsc.org or call 800-616-6164. Follow the National Center for State Courts on [Facebook](#), [X](#), [LinkedIn](#), and [Vimeo](#). For more Trending Topics posts, visit ncsc.org/trendingtopics or subscribe to the [LinkedIn newsletter](#).

In this section



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KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-457

Issued: March 15, 2024

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Subject: The Ethical Use of Artificial Intelligence (“AI”) in the Practice of Law

Question #1: Like other technological advances, does an attorney have an ethical duty to keep abreast of the use of AI in the practice of law?

Answer: Yes.

Question #2: Does an attorney have an ethical duty to disclose to the client that AI is being used with respect to legal matters entrusted to the attorney by the client?

Answer: No, there is no ethical duty to disclose the rote use of AI generated research for a client’s matter unless the work is being outsourced to a third party; the client is being charged for the cost of AI; and/or the disclosure of AI generated research is required by Court Rules.

Question #3: If the effect of an attorney’s use of AI reduces the amount of attorney’s time and effort in responding to a client matter must the lawyer consider reducing the amount of attorney’s fees being charged the client when appropriate under the circumstances?

Answer: Yes.

Question #4: May an attorney charge the client for expenses related to using AI in the legal practice?

Answer: If the client agrees in advance to reimburse the attorney for the attorney’s expense in using AI, and that agreement is confirmed in writing, then yes, the attorney may charge for those expenses. However, similar to the lawyer’s cost of general overhead expenses, the costs of AI training and keeping abreast of AI developments should not be charged to clients.

Question #5: If an attorney utilizes AI in the practice of law, is the attorney under a continuing duty to safeguard confidential client information?

Answer: Yes.

Question #6: Does an attorney using AI have an ethical duty to review court rules and procedures as they relate to the use of AI, and to review all submissions to the Court that utilized Generative AI to confirm the accuracy of the content of those filings?

Answer: Yes.

Question #7: Does an attorney serving as a partner or manager of the law firm that uses AI, and/or supervising lawyers and/or nonlawyers in the law firm who are using AI, have an ethical responsibility of ensuring that policies and procedures regarding AI are in place, and that training has taken place to assure compliance with those policies?

Answer: Yes.

REFERENCES

SCR 3.130 [Kentucky Rules of Professional Conduct] 3.130(1.1) & cmt. (2) & (6); (1.4); (1.5(a) & (b)); (1.6); (1.8); (1.9(c)(1)); (3.1); (3.3); (4.1); (5.1(b)); (5.8); and (8.4).

Cases:

In re Burghoff, 374 B.R. 681 (Bankr. S.D. Iowa 2007) 374 B.R. 681; *Mata vs. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

Ethics Opinions

KBA E-446 (2018); KBA E-403 (1998); KBA E-427 (2007); KBA E-437 (2007); and KBA E-442 (2017); ABA Formal Ethics Op. 08-451 (2008); ABA Formal Opinion 93-370 (1993); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010); Florida Bar Ethics Opinion 24-1 (2024).

Miscellaneous

2023 Year-End Report of the Federal Judiciary" by John G. Roberts, Jr., Chief Justice of the U.S. Supreme Court; American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013; President Joe Biden's Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.

INTRODUCTION

Artificial intelligence ("AI") is defined as "... the use... of computer systems or machines that have some of the qualities that the human brain has, such as the ability to interpret and produce language in a way that seems human, recognize or create images, solve problems, and learn from data supplied to them...."¹ AI is now the latest form of technology that may revolutionize the practice of law. Whether AI is utilized by machine learning such as Google search, by deep learning with voice recognition systems named Siri or Alexa, or Generative AI² ("GAI") in applications known as Chat GPT, Google Bard or Microsoft Bing, the potential use of AI in the

¹ Cambridge English Dictionary at "artificial intelligence."

² The term "generative" has been found to have two neural networks, a generator, and a discriminator, which are trained simultaneously through a competitive process. The generator creates new data, while the discriminator evaluates whether the generated data is authentic or not. This adversarial training process helps the generator improve over time, creating more realistic and convincing content. However, potential misuse comes into play because generative AI can be used to create deepfakes or other deceptive content.

practice of law is unlimited.³

As with all technological advances, attorneys are challenged to meet lawyer ethical responsibilities when utilizing a new product and this applies to AI. Whether the attorney is researching relevant case law, reviewing documents, or drafting court pleadings, care must be taken that the attorney understands how AI works, how it may be used responsibly and in conjunction with the Supreme Court Rules of Professional Conduct.⁴ As U. S. Supreme Court Chief Justice John G. Roberts, Jr., explained, “(A)ny use of AI requires caution and humility.”⁵

The current Rules of Professional Conduct do not specifically address AI, but they do require an attorney to “...keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.”⁶ While the use of AI continues to evolve, some of the suggested benefits of AI for lawyers are:

- ☐ Streamlining legal research to find relevant case law, statutes, and precedents more quickly;
- ☐ Reviewing and analyzing large volumes of documents and summarizing them;
- ☐ Automating repetitive tasks to reduce the requirement for extensive manual labor;
- ☐ Detecting deception in emails or documents;
- ☐ Predicting case outcomes and legal trends based upon historical data;
- ☐ Expediting responses to client inquiries;
- ☐ Providing around-the-clock access to legal information and resources;
- ☐ Reducing legal expenses to the client due to accelerated research and document preparation.

Although the use of AI in the practice of law is relatively new, certain risks have already become apparent, including but not limited to:

- AI may struggle to grasp complex legal concepts which can produce inaccuracies and misinterpretations;
- AI models trained on biased data may perpetuate biases in the legal decision-making process;
- AI lacks transparency because of its use of AI algorithms which operate as “black boxes” making it difficult to understand how AI arrived at its conclusions;.

³ When ChatGPT was asked to explain how it functions and compares to other AI providers, ChatGPT answered, in general, as follows:

ChatGPT is based on Generative Pre-trained Transformer architecture and is trained using a diverse range of internet text but does not have specific knowledge about the details of individual documents or sources. Other AI providers use different architectures, training datasets, and methods. For example, Google’s BERT (Bidirectional Encoder Representations from Transformers) focuses on bidirectional context understanding. Further, ChatGPT is designed for natural language understanding, making it suitable for conversational applications, and content generation. Other AI providers may offer a broader range of services, including image recognition, speech processing, and domain-specific applications. Finally, ChatGPT advises that it has options for users to fine-tune models for specific tasks, while other providers may offer more customization options, allowing developers to fine-tune models for specific use cases.

⁴ SCR 3.130 et seq.

⁵ “2023 Year-End Report of the Federal Judiciary” by John G. Roberts, Jr., Chief Justice

⁶ SCR 3.130(1.1), Comment (6).

- AI's generative training may result in the disclosure of confidential client information ;
- AI may provide false information including citations to nonexistent legal "authorities;" and,
- AI may provide duplicative and/or irrelevant materials which may increase discovery production expenses.

The Ethics Committee has issued Ethics Opinions discussing the ever-changing environment of technology and its application to the Rules, and many of these Opinions are applicable to AI.⁷ In addition to the guidance provided by these Opinions, we caution lawyers that before using an AI product they review the provider's privacy policies and its disclaimers in handling client and attorney information.

Due to the many concerns surrounding the impact AI has to the ethical requirements of lawyers, the Kentucky Bar Association formed a Task Force on Artificial Intelligence and the Task Force is considering a lawyer's responsible use of AI. Until the Task Force's work is completed, and years of usage have passed, lawyers should be mindful that it may be difficult or impossible to answer many questions regarding the ethical use of AI. Further, we do not address Kentucky's Advertising Rules which may come into play if a lawyer intends to advertise the use of AI because the Advertising Rules raise issues beyond the scope of this Committee's authority.

In the interim it is intended that this Opinion will provide some practical guidance while the Task Force explores multiple AI issues and whether amendments to the Rules of Professional Conduct are appropriate to address the unique applications a lawyer faces in the use of AI. The following commentary is a review of what we today consider the most crucial ethical issues when using an AI tool; however, lawyers must be mindful to the future implications of using AI services and the Rules governing lawyer conduct.⁸

COMPETENCE

SCR 3.130(1.1) mandates that "(a) lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Two of the Supreme Court's Comments to the Rules elaborate on the scope of the competency requirement. The first point is Comment 2, as follows:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. ... Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation

⁷ See, KBA E-446; KBA E-403; KBA E-427; KBA E-437; and KBA E-442. For example, in E-437 the Committee considered a new development in technology (cloud computing) and while the Opinion is not directly applicable to the use of AI, many of the Committee's comments would apply when a lawyer uses AI. The Committee opined that lawyers may use cloud computing but must follow the Rules with regard to safeguarding client confidential information, act competently in using cloud computing, properly supervise the provider of the cloud service, and communicate with the client about cloud computing.

⁸ We remind lawyers that the ethical implications of using AI also apply to all of a lawyer's non-lawyer activities; specifically, "a lawyer is a lawyer is a lawyer" and the Rules of Professional Conduct apply to all of a lawyer's actions. SCR 3.130(5.8) ("Responsibilities regarding law-related services").

can also be provided through the association of a lawyer of established competence in the field in question.

The second point is Comment 6, as follows:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Therefore, attorneys have a continuing ethical responsibility to maintain competence in their law practice, and reliance upon technology to do so is just another aspect of the competency requirement.

Indeed, for many years lawyers have used technology to not only attain competency in the practice of law, but also to maintain their competence by utilizing computer research resources, including Westlaw, LexisNexis, and Decisis, all of which are readily available. Internet research also provides an additional level of resources for an attorney to best serve their clients' needs. In addition, many lawyers are now required to take training in, and become competent in, the use of electronic filing in state and federal courts, as well as in most administrative proceedings.

Attorneys have already been using AI whether they realize it or not. "Spell check," "grammar search" and the auto correcting function on most emails employ AI, as do the Shephardizing functions of legal research tools. We are told that these functionalities only scratch the surface of what AI may be able to do for the practice of law in this ever-changing dynamic of the technological revolution. As with any new advance in technology, lawyers are expected to know how to use AI to maintain competence because, it is argued, it will allow lawyers to provide better, faster, and more efficient legal services, and at a reduced cost to the client. In the near future, using AI may become as commonplace as an attorney's current use of other technological systems which have now become an indispensable part of the practice of law.

There are many AI resources now available to the lawyer, and there is much discussion about what AI resources are on the horizon, therefore, as AI tools become more refined, and their use in the legal profession becomes more widespread, lawyers need to be aware that not using an available AI tool may constitute a failure to meet the lawyer's duty of attaining and maintaining competence under Rule 1.1. For example, legal research may be more comprehensive using an AI-generated function of computer research programs. At the same time, understanding how AI works, (a) may enable an attorney to better respond to an opponent's arguments or theories, or (b) better analyze the evidence presented by the attorney's adversary. In essence, the rapid development of AI poses challenges for attorneys to continuously update their knowledge base in order to maintain their competence.

COMMUNICATION

Consideration should be given to whether a lawyer has an ethical duty to advise the client that AI is being utilized in respect to their matters. SCR 3.130(1.4)⁹ requires that a lawyer keep the

⁹ (a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be

client reasonably informed about the status of their matter, to promptly inform the client of any decision or circumstance which requires the client's informed consent, and to obtain the client's informed consent of such decision or circumstance. Further, the attorney is required to "reasonably consult" with the client about the means by which the client's objectives are to be accomplished.¹⁰ The word "reasonably" is intended to preclude an interpretation that the lawyer would always be required to consult with the client when a particular act is impliedly authorized.¹¹ The Rule's Comments explain that the lawyer is to provide the client with sufficient information to participate intelligently in decisions concerning the means by which the client's objectives are to be pursued.¹² Thus, routine use of AI generated research in a client's matter does not in and of itself require specific communication to the client, unless the client is being charged for the cost of the research,¹³ a third party service is being utilized to provide the AI research, or if the disclosure of the use of AI generated research is required by Court or other rules.¹⁴

Moreover, it is clear from prior opinions that when an attorney employs third party providers, or outsources a client's work, that communication of the "means" by which a representation is to be accomplished requires that clients should be informed of such outsourcing.¹⁵ If an outside AI service will be receiving information protected by the lawyer's duty of confidentiality under SCR 3.130(1.6), then obtaining client consent is required. Further, as discussed below, the attorney should also have an agreement with the client about who is responsible for paying the cost of such outsourced services.

LAWYER'S CHARGES FOR FEES & EXPENSES

As with other uses of technology, the lawyer's charging of fees and expenses to a client remains subject to the reasonableness standards of SCR 3.130(1.5(a) and (b)).¹⁶ These standards

accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

¹⁰ See SCR 3.130(1.4(a)(2)).

¹¹ See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013, at 77 (2013).

¹² SCR 3.130(1.4) Supreme Court Commentary at (3) and (4).

¹³ See the portion of this opinion regarding "Lawyers' Charges for Fees & Expenses."

¹⁴ See the portion of this opinion regarding "Duty to Comply with Court Rules When Using AI."

¹⁵ See ABA Formal Ethics Op. 08-451 (2008); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010).

¹⁶ (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

provide the following two primary points in charging a client when the lawyer has used AI. First, a reduced fee may be appropriate when a lawyer obtains an expeditious on point response to the client's matter because in all cases a lawyer's fee must be reasonable. Accordingly, the attorney's charge for legal services must be adjusted to recognize the reduced legal work devoted to a client's matter when there is a successful result by virtue of using AI. Second, if there are expenses associated with the use of AI, then who will bear the cost of implementing AI services, such as paying for online usage, and/or reimbursing a third-party provider? If the client is to bear these expenses, then before the charge can be made, the client's written consent must first be obtained.

Regarding the attorney's billings for client services and expenses, the essence of Rule 1.5 and the Supreme Court's Comments to the Rule, require that a lawyer provide the client with information about the lawyer's fees and expenses, and then render billing statements that adequately apprise the client as to the basis for the attorney's billing and how it has been determined. Advanced discussion with the client as to how AI expenses are to be paid are as necessary as the agreement with the client as to the basis or rate of the lawyer's fees. Ethics rules suggest that a written statement that confirms the terms of the engagement with the client "... reduces the possibility of misunderstanding."¹⁷ If the lawyer intends to charge the client for AI expenses and the client agrees to pay these expenses, then the lawyer should explain, in writing and in advance, the anticipated cost of those expenses, the basis for the cost being billed, and the terms of payment.¹⁸ There is an exception when the lawyer has regularly represented the client on an already existing basis, but with any changes in the billing procedure being communicated to the client.¹⁹

With regards to the time savings that an attorney using AI services may generate, an earlier ABA Formal Opinion²⁰ provided guidance which the attorney will continue to find helpful in determining the propriety of the lawyer's billing methods. The ABA Opinion explains that a lawyer is obliged to pass the benefits of economies on to the client. Thus, the use of AI programs may make a lawyer's work more efficient, and this increase in efficiency must not result in falsely

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- (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

¹⁷ See Comment (2) When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

¹⁸ See, SCR 3.130(1.5), Comments 2 and 3.

¹⁹ See, SCR 3.130(1.5(a)&(b)).

²⁰ ABA Formal Opinion 93-370 (December 6, 1993).

inflated claims of time.

It should be obvious that lawyers may not charge a client for hours not actually spent on a client's matter. In the case of *In re Burghoff*,²¹ the court found that the attorney's brief contained an extraordinary amount of research, and the attorney was directed to certify to the Court the author of two submitted briefs. The Court found that 17 of the 19 pages of one brief were verbatim excerpts from an article the lawyer found on the internet which had not been attributed to the article's author. The Court held, first, that it was a violation of the ethics Rules for an attorney to "...engage in conduct involving dishonesty, fraud, deceit, or misrepresentation ... by committing plagiarism, ...".²² Further, the Court found that the attorney violated the ethics Rules by charging his client for 25.5 hours of legal work in preparing the briefs which was unreasonable given the actual labor invested in copying the article from the internet. Charging an unreasonable fee for "legal work" was also considered a form of attorney misconduct.²³

While the total impact and costs for AI remain unknown, lawyers must consider the ethical requirements of SCR 3.130(1.5); specifically, including the following:

- Costs incurred in learning about AI, in maintaining AI provided services, and keeping up to date with changes in its use, should be considered like any other continuing legal education expense, and a part of the lawyer's overhead.
- Lawyers charging their clients on an hourly basis cannot submit inflated bills for hours not actually spent on their case, and savings generated by using AI, like other technologies, should be passed on to the client.
- Lawyers may request that their client reimburse them for the costs incurred in using AI services, but only after first explaining the anticipated cost, and also obtaining the client's agreement to reimburse the attorney for the expense.

CONFIDENTIALITY OF CLIENT INFORMATION

There is no ethical duty more sacrosanct than the requirement that an attorney not reveal information relating to a client, or the fact of the attorney's representation of that client, without the client's informed consent. SCR 3.130(1.6) is clear: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted ..." under a specific exception to the Rule.²⁴ Additional Rules extend this nondisclosure duty to information provided to an attorney by a prospective client,²⁵ as well as to information obtained by the attorney in the representation of a former client.²⁶ The nondisclosure duty is broad, inasmuch as "(t)he confidentiality rule, for example, applies not only to matters communicated in confidence by the

²¹ 374 B.R. 681 (Bankr. S.D. Iowa 2007) 374 B.R. 681.

²² *Ibid*, at page 683.

²³ *Id*.

²⁴ Paragraph (b) to SCR 3.130(1.6) creates exceptions to the disclosure prohibition in those circumstances where the "... lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to secure legal advice about a lawyer's compliance with these Rules..." or (3) to establish a claim or defense on behalf of a lawyer and the client, or in defense of a criminal or civil charge made by the client against the lawyer, or "(4) to comply with another law or a court order."

²⁵ *See*, SCR 3.130(1.8).

²⁶ *See*, SCR 3.130(1.8(b)) and (1.9(c)(l)).

client, but also to all information relating to the representation, whatever its source.”²⁷

It is well known that “AI is making it easier to extract, re-identify, link, infer, and act on sensitive information about people’s identities, locations, habits, and desires. AI’s capabilities in these areas can increase the risk that a client’s personal data could be exploited and exposed.”²⁸ To prevent or reduce this risk of disclosure, the attorney must ensure that the use and the retention of confidential client information by an AI provider is secure and avoids confidentiality risks. In order to confirm the confidentiality of client information, the attorney should understand how generative AI products are being used and then not input any client information that lacks reasonable and adequate security protections unless, of course, client consent is first obtained. Some generative AI products utilize inputted information or uploaded documents such as pleadings or contracts to train itself, or to share that information with third parties. Therefore, the attorney should review the “terms of use” of any AI product and the provider’s disclaimers in order to understand whether the AI provider shares inputted information with a third party or will utilize the lawyer’s inputted information for its own purposes.

Hence, an attorney should take care that any information inputted into a generative AI product does not identify the client or the nature of the representation. Historically, attorneys have relied upon hypotheticals to discuss legal or factual issues relating to a client’s representation; however, the use of hypotheticals is only permissible as long as there is no reasonable likelihood that anyone will be able to determine who the client is or what the client matter involves.²⁹ The sophistication of generative AI which allows the attorney to have near-human conversations by asking questions with AI responding calls into question whether the use of a hypothetical can be disguised sufficiently to avoid confidential client information from being disclosed.

There are GAI systems that promise that the provider will not send a client’s information off-site, or host or share third party content. If that promise is confirmed in writing, then it may be allowable to input the client’s confidential information with that provider. However, it still may be difficult, or even impossible to determine whether client information has been kept confidential and once the information has been disclosed it has not yet been judicially determined whether sharing information with an AI program would render that information discoverable, and/or result in waiving claims of attorney-client privilege. Because these questions are currently unanswered, lawyers are advised to maintain a healthy dose of skepticism of AI programs and should proceed with caution.³⁰

Two final points on this issue: first, if the attorney intends to utilize AI and is concerned that despite taking appropriate preventative measures confidential client information will be inadvertently disclosed, then SCR 3.130(1.6) allows disclosure of client information if the client gives “informed consent.”³¹ The attorney should discuss with the client the proposed use of AI, the applications of AI to be utilized, the risks and benefits of the AI product, and fully explain

²⁷ See, SCR 3.130(1.6), Comment (3).

²⁸ President Joe Biden’s Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.

²⁹ See, SCR 3.130(1.6), Comment (5).

³⁰ The words of President Reagan: “trust but verify” come to mind – this is what we need to do.

³¹ See, SCR 3.130(1(e)) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

privacy concerns. With the informed consent of the client, the attorney should be able to meet this Rule's ethical obligations. We recognize there are some states that are considering ethics rules requiring clients to give advance permission before an attorney may use AI on their legal matters, but at this time Kentucky does not have any similar pending rules.

Second, using AI may expose a host of cybersecurity threats to the law firm, including phishing, social engineering, and malware. "We use ChatGPT differently than the way we use other types of searches, and therefore any vulnerabilities in ChatGPT become exacerbated and are much more likely to lead to the exposure of privileged information."³²

DUTY TO COMPLY WITH COURT RULES WHEN USING AI

"A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (or) (2) fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."³³ Accordingly, attorneys have an ethical duty to ensure that legal authorities presented to the Court are accurate. GAI tools are known to sometimes produce erroneous and often fictitious responses to inquiries that may seem credible, called "hallucinations." Attorneys who use AI provider services like ChatGPT have a responsibility to check their pleadings for accuracy in their references to both facts and legal citations. Citing non-existent judicial opinions, false quotes and fake citations in filings with the court have caused the judiciary to take notice, and in some instances the attorneys have been sanctioned for their inaccuracy and misleading pleadings. Two New York lawyers were recently sanctioned after the Court found they filed a brief that contained numerous fake, GAI case law citations, when they later failed to "come clean" with the Court about their use.³⁴ Since then several federal and specialty courts, and at least one state court, have adopted rules requiring attorneys using AI programs to review, and verify any computer-generated content, and then certify that fact to the courts with their filings.³⁵

In light of the everchanging nature of AI and the adoption of different court practice rules,³⁶ attorneys are reminded that they are responsible to understand the court rules and procedures to competently represent a client in those courts in which they are practicing, including those rules related to AI.³⁷ The attorney should check, and keep abreast of any rules, orders or other court procedures implemented in the jurisdiction in which the attorney is practicing that may require additional certifications as it relates to filings prepared by utilizing GAI products.

³² Mark D. Rasch, lawyer, cybersecurity, and data privacy expert, quoted in "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers?," American Bar Association Journal (June, 2023).

³³ SCR 3.130(3.3(a)).

³⁴ *Mata vs. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

³⁵ U.S. District Court for the Eastern District of Texas. U.S. District Judge Brantley Starr of the Northern District of Texas is one of the first U.S. Judges to require lawyers to certify that they did not use AI to draft their filings without a human checking their accuracy. In addition, the United States Court of Appeals for the Fifth Circuit has pending a similar certification requirement, and notes that lawyers who misrepresent their compliance with this certification could be sanctioned and have their filings stricken of record.

³⁶ Utah has established rules concerning the use of GAI and restricts judicial officers and court employees to using ChatGPT(version 3 or 4); Claude.ai(Beta); and Bard (Experiment) for all court-related work.

³⁷ See, SCR 3.130(1.1).

If an attorney later discovers an inaccuracy, then the attorney is required to correct the inaccuracy, and to notify the Court of any misleading statements. Without a doubt, if the Court questions the attorney's filings that include fake cases, the attorney must be candid with the Court and explain the error. Failure to do so not only subjects the attorney to potential sanctions by the Court but may also result in disciplinary action for the attorney for noncompliance with the Rules.³⁸

SUPERVISING ATTORNEYS' RESPONSIBILITIES WHEN USING AI

SCR 3.130(5.1) requires a partner in a law firm, as well as an individual lawyer who exercises managerial authority over others, to make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules." Lawyers who have direct supervisory authority over another lawyer are similarly responsible to ensure the other lawyer complies with the Rules.³⁹ Having policies and procedures relating to the use of AI in the law firm may reduce potential disclosure of confidential client information and ensure that generative AI is being used appropriately. "AI systems keep challenging old conceptions of things like security, privacy, and fairness. But at another level, they just reinforce existing best practices."⁴⁰ These issues were discussed in KBA E-446 relating to cybersecurity and confirmed that law firm partners, managers of attorneys, and any attorneys supervising other attorneys are required to ensure that all of the firm's attorneys, as well as nonlawyer assistants, employees, or independent contractors who are under their supervision, comply with the Rules of Professional Conduct. This requirement places an enhanced responsibility upon those managerial attorneys to prescribe policies and procedures to reduce the risk of disclosure of confidential information when using AI, as well as to explain the permissible uses, as well as the known risks of AI.

The following comments of Florida Bar Ethics Opinion 24-1 are appropriate to this topic:

(A) lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence [Kentucky SCR 3.130(4.1)], avoidance of frivolous claims and contentions [Kentucky SCR 3.130(3.1)], candor to the tribunal [Kentucky SCR 3.130(3.3)], and truthfulness to others [Kentucky SCR 3.130(4.1)], in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

The Committee does not intend to specify what AI policy an attorney should follow because it is the responsibility of each attorney to best determine how AI will be used within their law firm and then to establish an AI policy that addresses the benefits and risks associated with AI products. The fact is that the speed of change in this area means that any specific recommendation will likely be obsolete from the moment of publication. At the very least lawyers must take care

³⁸ See, SCR 3.130(8.4).

³⁹ See, SCR 3.130(5.1(b)).

⁴⁰ "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers" by Matt Reynolds, American Bar Association Journal (June, 2023).

to address the use of any form of AI, what risk is associated with it, and what steps can be taken to avoid release of client information. As a part of this process, it is appropriate to review the law firm's existing cybersecurity policies so as to take AI into consideration.

The establishment of policies and procedures to deal with AI is an important step in meeting a lawyer's ethical obligations but it is not the end of the lawyer's duties. "All lawyers must make sure that subordinate attorneys, interns, paralegals, case managers, administrative assistants, and external business partners all understand necessary data and security practices and the critical role that all parties play in ensuring the protection of client information."⁴¹ Creating a culture of security and privacy of client information may be best attained through training everyone on the law firm's AI policies and focusing on human error and behavior. "Humans are ... involved in more than 80% of data breaches, whether they've clicked on a phishing email or they've just done something stupid."⁴²

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

⁴¹ KBA Ethics Opinion E-446, quoting Drew T. Simshaw in the American Journal of Trial Advocacy.

⁴² Sharon Nelson, president of Sensei Enterprises, as quoted in ABA Journal, *supra* at 4.

Exhibit 11

Informal Opinion Number: 2024-11

Adoption Date: April 25, 2024

Rules: 4-1.1, 4-1.6, 4-3.3, 4-3.4, 4-5.1, 4-5.3, 4-5.4

Client-Lawyer Relationship; Advocate; Law Firm and Associations
Competence; Confidentiality of Information; Candor Toward the Tribunal; Duties to Opposing Party and Counsel and Ethical Obligations to Follow Court Orders and Rules; Responsibilities of Partners, Managers, and Supervisory Lawyers; Responsibilities Regarding Nonlawyer Assistants

Subject: Candor to the Court or Tribunal; Competence; Confidentiality; Supervision of Nonlawyers

Summary: lawyer's use of generative artificial intelligence (AI)

Question: Lawyer would like to use generative artificial intelligence (AI) platforms and services in Lawyer's practice and asks for guidance regarding whether Lawyer may ethically use this emerging technology. What ethical issues should Lawyer consider in developing a policy to use this technology in Lawyer's practice within Law Firm?

Answer: Various forms of artificial intelligence are used by lawyers every day. However, Lawyer rightly has distinguished that generative artificial intelligence, a type of AI wherein the platform being used is learning and further developing from each query or task to generate new content and produce an appropriate response in this context to assist Lawyer, requires an examination of ethical considerations just as any other new technology service or device does that is being considered for implementation into Law Firm's use. In developing a policy to use generative artificial intelligence platforms within Law Firm, this office provides the following initial guidance as an Informal Opinion on the subject of generative artificial intelligence. The Informal Opinion is not intended to be an exclusive list of ethical considerations, as all of the Missouri Rules of Professional Conduct pursuant to Rule should be considered, but it is

intended to address key ethical considerations to the question presented. Lawyer should also analyze other legal considerations outside the scope of an informal opinion.

It is important to note that this is not the first time that an Informal Opinion has addressed technology considerations for lawyers. Lawyer may also gain guidance and understanding from reviewing other technology-related Informal Opinions including: 2023-09 (lawyers may not use third-party payment programs where advance paid legal fees or expense are not deposited directly in a client trust account); 2021-13 (metadata); 2020-26 (theft of laptop, cell phone, bar card, and credit cards; loss of client confidential information); 2018-10 (crowdfunding); 2018-09 (cloud computing); and 990007 (email).

First, Lawyer must consider the duty of competence in the appropriateness of use of generative AI. Rule 4-1.1 – Competence, states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [6] to Rule 4-1.1 provides guidance that part of that duty of competence by stating that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.” [emphasis added.] Lawyer should get education and training to ascertain what types of generative AI are and are not appropriate for use by Law Firm. Not all generative AI platforms and services are intended for use by lawyers, and Lawyer must understand the risks and benefits of implementing use of these technologies.

Second, Lawyer must consider confidentiality. Rule 4-1.6(a) on confidentiality generally prohibits a lawyer from revealing information related to a representation of a client unless an exception is met. That means that Lawyer needs to carefully assess any generative AI platforms or services that will be used by Law Firm to ensure confidentiality of client information is maintained. Lawyer should carefully consider such factors as the terms and conditions of using a generative AI platform or service to understand the security of the information being inputted, how that information is being used by the platform or service, and what data sources the platform or service is using to produce responses to prompts or queries.

See Informal Opinion 2018-04 (cloud computing) and Informal Opinion 2021-12 (virtual practice).

Additionally, Rule 4-1.6(c) states that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.” Comment [15] to Rule 4-1.6 provides guidance that lawyers are required to act competently to safeguard client confidential information and creates three categories for doing so: (1) unauthorized access by third parties; (2) inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client; and (3) inadvertent or unauthorized disclosure by those subject to the lawyer’s supervision. In describing these categories, Comment [15] to Rule 4-1.6 references Rule 4-1.1 (Competence), Rule 4-5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), and Rule 4-5.3 (Responsibilities Regarding Nonlawyer Assistants). Comment [15] to Rule 4-1.6 also provides factors that lawyers should consider as to the reasonableness of efforts to safeguard client confidential information, and it includes a reference that state or federal data privacy laws outside the Rules of Professional Conduct may require additional safeguards over client confidential information or notification in the event of a loss of, or unauthorized access to, such information. In considering the use of a generative AI platform or service, lawyers are required to make reasonable efforts to safeguard client confidential information in accordance with Rule 4-1.6(c) and Lawyer should consider the guidance of Comment [15] as to how client confidential information will be safeguarded.

Further, Comment [16] to Rule 4-1.6 provides guidance as to reasonable precautions “[w]hen transmitting a communication that includes information relating to the representation of a client....” Lawyer should consider the guidance from Comment [16] to Rule 4-1.6 to the extent use of a generative AI platform or service may include transmission of client confidential information.

Third, to the extent court orders or court rules implicate the use of any generative AI platform or service, Lawyer should be mindful of the obligation pursuant to Rule 4-3.4(c) that prohibits knowingly disobeying an obligation under the rules of a tribunal.

Fourth, Lawyer and Law Firm must protect and maintain professional independence and independent professional judgment as required by Rule 4-5.4 and not rely solely on content created by a generative AI platform or service.

Fifth, if Lawyer or members of Law Firm use content produced with the assistance of a generative AI platform or service, just as any other time a lawyer is being assisted by a nonlawyer, there is a professional responsibility to verify the accuracy and content of the product in accordance with Rule 4-5.3. Professional responsibilities regarding nonlawyers outside the firm, including service providers, are addressed by guidance in Comments [3] and [4] to Rule 4-5.3. See Informal Opinion 2021-12 (virtual practice); Informal Opinion 2021-03 (contract with vendor for disposal of client files); and Informal Opinion 2018-04 (cloud computing). Per Rule 4-5.3(c), if Lawyer has managerial authority or supervisory authority, Lawyer is ethically responsible for conduct that would be a violation of the Rules of Professional Conduct if engaged in by Lawyer if Lawyer orders or with specific knowledge of the conduct ratifies it, or knows of the conduct at a time when its consequences could have been avoided or mitigated, but Lawyer failed to take reasonable remedial measures. See Informal Opinion 2022-07 (email sent to incorrect address); Informal Opinion 2021-12 (virtual practice); and Informal Opinion 2017-02 (lawyer's responsibilities when a nonlawyer assistant breaches confidentiality).

Sixth, in developing this generative AI use policy, Lawyer and Law Firm should also consider supervisory responsibilities in relation to Rule 4-5.1, which requires managers and supervisors to ensure that other lawyers in the firm conform to the Rules of Professional Conduct. Per Rule 4-5.1(c), a lawyer with such responsibility within Law Firm is responsible for the conduct of another lawyer's violation of the Rules of Professional Conduct if the lawyer orders, or with specific knowledge of the conduct ratifies it or otherwise fails to take reasonable remedial action at a time when the lawyer knows of the conduct and consequences can be avoided or mitigated. See Informal Opinion 2021-12 (virtual practice). An ethical framework for the use of generative AI, if Lawyer and Law Firm decide to use it, should be developed, and, just as with any other resource or tool used in the practice of law, appropriate training should be provided to educate lawyers and nonlawyers. See Rule 4-5.1 and 4-5.3.

Seventh, Lawyer and Law Firm should consider how use of generative AI may impact the reasonableness of fees pursuant to Rule 4-1.5(a).

Finally, use of a product of generative AI can also implicate Rule 4-3.3 – Candor Toward the Tribunal. Rule 4-3.3(a) states that “[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” At this point, generative AI tools are not always accurate, thereby requiring the careful attention to competence and supervision as outlined above to avoid any false statement of material fact or law to a tribunal. See Informal Opinion 2020-25 (remedial measures when lawyer learns of false information filed in connection with dissolution matter) and Informal Opinion 2020-24 (false testimony of client at deposition).

Informal Opinions are ethics advisory opinions issued by the Office of Legal Ethics Counsel to members of the Bar about Rule 4 (Rules of Professional Conduct), Rule 5 (Complaints and Proceedings Thereon), and Rule 6 (Fees to Practice Law) pursuant to Missouri Supreme Court Rule 5.30(c). Written summaries of select Informal Opinions are published for informational purposes as determined by the Advisory Committee of the Supreme Court of Missouri pursuant to Rule 5.30(c). Informal opinion summaries are advisory in nature and are not binding. These opinions are published as an educational service and do not constitute legal advice.

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT**

**PRACTICAL GUIDANCE FOR THE USE OF
GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW**

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

The following Practical Guidance is based on current professional responsibility obligations for lawyers and demonstrates how to behave consistently with such obligations. While this guidance is intended to address issues and concerns with the use of generative AI and products that use generative AI as a component of a larger product, it may apply to other technologies, including more established applications of AI. This Practical Guidance should be read as guiding principles rather than as "best practices."

PRACTICAL GUIDANCE

Applicable Authorities	Practical Guidance
Duty of Confidentiality Bus. & Prof. Code, § 6068, subd. (e) Rule 1.6 Rule 1.8.2	Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security. A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client. A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols. A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.
Duties of Competence and Diligence Rule 1.1 Rule 1.3	It is possible that generative AI outputs could include information that is false, inaccurate, or biased. A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law. Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product. Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer. AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for

Applicable Authorities	Practical Guidance
	accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results. A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.
Duty to Comply with the Law Bus. & Prof. Code, § 6068(a) Rule 8.4 Rule 1.2.1	A lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools. There are many relevant and applicable legal issues surrounding generative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns. A lawyer should analyze the relevant laws and regulations applicable to the attorney or the client.
Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers Rule 5.1 Rule 5.2 Rule 5.3	Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm's lawyers and non lawyers' conduct complies with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use. A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations.

Applicable Authorities	Practical Guidance
Communication Regarding Generative AI Use Rule 1.4 Rule 1.2	A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client. The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use. A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.
Charging for Work Produced by Generative AI and Generative AI Costs Rule 1.5 Bus. & Prof. Code, §§ 6147–6148	A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI. Costs associated with generative AI may be charged to the clients in compliance with applicable law. A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI.
Candor to the Tribunal; and Meritorious Claims and Contentions Rule 3.1 Rule 3.3	A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court. A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.
Prohibition on Discrimination, Harassment, and Retaliation Rule 8.4.1	Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees). Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.

Applicable Authorities	Practical Guidance
Professional Responsibilities Owed to Other Jurisdictions Rule 8.5	A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.

FLORIDA BAR ETHICS OPINION
OPINION 24-1
January 19, 2024

Advisory ethics opinions are not binding.

Lawyers may use generative artificial intelligence (“AI”) in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program’s policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer’s ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

- RPC:** 4-1.1; 4-1.1 Comment; 4-1.5(a); 4-1.5(e); 4-1.5(f)(2); 4-1.5(h); 4-1.6; 4-1.6 Comment; 4-1.6(c)(1); 4-1.6(e); 4-1.18 Comment; 4-3.1; 4-3.3; 4-4.1; 4-4.4(b); Subchapter 4-7; 4-7.13; 4-7.13(b)(3); 4-7.13(b)(5); 4-5.3(a)
- OPINIONS:** 76-33 & 76-38, Consolidated; 88-6; 06-2; 07-2; 10-2; 12-3; ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 498 (2021); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993); Iowa Ethics Opinion 11-01; New York State Bar Ethics Opinion 842
- CASES:** *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023); *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992); *The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002); *Att’y Grievance Comm’n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006)

The Florida Bar Board of Governors has directed the Board Review Committee on Professional Ethics to issue an opinion regarding lawyers’ use of generative artificial intelligence (“AI”). The release of ChatGPT-3 in November 2022 prompted wide-ranging debates regarding lawyers’ use of generative AI in the practice of law. While it is impossible to determine the impact generative AI will have on the legal profession, this opinion is intended to provide guidance to Florida Bar members regarding some of the ethical implications of these new programs.

Generative AI are “deep-learning models” that compile data “to generate statistically probable outputs when prompted.” IBM, *What is generative AI?*, (April 20, 2023), <https://research.ibm.com/blog/what-is-generative-AI> (last visited 11/09/2023). Generative AI can create original images, analyze documents, and draft briefs based on written prompts. Often, these programs rely on large language models. The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine

how a program came to a specific result. Tsedel Neeley, 8 Questions About Using AI Responsibly, Answered, Harv. Bus. Rev. (May 9, 2023).

While generative AI may have the potential to dramatically improve the efficiency of a lawyer's practice, it can also pose a variety of ethical concerns. Among other pitfalls, lawyers are quickly learning that generative AI can "hallucinate" or create "inaccurate answers that sound convincing." Matt Reynolds, vLex releases new generative AI legal assistant, A.B.A. J. (Oct. 17, 2023), <https://www.abajournal.com/web/article/vlex-releases-new-generative-ai-legal-assistant> (last visited 11/09/2023). In one particular incident, a federal judge sanctioned two unwary lawyers and their law firm following their use of false citations created by generative AI. *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023).

Even so, the judge's opinion explicitly acknowledges that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance." *Id.* at 1.

Due to these concerns, lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.

Confidentiality

When using generative AI, a lawyer must protect the confidentiality of the client's information as required by Rule 4-1.6 of the Rules Regulating The Florida Bar. The ethical duty of confidentiality is broad in its scope and applies to all information learned during a client's representation, regardless of its source. Rule 4-1.6, Comment. Absent the client's informed consent or an exception permitting disclosure, a lawyer may not reveal the information. In practice, the most common exception is found in subdivision (c)(1), which permits disclosure to the extent reasonably necessary to "serve the client's interest unless it is information the client specifically requires not to be disclosed[.]" Rule 4-1.6(c)(1). Nonetheless, it is recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information.

Rule 4-1.6(e) also requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation." Further, a lawyer's duty of competence requires "an understanding of the benefits and risks associated with the use of technology[.]" Rule 4-1.1, Comment.

When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations. For generative AI, this specifically includes knowledge of whether the program is "self-learning." A generative AI that is "self-learning" continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters. Neeley, *supra* n. 2. Use of a "self-learning" generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties.

Existing ethics opinions relating to cloud computing, electronic storage disposal, remote paralegal services, and metadata have addressed the duties of confidentiality and competence to prior technological innovations and are particularly instructive. In its discussion of cloud computing resources, Florida Ethics Opinion 12-3 cites to New York State Bar Ethics Opinion 842 and Iowa Ethics Opinion 11-01 to conclude that a lawyer should:

- Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

While the opinions were developed to address cloud computing, these recommendations are equally applicable to a lawyer's use of third-party generative AI when dealing with confidential information.

Florida Ethics Opinion 10-2 discusses the maintenance and disposition of electronic devices that contain storage media and provides that a lawyer's duties extend from the lawyer's initial receipt of the device through the device's disposition, "including after it leaves the control of the lawyer." Opinion 10-2 goes on to reference a lawyer's duty of supervision and to express that this duty "extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts[.]" Id.

Florida Ethics Opinion 07-2 notes that a lawyer should only allow an overseas paralegal provider access to "information necessary to complete the work for the particular client" and "should provide no access to information about other clients of the firm." Additionally, while "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved[.]" including "whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." Id. Again, this guidance seems equally applicable to a lawyer's use of generative AI.

Finally, Florida Ethics Opinion 06-2 provides that a lawyer should take reasonable steps to safeguard the confidentiality of electronic communications, including the metadata attached to those communications, and that the recipient should not attempt to obtain metadata information that they know or reasonably should know is not intended for the recipient. In the event that the recipient inadvertently receives metadata information, the recipient must "promptly notify the sender," as is required by Rule 4-4.4(b). Similarly, a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers.

It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party. If the use of a generative AI program does not involve the disclosure of confidential

information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to Rule 4-1.6.

Oversight of Generative AI

While Rule 4-5.3(a) defines a nonlawyer assistant as a "a person," many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.

First, just as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer's own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants.

Second, a lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

Third, these duties apply to nonlawyers "both within and outside of the law firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); see Fla. Ethics Op. 07-2. The fact that a generative AI is managed and operated by a third-party does not obviate the need to ensure that its actions are consistent with the lawyer's own professional and ethical obligations.

Further, a lawyer should carefully consider what functions may ethically be delegated to generative AI. Existing ethics opinions have identified tasks that a lawyer may or may not delegate to nonlawyer assistants and are instructive. First and foremost, a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation.

Florida Ethics Opinion 88-6 notes that, while nonlawyers may conduct the initial interview with a prospective client, they must:

- Clearly identify their nonlawyer status to the prospective client;
- Limit questions to the purpose of obtaining factual information from the prospective client; and
- Not offer any legal advice concerning the prospective client's matter or the representation agreement and refer any legal questions back to the lawyer.

This guidance is especially useful as law firms increasingly utilize website chatbots for client intake. While generative AI may make these interactions seem more personable, it presents additional risks, including that a prospective client relationship or even a lawyer-client relationship has been created without the lawyer's knowledge.

The Comment to Rule 4-1.18 (Duties to Prospective Client) explains what constitutes a consultation:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Similarly, the existence of a lawyer-client relationship traditionally depends on the subjective reasonable belief of the client regardless of the lawyer's intent. *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

For these reasons, a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations.

Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the "work product" of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.

Legal Fees and Costs

Rule 4-1.5(a) prohibits lawyers from charging, collecting, or agreeing to fees or costs that are illegal or clearly excessive while subdivision (b) provides a list of factors to consider when determining whether a fee or cost is reasonable. A lawyer must communicate the basis for fees and costs to a client and it is preferable that the lawyer do so in writing. Rule 4-1.5(e). Contingent fees and fees that are nonrefundable in any part must be explained in writing. Rule 4-1.5(f)(2).

Regarding costs, a lawyer may only ethically charge a client for the actual costs incurred on the individual client's behalf and must not duplicate charges that are already accounted for in

the lawyer's overhead. *See, The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002) (lawyer sanctioned for violations including a \$500.00 flat administrative charge to each client's file); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (lawyer should only charge clients for costs that reasonably reflect the lawyer's actual costs); Rule 4-1.5(h) (lawyers accepting payment via a credit plan may only charge the actual cost imposed on the transaction by the credit plan).

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

While a lawyer may separately itemize activities like paralegal research performed by nonlawyer personnel, the lawyer should not do so if those charges are already accounted for in the lawyer's overhead. Fla. Ethics Op. 76-33 & 76-38, Consolidated. In the alternative, the lawyer may need to consider crediting the nonlawyer time against the lawyer's own fees. *Id.* Florida Ethics Opinion 07-2 discusses the outsourcing of paralegal services in contingent fee matters and explains:

The law firm may charge a client the actual cost of the overseas provider [of paralegal services], unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third-party provider.

Additionally, a lawyer should have sufficient general knowledge to be capable of providing competent representation. *See, e.g., Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006). "While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client." *Id.* at 5.

In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI.

Lawyer Advertising

The advertising rules in Subchapter 4-7 of the Rules Regulating The Florida Bar include prohibitions on misleading content and unduly manipulative or intrusive advertisements.

Rule 4-7.13 prohibits a lawyer from engaging in advertising that is deceptive or inherently misleading. More specifically, subdivision (b) includes prohibitions on:

(3) comparisons of lawyers or statements, words, or phrases that characterize a lawyer's or law firm's skills, experience, reputation, or record, unless the characterization is objectively verifiable; [and]

* * *

(5) [use of] a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm unless the advertisement contains a clear and conspicuous disclaimer that the person is not an employee or member of the law firm[.]

As noted above, a lawyer should be careful when using generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion or deception, a lawyer must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

Conclusion

In sum, a lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services. Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies.



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January 22, 2024

By email to shayna@vernonbice.com

Shayna Sonnier

Louisiana State Bar Association, President

601 St. Charles Ave.

New Orleans, LA 70130

Re: The Emergence of Artificial Intelligence

Dear Ms. Sonnier:

Happy 2024! This new year is certain to present both challenges and opportunities to Louisiana's legal practitioners, and one of the more challenging and presenting a significant opportunity is the emergence of artificial intelligence (AI) technology and the use of this technology in the legal profession. Accordingly, the Justices have asked me to share the following comments with you.

As with any developing technology, AI appears to present both opportunities and concerns, and the use of such technology raises a host of possible issues from an ethics and professionalism standpoint. Although many applications of AI technology in the legal profession are new, the rules governing the bench and the Bar are not new and have been in place for decades. At the present time, the ethical and professional rules governing the bench and the Bar are robust and broad enough to cover the landscape of issues presented by AI in its current forms.

Regardless of the use of AI, attorneys practicing in Louisiana have always been ultimately responsible for their work-product and the pleadings they file in court, maintaining competence in technology, and protecting confidential client information and have a duty to avoid making misrepresentations of fact or law. See, e.g., [Rules of Professional Conduct](#) 1.1, 1.3, 1.4, 1.6, 1.15, 3.1, 3.3, and 5.3; [Louisiana Code of Civil Procedure](#) articles 371 and 863. These obligations remain unchanged or unaffected by the availability of AI. Likewise, judges have always been ultimately responsible for their opinions and decisions, for maintaining

Shayna Sonnier
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professional competence in judicial administration (which includes maintaining competence in technology), and for protecting confidential information. See, e.g., Canons 1, 2A, 2B, 3A(1), 3A(4), 3A(7), and 3B(1) of the [Code of Judicial Conduct](#).

Many applications of AI technology in the legal profession are in their nascent stages but are rapidly developing, and the applications and software currently being used (and the attendant ethical and professional issues) may look very different with the passage of even a short amount of time. The Louisiana Supreme Court Justices and staff will continue to monitor the development of this technology and its impact on the legal profession to determine what future action or rule changes may be necessary or appropriate. In particular, the Court's Technology Commission and Rules Committee are well-positioned to keep the Justices abreast of new developments and the potential need for any future Court action.

The Justices sincerely appreciate the work and leadership of the Louisiana State Bar Association. We note that the cover of the recently published Bar Journal had an article which addressed AI. Please share this communication with your members, and we ask that Bar leadership stay attuned to any developing issues associated with the emergence of AI technology in the legal profession as we navigate this new realm. We look forward to continuing to work with the Bar Association.

Sincerely,

David Becker

David Becker
General Counsel

Cc: All Justices
Judge Scott U. Schlegel, Louisiana Supreme Court Technology Commission Chair
Patricia Reeves Floyd, Louisiana Supreme Court Rules Committee Chair
Loretta Larsen, LSBA Executive Director



**PENNSYLVANIA BAR ASSOCIATION COMMITTEE
ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY
and
PHILADELPHIA BAR ASSOCIATION PROFESSIONAL GUIDANCE COMMITTEE
JOINT FORMAL OPINION 2024-200**

ETHICAL ISSUES REGARDING THE USE OF ARTIFICIAL INTELLIGENCE

Introduction

Artificial Intelligence (“AI”) has fundamentally transformed the practice of law by revolutionizing various aspects of legal work. AI-powered software can perform legal research, contract analysis, and document review tasks, saving time and increasing efficiency. AI can also help predict legal outcomes, manage cases, and automate routine tasks. AI technology has facilitated the automation of routine legal tasks, allowing legal professionals to focus on higher-value work requiring human expertise and judgment.

Generative AI has taken the advances of AI even further. It can assist lawyers by automating document drafting, preparing summaries, analyzing and synthesizing large volumes of documents and other information, optimizing efficiency, and allowing for more focused attention on legal strategy and client needs.

In short, the use of AI has gone from something in movies to an everyday tool in the practice of law. This technology has begun to revolutionize the way legal work is done, allowing lawyers to focus on more complex tasks and provide better service to their clients.

To attorneys, the thought of using AI to draft pleadings and briefs and review documents may seem unfamiliar and even intimidating because the technology is relatively new, and many attorneys have not used it. Now that it is here, attorneys need to know what it is and how (and if) to use it.

The use of AI has also raised ethical issues for attorneys. Topics such as client confidentiality and competence in the use of AI are at the forefront of our day-to-day legal practices. As outlined in more detail in the “Guidance & Best Practices for the Use of Artificial Intelligence” section below, this Joint Opinion is intended to educate attorneys on the benefits and pitfalls of using this type of technology, and provide ethical guidelines, including:

- Lawyers must ensure that AI-generated content, such as legal documents or advice, is truthful, accurate, and based on sound legal reasoning, upholding principles of honesty and integrity in their professional conduct.
- Lawyers must be competent in the use of AI technologies.
- Lawyers must ensure the accuracy and relevance of the citations they use in legal documents or arguments. When citing legal authorities such as case law, statutes, regulations, or scholarly articles, lawyers should verify that the citations accurately reflect the content they are referencing.
- Lawyers must safeguard information relating to the representation of a client and ensure that AI systems handling confidential data adhere to strict confidentiality measures.
- Lawyers must be vigilant in identifying and addressing potential conflicts of interest arising from using AI systems.
- Lawyers must communicate with clients about their use of AI technologies in their practices, providing clear and transparent explanations of how such tools are employed and their potential impact on case outcomes.
- Lawyers must ensure that AI-related expenses are reasonable and appropriately disclosed to clients.
- Lawyers must engage in continuing legal education and other training to stay informed about ethical issues and best practices for using AI in legal practice.

The rapid growth of AI is forcing the legal profession to confront and adapt to it. As with other forms of technology, from cloud computing to virtual offices, these new technologies implicate old ethical problems. This opinion will clarify how our existing ethical rules impact the proper use of this technology.

The Committees also emphasize that lawyers must be proficient in using technological tools to the same extent they are in employing traditional methods. Whether it is understanding how to navigate legal research databases, use e-discovery software, use their smartphones, use email, or otherwise safeguard client information in digital formats, lawyers are required to maintain competence across all technological means relevant to their practice.

Definitions of Artificial Intelligence

1. Artificial Intelligence

The *Oxford English Dictionary* defines “artificial intelligence” as “software used to perform tasks or produce output previously thought to require human intelligence, esp. by using machine learning to extrapolate from large collections of data.”¹

The National Artificial Intelligence Act of 2020 defines “artificial intelligence” as “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.”²

2. Generative Artificial Intelligence

Although artificial intelligence has been used for decades, generative AI represents a significant change and a dramatic step forward in legal applications, because instead of only analyzing content, it can also generate new content. McKinsey and Company explain that “Generative artificial intelligence (AI) describes algorithms (such as ChatGPT) that can be used to create new content, including audio, code, images, text, simulations, and videos.”³

Generative AI and large language models are like two peas in a pod. Generative AI is the brain behind creating new output, including text, images, and music, by learning from existing data. Of particular concern is the type of generative AI, which, unlike its predecessors, is used not only to analyze data but also to create novel content. Generative AI creates this content using large language models, in which a model is “trained” on vast amounts of data, rendering it able to generate new content by referring back to the data it has ingested. The release of OpenAI’s ChatGPT in November 2022 ushered in this new era of technological development.

Artificial Intelligence’s Application for Lawyers

AI has already been used for many years in various legal software applications including document review, legal research, and document assembly. Generative AI differs from non-generative AI because it creates content, and it is the creation of content that necessitates heightened awareness by lawyers.

For example, document review software has enabled Technology-Assisted Review (“TAR”) of large document collections, sometimes referred to as “predictive coding” or “computer-assisted review.” The Sedona Conference defines TAR as “A process for prioritizing or coding a collection of electronically stored information using a computerized system that harnesses human judgments of subject-matter experts on a smaller set of documents and then extrapolates those judgments to the remaining documents in the collection. ... TAR systems generally incorporate statistical

¹ https://www.oed.com/dictionary/artificial-intelligence_n

² 15 U.S.C. 9401(3).

³ <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai>

models and/or sampling techniques to guide the process and to measure overall system effectiveness.”⁴

Similarly, technology is deployed within legal research software to identify other authorities of interest to the researcher based on the authorities with which the researcher has engaged. Legal research software traditionally utilizes AI for document indexing and natural language processing, enabling it to categorize and index legal documents and efficiently retrieve relevant information. Because generative AI creates content, however, lawyers have an obligation to verify that the citations are correct and that they accurately summarize the cases or other information cited.

In legal applications, generative AI is like having an assistant who can create legal documents, analyze cases, and provide insight into potential outcomes of legal issues. It works by learning from legal data and examples and then using the knowledge to generate new legal documents or predictions. Thus, instead of spending hours drafting contracts or researching case law, lawyers can now use generative AI to speed up their work and make more informed decisions.

Hallucinations & Biases

Among the reasons that AI, particularly generative AI, is so controversial is that the software sometimes responds to queries with “hallucinations,” or “false answers.” IBM describes hallucinations as follows:

AI hallucination is a phenomenon wherein a large language model (LLM)—often a generative AI chatbot or computer vision tool—perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate.

Generally, if a user makes a request of a generative AI tool, they desire an output that appropriately addresses the prompt (*i.e.*, a correct answer to a question). However, sometimes AI algorithms produce outputs that are not based on training data, are incorrectly decoded by the transformer or do not follow any identifiable pattern. In other words, it “hallucinates” the response.

Generative AI is not a clean slate, free from prejudices and preconceptions. To the contrary, AI has biases that are the result of the data input into them. These biases can lead to discrimination, favoring certain groups or perspectives over others, and can manifest in areas like facial recognition and hiring decisions. Addressing AI biases is essential to obtaining the best results.

Lawyers have fallen victim to hallucinations and biases, signing their names to briefs authored entirely by or with the assistance of AI, which included some nonexistent cases. Some recent examples include:

⁴ The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition, 21 SEDONA CONF. J. 263 (2020) (definition adopted from Maura R. Grossman & Gordon V. Cormack, The Grossman-Cormack Glossary of Technology Assisted Review with Foreword by John M. Facciola, U.S. Magistrate Judge, 7 FED. CTS. L. REV. 1, 32 (2013)).

- A New York lawyer filed a brief citing fake cases generated by ChatGPT, stating in an affidavit that he consulted ChatGPT for legal research when preparing a response to a motion, and that ChatGPT provided the legal sources and assured him of the reliability of the opinions. The lawyer ultimately admitted that the source of the legal opinions had “revealed itself to be unreliable.”⁵
- A New York lawyer filed an appellate reply brief citing a nonexistent case, and was referred to the court’s Grievance Panel.⁶
- A Colorado lawyer submitted a brief that included false citations generated by ChatGPT. “Respondent provided example searches/results to explain his confidence in the technology. Based on the prior results, he explained, ‘it never dawned on me that this technology could be deceptive.’”⁷

An example of AI bias in legal applications can be found in the predictive algorithms for risk assessment in criminal justice systems. If the algorithm disproportionately flags individuals from marginalized communities as high-risk, it could lead to unjust outcomes such as harsher sentences, perpetuating systemic biases within the legal system.

These and similar incidents have caused much concern about AI, and generative AI in particular.

How Courts Are Reacting to AI

Courts have begun to create new rules or implement new policies relating to the use of AI in court submissions. Some Courts are mandating certain attorney disclosures and verifications when submitting any document to the Court that may be generated in whole or in part by some form of AI program or application.

For example, one federal judge in the Eastern District of Pennsylvania has issued a standing order requiring:

... that counsel (or a party representing himself or herself) disclose whether he or she has used generative Artificial Intelligence (“AI”) in the preparation of any complaint, answer, motion, brief, or other paper filed with the Court, including in correspondence with the Court. He or she must, in a clear and plain factual statement, disclose that generative AI has been used in any way in the preparation of the filing or correspondence and certify that each and every citation to the law or the record in the filing has been verified as authentic and accurate.⁸

A federal judge in Texas has a standing order requiring a Mandatory Certification Regarding Generative Artificial Intelligence. The Order identifies that generative AI “is the product of programming devised by humans who did not have to swear [an attorney’s] oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such

⁵ *Mata v. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263 (SDNY June 22, 2023).

⁶ *Park v. Kim*, No. 22-2057, 2024 WL 332478 (2d Cir, Jan. 30, 2024).1

⁷ 2023 Colo. Discipl. LEXIS 64 (Colo. O.P.D.J, Nov. 22, 2023).

⁸ https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/praso1_0.pdf

programs act according to computer code rather than conviction, based on programming rather than principle.”⁹

Courts are also sanctioning lawyers and their firms for the misuse of AI.

For example, in *Mata*, the Southern District of New York sanctioned attorneys for writing a legal brief using ChatGPT. The Court determined that the lawyers “abandoned their responsibilities” when they submitted the AI-written brief and “then continued to stand by the fake opinions after the judicial orders called their existence into question.” Both the individual attorneys and their law firm were fined \$5,000 each.¹⁰

In *People v. Crabill*¹¹, an attorney was suspended for one year and one day for using cases created by ChatGPT that were not actual cases. The attorney did not cite or check any of the case references generated by ChatGPT, and he solely relied on the technology to create his brief without any review. The Colorado Supreme Court held that his conduct violated Colorado Rules of Professional Conduct 1.1, 1.3, 3.3(a)(1) and 8.4(c).

The Ninth Circuit struck a brief containing false authority drawn from generative AI.¹²

⁹ See <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>, in which the Judge writes:

All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here’s why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court’s judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

¹⁰ *Mata v. Avianca, Inc.*, Case No. 22-CV-1461, 2023 WL 4114965, 2023 U.S. Dist. LEXIS 108263 (S.D.N.Y., July 7, 2023).

¹¹ *People v. Zachariah C. Crabill*. 23PDJ067. November 22, 2023.

¹² <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-sanctions-for-fake-generative-ai-cites-harm-clients#:~:text=There%20are%20other%20ways%20to,appropriate%20bar%20or%20disciplinary%20committee.>

Lawyers are, therefore, facing disciplinary actions, both before judges and disciplinary authorities, for using AI technology without taking appropriate steps to ensure its accuracy and that their clients are receiving effective representation with its use.

What Other Jurisdictions Are Saying

In every jurisdiction that has issued guidance or made recommendations concerning the use of AI, there is one common theme: Lawyers must recognize the risks and benefits of AI technology. If they choose to use AI, particularly generative AI, they must understand its strengths and weaknesses and employ it consistent with their ethical obligations under the Rules of Professional Conduct.

Florida

The Florida State Bar, Ethics Opinion 24-1 (2024), concludes that lawyers may use generative AI in the practice of law but must (1) protect the confidentiality of client information, (2) provide accurate and competent services, (3) avoid improper billing practices, and (4) comply with applicable restrictions on lawyer advertising.

The Opinion points out that lawyers must also make reasonable efforts to prevent unauthorized access to client information and understand the risks associated with the use of technology. They also remain responsible for their work product and must verify the accuracy and sufficiency of research performed by generative AI. The Opinion concludes that lawyers must continue to develop competency in the use of generative AI and stay informed about the risks and benefits of new technologies.

New York

The New York State Bar Association Task Force on Artificial Intelligence issued a Report and Recommendations (2024) in which it offered “no conclusions.” Rather, the Task Force stated:

As a profession, we must continue to refine the initial guidelines suggested in this report and audit the efficacy of proposed rules and regulations. We liken this journey to the mindset of ancient explorers: be cautious, be curious, be vigilant and be brave.

The Report does, however, affirm that lawyers must comply with the Rules of Professional Conduct. In addition, the Report provides (1) an extensive history and analysis of the evolution of AI and generative AI, (2) the benefits and risks of AI and generative AI use, (3) the impact of AI on legal profession, (4) legislative overview and recommendations, (5) AI and generative AI guidelines under the Rules of Professional Conduct.

California

The State Bar of California Standing Committee on Professional Responsibility and Conduct issued “Practical Guidance For The Use Of Generative Artificial Intelligence In The Practice Of Law” (2023), explaining that:

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

New Jersey

The New Jersey Supreme Court Committee on Artificial Intelligence and the Courts issued “Preliminary Guidelines On New Jersey Lawyers’ Use of Artificial Intelligence” (2024). The Guidelines explain that AI does not change the fundamental duties of legal professionals to be aware of new applications and potential challenges in the discharge of such responsibilities. In particular, the report notes that “As with any disruptive technology, a lack of careful engagement with AI could lead to ethical violations, underscoring the need for lawyers to adapt their practices mindfully and ethically in this evolving landscape.”

The Guidelines further explain that the use of AI does not change the lawyer’s duty to (1) be accurate and truthful, (2) be honest and candid when communicating, (3) preserve confidentiality, (4) prevent misconduct, including discrimination, and (5) provide oversight to lawyers, nonlawyer staff and others.

Michigan

The State Bar of Michigan, in Ethics Opinion JI-155 (2023), addresses judicial competence and artificial intelligence, and concludes that judicial officers need to maintain competence with advancing technology, especially artificial intelligence, and how it affects their conduct and decisions. The Opinion provides examples of how AI can pose ethical dilemmas, such as bias, partiality, explainability, or accuracy, as well as how AI can assist judges in tasks like docket management, legal research, drafting documents, or answering questions.

The Opinion concludes that judicial officers have an ethical obligation to understand technology, including AI, and take reasonable steps to ensure that AI tools are used properly and within the confines of the law and court rules. The document also recommends that judges ask the right questions and place their analysis and application of AI on the record.

How the Pennsylvania Rules of Professional Conduct Apply to AI Use for Lawyers

Lawyers' use of artificial intelligence implicates the same ethical issues as other forms of technology. However, there is the additional caveat that lawyers must not only comply with the Rules of Professional Conduct but also ensure that AI adheres to the same requirements.

In particular, the use of AI applies to the lawyer's duties of (1) confidentiality, (2) competence, (3) candor, (4) truthfulness, (5) supervision, (6) communication, (7) conflicts of interest, and (8) the unauthorized practice of law, and implicates the following Rules of Professional Conduct:

1. Duty of Competence

Pennsylvania Rule of Professional Conduct 1.1(Competence) states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In addition, Comment [8] states in relevant part:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Thus, if a lawyer chooses to use AI or any other technology, the lawyer has the responsibility to (1) understand the technology and how it works, (2) understand the benefits of the technology, (3) understand the risks of the technology, (4) check and verify all citations and the material cited, and (5) especially in cases where the benefits outweigh the risks, have an obligation to educate the client and seek their informed consent to use the technology. At their core, the obligations under all of the relevant Rules are subject to Rule 1.1.

2. Communication

Pennsylvania Rule of Professional Conduct 1.4 ("Communication") states:

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and

- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4 requires the lawyer to inform the client of the benefits, risks, and limits of the use of generative AI. In conjunction with the client, the lawyer must also determine whether the permissible use of generative AI would serve the client's objectives in the representation.

3. Duty of Confidentiality

Pennsylvania Rule of Professional Conduct 1.6 ("Confidentiality of Information") states in relevant part:

A lawyer shall not reveal information relating to representation of a client unless the clients give informed consent, except for disclosures that are impliedly authorized in order to carry out the representation

4. Conflicts

Pennsylvania Rules of Professional Conduct Rules 1.7 ("Conflict of Interest: Current Clients") and 1.9 ("Duties to Former Clients") preclude a lawyer from revealing information relating to a representation of a current or former client or from using that information to the disadvantage of the current or former client. Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another. Therefore, a lawyer must not input any confidential information of a client into AI that lacks adequate confidentiality and security protections.

5. Meritorious Claims and Contentions

Pennsylvania Rule of Professional Conduct 3.1 ("Meritorious Claims and Contentions") states:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

In addition, Comment [4] states in relevant part:

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities... The underlying concept is

that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

The ability of AI tools to generate text opens a new frontier in our ethics guidance. Rather than focus on whether a lawyer's choice of specific legal arguments has merit, some lawyers have used Generative AI platforms without checking citations and legal arguments. In essence, the AI tool gives lawyers exactly what they were seeking, and the lawyers, having obtained positive results, fail to perform due diligence on those results. Regardless, whether a baseless argument is made with the assistance of AI or not is irrelevant; the lawyer is responsible.

6. Candor Toward the Tribunal

Pennsylvania Rule of Professional Conduct 3.3 ("Candor Toward the Tribunal") states in relevant part:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Further, Comment [10] to Rule 3.3 states in relevant part:

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false... In such situations... the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial

action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

The full version of this Comment is focused on a false statement by a *client*; however, a lawyer has an obligation to ensure that evidence has not been altered or invented from whole cloth by an AI tool. Upon learning of altered or invented evidence, the lawyer must take “reasonable remedial measures.”

Rule 3.3 imposes multiple obligations on lawyers. A lawyer must be both proactive and reactive in not presenting false statements or false evidence to a tribunal. This Rule goes hand in hand with Rule 1.1 (Competence); lawyers must be competent in their use of legal tools, including AI, which may reduce the risk of violating Rule 3.3.

7. Duty to Supervise

Pennsylvania Rule of Professional Conduct 5.1 (“Responsibilities of Partners, Managers and Supervisory Lawyers”) states:

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Pennsylvania Rule of Professional Conduct 5.3 (“Responsibilities Regarding Nonlawyer Assistance”) states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and,
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The same ethical rules that apply to lawyers who employ or retain paralegals, junior associates, or outside consultants applies to lawyers who utilize AI. Rule 5.1 addresses the responsibilities of partners, managers, and supervisory lawyers at a law firm and requires that they “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”

While Rule 5.3 applies to “non-lawyers” and “persons,” where AI is able to function like a human, the Rule should apply with the same force. Thus, when contemplating the appropriate use of generative AI, lawyers should consider whether an AI tool can satisfy the Rules of Professional Conduct to the same extent as a human hired to complete the same tasks.

8. Unauthorized Practice of Law

Pennsylvania Rule of Professional Conduct 5.5 (“Unauthorized Practice of Law; Multijurisdictional Practice of Law”) states in relevant part:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

In AI’s development, even in machine learning, where AI learns independently, humans initially program the technology, making AI essentially a creation of humans. To the extent that the AI programmer is not a lawyer, the programmer may violate Rule 5.5 regarding the unauthorized practice of law. To avoid the UPL, lawyers must ensure that AI does not give legal advice or engage in tasks that require legal judgment or expertise, without the involvement of a licensed attorney. There must always be a human element in the legal work product to ensure that lawyers are upholding their ethical obligations.

9. Duty of Truthfulness

Pennsylvania Rule of Professional Conduct 8.4 (“Misconduct”) provides in relevant part:

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Prior Committee Opinions

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility in Formal Opinion 2011-200 (“Ethical Obligations For Attorneys Using Cloud Computing/Software As A Service While Fulfilling The Duties Of Confidentiality and Preservation Of Client Property”) describes the steps that a lawyer should take when dealing with “cloud” computing, including

detailed lists of required steps and descriptions of what other states have held on the issue. The same rationale applies to a lawyer's use of AI.

In that opinion, the Committee emphasizes that “lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards.”

In PBA Formal Opinion 2022-400 (“Ethical Obligations For Lawyers Using Email And Transmitting Confidential Information”), the Committee stated:

Given the changes in technology and the rise of cyberattacks, this Formal Opinion concludes that the Rules of Professional Conduct require more. Rule 1.1 requires a lawyer to be competent, including understanding the benefits and risks associated with technology such as email. Rule 1.4 requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Rule 1.6(d) requires a lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

In PBA Formal Opinion 2022-500 (“Ethical Considerations For Lawyers Storing Information Relating To The Representation Of A Client On A Smartphone”), the Committee stated:

... if a lawyer’s smartphone contains information governed by Pa.R.P.C. 1.6, then the lawyer may not consent to share the information with a smartphone app unless the lawyer concludes that no human being will view that information, and that the information will not be sold or transferred to additional third parties, without the client’s consent.

Guidance Applicable to Technology Generally

A lawyer’s duty of competence requires them to possess the necessary knowledge and skills to represent their clients effectively. The Committee has previously stated and reaffirms that the obligation extends to the use of technology:

Lawyers must be proficient in using technological tools to the same extent they are in employing traditional methods. Whether it is understanding how to navigate legal research databases, use e-discovery software, use their smartphones, use email, or otherwise safeguard client information in digital formats, lawyers are required to maintain competence across all technological means relevant to their practice.

In sum, lawyers must act reasonably, and their duty of competence applies equally to technology as it does to any other aspect of legal representation.

Guidance & Best Practices for the Use of Artificial Intelligence:

When using AI, a lawyer must ensure that any client information and materials remain confidential and safeguard that information to ensure that it is protected from breaches, data loss, and other risks. Multiple Rules of Professional Conduct are implicated in a lawyer's use of AI because so many questions arise:

- Is the client's information being used when forming queries, and if so, is it kept confidential?
- Who has access to that information?
- Is the information secure or "out in the world" for all to see?

To address these concerns, for example, some firms are implementing internal policies on whether a lawyer can use AI (and programs such as ChatGPT) when creating pleadings or other documents that may contain sensitive client information. Additionally, some legal malpractice insurance carriers will not insure for AI's use, and many policies now limit firms that are covered by them from using AI to prepare any documents, especially those that are being filed with a Court.

Therefore, the Committees conclude as follows:

- **Being Truthful & Accurate:** Lawyers must ensure that AI-generated content, such as legal documents or advice, is truthful, accurate, and based on sound legal reasoning, upholding principles of honesty and integrity in their professional conduct.
- **Verifying All Citations & The Accuracy of Cited Materials:** Lawyers must ensure the accuracy and relevance of the citations they use in legal documents or arguments. When citing legal authorities such as case law, statutes, regulations, or scholarly articles, lawyers should verify that the citations accurately reflect the content they are referencing.
- **Assuring Competence:** Lawyers must be competent in using AI technologies.
- **Maintaining Confidentiality:** Lawyers must safeguard information relating to the representation of a client and ensure that AI systems handling confidential data (1) adhere to strict confidentiality measures, and (2) confidential data will not be shared with other clients or others not protected by the attorney-client privilege.
- **Identifying Conflicts of Interest:** Lawyers must be vigilant in identifying and addressing potential conflicts of interest arising from using AI systems.
- **Communicating with Clients:** Lawyers must communicate with clients about using AI technologies in their practices, providing clear and transparent explanations of how such tools are employed and their potential impact on case outcomes. If necessary, they should obtain client consent before using certain AI tools.
- **Assuring Information is Unbiased & Accurate:** Lawyers must ensure that the data used to train AI models is accurate, unbiased, and ethically sourced to prevent perpetuating biases or inaccuracies in AI-generated content.

- **Ensuring That AI Is Properly Used:** Lawyers must be vigilant against the misuse of AI-generated content, ensuring it is not used to deceive or manipulate legal processes, evidence, or outcomes.
- **Adhering to Ethical Standards:** Lawyers must stay informed about relevant regulations and guidelines governing the use of AI in legal practice to ensure compliance with legal and ethical standards.
- **Exercising Professional Judgment:** Lawyers must exercise their professional judgment in conjunction with AI-generated content, and recognize that AI is a tool that assists but does not replace legal expertise and analysis.
- **Utilizing Proper Billing Practices:** AI has tremendous time-saving capabilities. Lawyers must, therefore, ensure that AI-related expenses are reasonable and appropriately disclosed to clients.
- **Maintaining Transparency:** Lawyers should be transparent with clients, colleagues, and the courts about the use of AI tools in legal practice, including disclosing any limitations or uncertainties associated with AI-generated content.

Conclusion

Artificial intelligence and generative AI tools, like any tool in a lawyer's arsenal, must be used with knowledge of their potential and an awareness of the risks and benefits the technology offers. They are to be used cautiously and in conjunction with a lawyer's careful review of the "work product" that those types of tools create. These tools do not replace personal reviews of cases, statutes, and other legislative materials. Additionally, although AI may offer increased productivity, it must be accomplished by utilizing tools to protect and safeguard confidential client information.

The Committees believe that, with appropriate safeguards, lawyers can utilize artificial intelligence in accordance with the Pennsylvania Rules of Professional Conduct.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512

July 29, 2024

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.¹ A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.² GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as “self-learning,” meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

¹ There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITANNICA, <https://www.britannica.com/technology/artificial-intelligence> (last visited July 12, 2024).

² George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), <https://www.techtarget.com/searchenterpriseai/definition/generative-AI>.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.³ 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?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.⁴ It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.⁵ This duty requires lawyers to exercise the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” as well as to understand “the benefits and risks associated” with the technologies used to deliver legal services to clients.⁶ Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.⁷

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

³ Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

⁴ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 (“Communications Concerning a Lawyer’s Services”), Model Rule 1.7 (“Conflict of Interest: Current Clients”), and Model Rule 1.9 (“Duties to Former Clients”). See, e.g., Fla. State Bar Ass’n, Prof’l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass’n Comm. on Legal Ethics & Prof’l Resp. & Philadelphia Bar Ass’n Prof’l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) (“Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another.”). Accordingly, lawyers should consider all rules before using GAI tools.

⁵ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

⁶ MODEL RULES R. 1.1 & cmt. [8]. See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA’s “technology amendments” made to the Model Rules in 2012).

⁷ MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof’l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.⁸ This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.⁹ Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.¹⁰

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.¹¹ One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.¹² Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.¹³ Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.¹⁴

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

⁸ Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

⁹ *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

¹⁰ MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

¹¹ As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

¹² *See*, W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law*, 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

¹³ *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

¹⁴ Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), available at https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.¹⁵ While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.¹⁶ Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.¹⁷ Over time, other new technologies have become integrated into conventional legal practice in this manner.¹⁸ For example, “a lawyer would have difficulty providing competent legal services in today's environment without knowing how

¹⁵ See generally ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that “[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1”).

¹⁶ See Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

¹⁷ See, e.g., Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), available at <https://ssrn.com/abstract=3485055> (“View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.”).

¹⁸ See, e.g., *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected “to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*”) (emphasis added); *Hagopian v. Justice Admin. Comm'n*, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have “become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant”).

to use email or create an electronic document.”¹⁹ Similar claims might be made about other tools such as computerized legal research or internet searches.²⁰ As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.²¹ But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,²² lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.²³ As previously noted regarding the possibility of outsourcing certain work, “[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary ‘legal knowledge, skill, thoroughness and preparation.’”²⁴ Ultimately, any informed decision about whether to employ a GAI tool must consider the client’s interests and objectives.²⁵

¹⁹ ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

²⁰ See, e.g., Bradley, *supra* note 17, at 3 (“Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of ‘methods and procedures’ used by competent lawyers.”); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers’ Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) (“The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice”); Ellie Margolis, *Surfin’ Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) (“While a lawyer’s research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means.”); Michael Thomas Murphy, *The Search for Clarity in an Attorney’s Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) (“This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both”); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney’s Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) (“Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.”).

²¹ See MODEL RULES R. 1.1 cmt. [5] (stating that “[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners”); New York County Lawyers Ass’n Prof’l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

²² The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

²³ Model Rule 1.5’s prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

²⁴ ABA Formal Op. 08-451, *supra* note 15, at 2. See also *id.* (“Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.”).

²⁵ MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 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 authorized to carry out the representation, or disclosure is permitted by an exception.²⁶ Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."²⁷

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,²⁸ the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.²⁹

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use³⁰ because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.³¹

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,³² even if the tool is used exclusively by lawyers at the same firm.³³ This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

²⁶ MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].

²⁷ MODEL RULES R. 1.6(c).

²⁸ ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when ... the nature of the information requires a higher degree of security.").

²⁹ MODEL RULES R. 1.6, cmt. [18].

³⁰ See MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.

³¹ See ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).

³² See *generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

³³ See Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.³⁴

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.³⁵

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.³⁶ As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.³⁷ Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

³⁴ This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. See Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), available at <http://www.wvdc.org/pdf/AILEO24-01.pdf>.

³⁵ See W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

³⁶ Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

³⁷ Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI*, BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7>.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."³⁸ Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.³⁹ There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.⁴⁰ For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.⁴¹ Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.⁴²

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,⁴³ such as when a lawyer relies on GAI

³⁸ *Baker v. Humphrey*, 101 U.S. 494, 500 (1879).

³⁹ *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

⁴⁰ *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

⁴¹ *See* section B for a discussion of confidentiality issues under Rule 1.6.

⁴² *See* section F for a discussion of fee issues under Rule 1.5.

⁴³ Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2-3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.⁴⁴

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.⁴⁵ Rule 8.4(c) provides that a

lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

⁴⁴ For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

⁴⁵ MODEL RULES R. 3.3(a) reads: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in “conduct involving dishonesty, fraud, deceit or misrepresentation.” Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers’ use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.⁴⁶

Some courts have responded by requiring lawyers to disclose their use of GAI.⁴⁷ As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers’ responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,⁴⁸ and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.⁴⁹ These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm’s permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm’s lawyers and nonlawyers comply with their professional obligations when using GAI tools.⁵⁰ Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,⁵¹ including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.⁵² Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”

⁴⁶ See DC Bar Op. 388 (2024).

⁴⁷ Lawyers should consult with the applicable court’s local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

⁴⁸ See MODEL RULES R. 1.0(c) for the definition of firm.

⁴⁹ ABA Formal Op. 08-451, *supra* note 15.

⁵⁰ MODEL RULES R. 5.1.

⁵¹ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 (2014).

⁵² See *generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make “reasonable efforts to ensure that” the nonlawyer’s conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.⁵³ These opinions note the importance of: reference checks and vendor credentials; understanding vendor’s security policies and protocols; familiarity with vendor’s hiring practices; using confidentiality agreements; understanding the vendor’s conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer’s use of a GAI tool that requires the disclosure and storage of information relating to the representation.⁵⁴ In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;⁵⁵
- investigate the [GAI tool’s] reliability, security measures, and policies, including limitations on the [the tool’s] liability;⁵⁶
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;⁵⁷ and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.⁵⁸

F. Fees

Model Rule 1.5, which governs lawyers’ fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer’s fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

⁵³ ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.

⁵⁴ See ABA Formal Op. 08-451, *supra* note 15.

⁵⁵ Fla. Bar Advisory Op. 12-3 (2013).

⁵⁶ *Id.* citing Iowa State Bar Ass’n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].

⁵⁷ Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.

⁵⁸ Fla. Bar Advisory Op. 12-3, *supra* note 55; See generally Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.⁵⁹ Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, “the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client’s behalf.”⁶⁰ If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, “If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,”⁶¹ because “[t]he client should only be charged a reasonable fee for the legal services performed.”⁶² The “goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client.”⁶³

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.⁶⁴ For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. “A fee charged for which little or no work was performed is an unreasonable fee.”⁶⁵

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

⁵⁹ The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

⁶⁰ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

⁶¹ *Id.*

⁶² *Id.* at 5.

⁶³ *Id.*

⁶⁴ See, e.g., *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

⁶⁵ Att’y Grievance Comm’n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of \$1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.⁶⁶ Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.⁶⁷ At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of “maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like.”⁶⁸ Formal Opinion 93-379 noted, “[i]n the absence of disclosure to a client in advance of the engagement to the contrary,” such overhead should be “subsumed within” the lawyer’s charges for professional services.⁶⁹

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer’s use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer’s word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider’s GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for “photocopying, computer research, . . . and similar items” rather than absorbing these expenses as part of the lawyers’ overhead as many lawyers would do.⁷⁰ For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as \$0.15 per page. Absent an advance agreement, the lawyer “is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator).”⁷¹

⁶⁶ ABA Formal Op. 93-379 at 7.

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 7.

⁶⁹ *Id.*

⁷⁰ *Id.* at 8.

⁷¹ *Id.* Opinion 93-379 also explained, “It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5’s injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer’s stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.” *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [8] explains that “[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”⁷² Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.⁷³ Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

⁷² MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

⁷³ *Heavener v. Meyers*, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re Poseidon Pools of Am., Inc.*, 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; “we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates”); *Att'y Grievance Comm'n v. Manger*, 913 A.2d 1 (Md. 2006) (“While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client.”); *In re Hellerud*, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of \$5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; “it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law”).

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

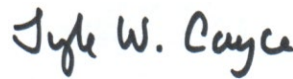
Notice of Proposed Amendment to 5TH CIR. R. 32.3

Pursuant to 28 U.S.C. § 2071, we give notice the court is considering amending 5TH CIR. R. 32.3 and Form 6 as shown below. Proposed changes are “redline text.”

We solicit written comments for consideration on the proposed changes through January 4, 2024. You may mail comments to:

Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 South Maestri Place
New Orleans, LA 70130

or send comments electronically to Changes@ca5.uscourts.gov.



Lyle W. Cayce
Clerk of Court

Fifth Circuit Rule 32.3

32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the FED. R. APP. P. **Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.**

FORM 6.

CERTIFICATE OF COMPLIANCE ~~WITH TYPE VOLUME LIMIT~~

Certificate of Compliance ~~with Type Volume Limit,
Typeface Requirements, and Type Style Requirements~~

1. This document complies with [the type-volume limit of FED. R. APP. P. [*insert Rule Citation; e.g. 32(a)(7)(B)*]] [the word limit of FED. R. APP. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

- ☐ this document contains [*state the number of*] words, **or**
- ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because:

- ☐ this document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**
- ☐ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

3. This document complies with the AI usage reporting requirement of 5TH CIR. R. 32.3 because:

- ☐ **no generative artificial intelligence program was used in the drafting of this document, or**
- ☐ **a generative artificial intelligence program was used in the drafting of this document and all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.**

s/ _____

Attorney for _____

Dated: _____

Local Rule 49 - Use of Artificial Intelligence in Court Submissions

(A) Purpose and Scope

This rule is established to govern the use of artificial intelligence (AI) technologies by attorneys and/or parties in the preparation and submission of materials to the Hamilton County Court of Common Pleas. It aims to ensure the ethical use of AI and maintain the integrity of evidence.

(B) Definitions

Artificial Intelligence (AI): Any technology that uses machine learning, natural language processing, or any other computational mechanism to simulate human intelligence, including document generation, evidence creation or analysis, and legal research.

AI-Assisted Material: Any document or evidence prepared with the assistance of AI technologies.

(C) Disclosure of AI Assistance

Attorneys and/or parties must disclose the use of AI-assisted technology in the creation or editing of any document or evidence submitted to the court. Such disclosure should include a general description of the AI technology used and its role in the preparation of the materials. The disclosure must be made at the time of submission through a certification attached to the document or evidence, indicating the type of AI used and certifying the attorney's final review and approval of the AI-assisted material.

(D) Responsibility and Review

Attorneys and/or parties remain ultimately responsible for the accuracy, relevance, and appropriateness of AI-assisted materials submitted to the court. Attorneys and/or parties must thoroughly review all AI-assisted materials to ensure they meet all legal and ethical standards. Use of AI does not absolve attorneys from their duty of competence, diligence, and supervision as required under the Ohio Rules of Professional Conduct.

(E) Sanctions

Violations of this rule may subject an attorney and/or party to sanctions, including but not limited to, Civil Rule 11 and/or Civil Rule 37.

AMENDED IN ASSEMBLY MARCH 21, 2024

CALIFORNIA LEGISLATURE—2023–24 REGULAR SESSION

ASSEMBLY BILL

No. 2811

Introduced by Assembly Member Lowenthal

February 15, 2024

An act to ~~relating to artificial intelligence.~~ *add Section 6068.1 to the Business and Professions Code, relating to artificial intelligence.*

LEGISLATIVE COUNSEL'S DIGEST

AB 2811, as amended, Lowenthal. ~~Artificial intelligence: legal professionals. Attorneys: court filings: artificial intelligence.~~

Existing law, the State Bar Act, regulates the conduct of attorneys. Existing law provides that it is the duty of an attorney to, among other things, support the Constitution and laws of the United States and this state, and to maintain inviolate the confidence, and at every peril to the attorney to preserve the secrets, of the attorney's client.

This bill would additionally require an attorney to execute and maintain, for a period of 7 years, an affidavit certifying whether generative artificial intelligence, as defined, was used in the drafting of each document that the attorney files, or intends to file, in a state or federal court within this state. The bill would require an attorney to, upon request or demand by a state or federal court within this state, file the affidavit with the court, provided that the 7-year retention period has not yet expired.

~~Existing law regulates the conduct of attorneys, legal document assistants, unlawful detainer assistants, and paralegals. Existing law establishes procedural rules governing pleadings, motions, notices, and other filings in civil and criminal actions and proceedings in trial and appellate courts in this state.~~

~~This bill would express the intent of the Legislature to enact legislation that would require legal professionals to disclose to the court whether they have used artificial intelligence or machine learning to prepare any pleadings, motions, or other documents filed with any court in this state.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 6068.1 is added to the Business and
2 Professions Code, to read:

3 6068.1. (a) For each document that an attorney files, or intends
4 to file, in a court of appropriate jurisdiction of this state or federal
5 court within this state, the attorney shall execute and maintain,
6 for a period of seven years beginning on the date the document
7 was created, an affidavit certifying whether a generative artificial
8 intelligence program was used in the drafting of the document.
9 The affidavit shall be substantially in the following form:

10
11 ARTIFICIAL INTELLIGENCE COMPLIANCE AFFIDAVIT

12 The attached document, titled “___,” complies with the artificial
13 intelligence (AI) usage reporting requirement set forth in the State
14 Bar Act because [check only ONE of the following options]:

15 ____ No generative artificial intelligence program was used in
16 the drafting of this document.

17 ____ A generative artificial intelligence program was used in
18 the drafting of this document, and all generated text, including all
19 citations and legal analysis, has been reviewed for accuracy and
20 approved by a human.

21
22 (Signed) _____

23 Attorney for: _____

24 Date: _____

25
26 (b) Upon request or order by a court of appropriate jurisdiction
27 of this state or federal court within this state, the attorney shall
28 file the affidavit with the court, provided that the retention period
29 described in subdivision (a) has not yet expired.

30 (c) For purposes of this section, “generative artificial
31 intelligence” means a machine-based system that can, for a given

1 set of human-defined objectives, make predictions,
2 recommendations, or decisions influencing real or virtual
3 environments, and that uses machine- and human-based inputs to
4 do all of the following:

- 5 (1) Perceive real and virtual environments.
- 6 (2) Abstract such perceptions into models through analysis in
7 an automated manner.
- 8 (3) Use model inference to formulate options for information
9 or action.

10 ~~SECTION 1. It is the intent of the Legislature to enact~~
11 ~~legislation that would protect the public and improve candor in~~
12 ~~legal proceedings by requiring legal professionals to disclose to~~
13 ~~the court whether they have used artificial intelligence or machine~~
14 ~~learning to prepare any pleadings, motions, or other documents~~
15 ~~filed with any trial or appellate court in this state. It is further the~~
16 ~~intent of the Legislature to require legal professionals who have~~
17 ~~used artificial intelligence or machine learning to prepare any~~
18 ~~documents filed with any court to ensure that citations contained~~
19 ~~within those documents conform to required ethical and~~
20 ~~professional standards.~~

SUPERIOR COURT
OF THE
STATE OF DELAWARE

SEAN P. LUGG
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE: (302) 255-0670

January 13, 2025

Justice Karen L. Valihura
Delaware Supreme Court
The Renaissance Centre
405 North King Street, Suite 509
Wilmington, Delaware 19801

**Re: Delaware Commission on Law and Technology (“DCLT”),
Courtroom Technology Committee (“CTC”) Annual Report**

Dear Justice Valihura:

Please accept this correspondence as the report of the Courtroom Technology Committee (“CTC”) of the Delaware Commission on Law and Technology (“DCLT” or “Commission”). During its December 19, 2023, meeting, the DCLT established this as one of five committees. The Commission charged the CTC to focus its efforts on: (a) Litigant Technology; (b) Courtroom Technology Resources; and (c) Courtroom Connectivity. Family Court Chief Judge Newell and I were assigned to chair the Committee, and, over the course of 2024, we developed committee membership and actively engaged in efforts to assess extant resources and inform the bar on how to best use these resources in case preparation and presentation.

Committee Membership

The CTC is comprised of the following active members:

- Family Court Chief Judge Michael Newell, Co-Chair
- Superior Court Judge Sean Lugg, Co-Chair
- Court of Common Pleas Chief Judge Carl Danberg
- Justice of the Peace Court Magistrate Judge Bethany Crowley
- Kenneth Kelemen, Deputy State Court Administrator and Information Systems Manager (Judicial Information Center (“JIC”))

- Gregory Lane, Chief Information Officer, Delaware Department of Technology & Information
- Brian Legum, Esquire, Kimmel, Carter, Roman, Peltz & O'Neill, P.A.
- Katelyn Will, Esquire, Staff Attorney, Superior Court, Recording Secretary
- Jamie McCloskey, Esquire, Deputy Attorney General, Delaware Department of Justice
- Benjamin Warshaw, Esquire, Assistant Public Defender, Delaware Office of Defense Services (In November of 2024, Mr. Warshaw left his position with the Office of Defense Services)
- Chris McGonigle, Chief of Information Technology, Office of Defense Services (Mr. McGonigle replaced Mr. Warshaw on the Committee)

Committee Work

In furtherance of its charge, the CTC established an annual meeting schedule to provide for quarterly meetings at times between Commission quarterly meetings. The CTC met on four occasions during 2024: February 19, June 5, August 27, and November 19. The CTC intends to maintain its meeting schedule for 2025, with meetings scheduled for February 24, May 19, September 8, and November 17. In addition to the regularly scheduled meetings, Committee members engaged in vibrant discussion throughout the year. From these meetings and discussions two areas became the focus of the Committee's work: (1) Resource Assessment; and (2) Training.

Mr. Kelemen informed the Committee of various technology upgrades and improvements installed in courtrooms throughout the State and scheduled a time to demonstrate the upgraded courtrooms to members of the Committee. Mr. Kelemen emphasized that his team will continue to deploy upgrades and improvements over time and that he regularly publishes a list of resources on the Delaware Judiciary website. These discussions also revealed some fundamental challenges in the Justice of the Peace Courts. A subgroup of the CTC plans to meet with JP Court representatives to determine whether any immediate improvements may be made, and Mr. Kelemen will continue to work on providing appropriate tools to the various JP Court locations.

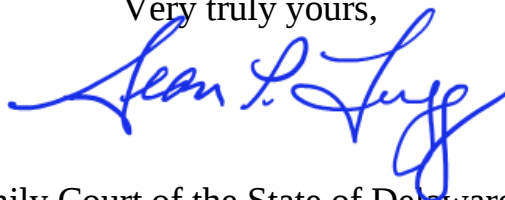
While technology tools have been available in Delaware Courts for years, the Committee's discussion revealed that, even in 2024, practitioners are unfamiliar with courtroom capabilities. To best address the deployment and use of technology in

Delaware Courts statewide the CTC focused its efforts on presenting a Continuing Legal Education (“CLE”) program to demonstrate courtroom technology tools.

Over the course of the summer and into the fall, members of the CTC worked to develop a training program to demonstrate, through simulated scenarios, how extant Courtroom technology may be used for presentation of evidence and argument. On October 25, 2024, the CTC offered a 2.5 hour session in the New Castle County Courthouse. This program highlighted the ease and efficacy of using technology for Courtroom presentation and stressed the need to engage in some minimal front-end preparation to best use existing resources. Performed “live with a studio audience,” the program also informed the committee (and JIC) of some needed adjustments. Following the program, Mr. Kelemen upgraded many of the Courtrooms to allow access to color printers (for printing highlighted exhibits) and is evaluating audio technology (headphones) more conducive to regular use. The CTC intends to offer this program in a location more readily accessible to the Kent County and Sussex County bar in 2025.

The CTC arranged for the recording of the October 25, 2024, seminar and is currently evaluating the footage to isolate short segments for publication on the DCLT website. The CTC intends to publish these short “snippets” as part of a learning library to allow users to review and relearn various skills prior to or during courtroom events. The CTC plans to continue its training and education efforts into 2025.

Very truly yours,



cc: Chief Judge Michael K. Newell, Family Court of the State of Delaware

January 10, 2025

VIA EMAIL

The Honorable Karen Valihura
The Honorable Sean Lugg

**Re: Commission on Law & Technology –
Information Governance Committee Report**

Justice Valihura and Judge Lugg:

In advance of our January 14, 2025 Commission on Law & Technology (the “Commission”) meeting, please see the following report from the Information Governance Committee (the “Committee”) regarding its initiatives in 2024 and for the forthcoming year.

eDiscovery CLE: As reported at prior meetings, the Committee is preparing a CLE to address certain recent opinions addressing eDiscovery.¹ At the October 2024 Commission meeting, we discussed whether there is a preference for an in-

¹ See, e.g., *Goldstein v. Denner*, 310 A.3d 548, 571 (Del. Ch. 2024); *Huntsman Int’l, LLC v. Benelux*, 321 A.3d 1205 (Del. Super. Ct. 2024).

person CLE versus a webinar. As there was no stated preference of the Commission, the Committee is prepared to proceed with a video recording. Young Conaway Stargatt & Taylor, LLP has recently acquired the capabilities to prepare video and audio recordings. By utilizing this technology, the Commission will be able to host the CLE on its website and re-purpose the video and audio (e.g., vignettes for social media or email blasts).

For the CLE, I will be joined on the panel by the following: the Honorable Christian Douglas Wright, Kevin F. Brady, and Ian D. McCauley. Mr. McCauley and I are presenting a similar CLE on January 14, 2025 for the Melson Inn of Court and Technology Inn of Court. We will further develop those materials for the Commission's CLE.

The Committee is targeting the spring of 2025 for the presentation.

ISO Certification Article: Ronald Briggs, of Morris, Nichols, Arsht, & Tunnell LLP and Gilbert Pinkett of Maron Marvel Bradley Anderson LLC have been preparing an article addressing ISO certification and, for firms that may not have the resources nor need for that level of certification, guidelines and recommended practices to achieve similar safeguards. Through this article, they will also explore different considerations facing large and small firms and offices when exploring ISO Certification.

The Committee is targeting late January or early February 2025 for the final draft of the article.

Bar Survey: As we have discussed at previous meetings, the Committee has been preparing a survey to determine issues and concerns facing the bar with respect to the three focus areas of the Committee: eDiscovery, data privacy, and law firm IT.

Subject to the thoughts of the Commission, the Committee believes a brief email survey is the best medium. The questions the Committee has proposed are as follows:

- With respect to eDiscovery, what issues or concerns are most important to you in the coming year? [Basic understanding of eDiscovery law; technical competency with respect to eDiscovery; emerging trends in eDiscovery (e.g., mobile data collection); other—please describe]
- With respect to data privacy, what issues or concerns are most important to you in the coming year? [Protecting client and firm data; having adequate security for client retention and maintenance; maintaining privacy across professional and personal devices; privacy and artificial intelligence; other—please describe]
- With respect to law firm IT, what issues or concerns are most important to you in the coming year? [Basic IT competency; IT for mid-size or small firms/offices; other—please describe]

Once the Committee knows the preferred medium, it can quickly generate the survey for dissemination in January 2025. We also welcome comments on the survey questions.

* * *

Please let me know if you have any questions or comments.

Respectfully submitted,

/s/ Ryan P. Newell

Ryan P. Newell

RPN

cc: The Honorable Christian Douglas Wright (via email)
Ahdel Candelaria Vega, M.S. (via email)

TO: Delaware Supreme Court Commission on Law and Technology

FROM: Travis Laster and Anthony Capone, Co-Chairs

DATE: January 23, 2025

SUBJECT: Rules and Professionalism Committee

This memorandum summarizes the activities of the Rules and Professionalism Committee (the “Rules Committee”) of the Commission on Law and Technology (the “Commission”).

The Rules Committee has collaborated with the Emerging Technologies Committee (the “ET Committee”) on an Interim Policy on the Use of GenAI by Judicial Officers and Court Personnel. The Rules Committee also has participated in joint meetings with the ET Committee with presenters about new technology. As the legal profession continues to discover the strengths and weaknesses of Generative AI technology, the coming year should provide additional evidence of whether current rules and policies need to be revised or reinforced.

The Rules Committee believes that it can best fulfill its function by collaborating with the other committees. For example, the Rules Committee theoretically could undertake its own investigation into areas covered by other committees, such as emerging technology or courtroom technology, then consider what rules or professional guidance could be warranted. That would involve the Rules Committee duplicating the efforts of the other committees.

Instead, the Rules Committee believes that by partnering with other committees, the Rules Committee can be available to address rules or professionalism issues as identified by those other committees.

Consequently, the Rules Committee intends to continue working with the ET Committee and to serve as a resource to that committee, other committees, and the Commission as a whole.