

## **(2) LEGAL ETHICS AND ARTIFICIAL INTELLIGENCE**

### **What is AI?**

Artificial intelligence has been defined as the “capability of a machine to imitate intelligent human behavior.” It also involves teaching computers how to perform tasks that typically require human intelligence such as perception, pattern recognition and decision-making.

**AI is everywhere.**

**You are Using AI every day and probably don’t even realize it**

**Microsoft word**-how many start typing and it starts to finish sentences or phrases?

**Siri/Alexa**- How many of you use Siri on your phones

**Google**- Ever have a conversation at home and the next time you are on your browser an ad or recommendation pops up for that exact same product or something similar that you had just talked about?

**Telephone Customer Service (Chat-bots)**-ever call somewhere only having to go through the automated service, having to press various numbers just to get an answer or non-answer? If you are like me, you are probably yelling Representative into the phone within 30 seconds only to be put back into an automated system.

**Waze/ Maps**- ever wonder how these programs can map out the exact route and help you to avoid traffic, tell you about speed traps and give you road conditions while knowing exactly where you are on the road and how much time you have left in your trip. These mapping systems take information from thousands of drivers, speeds, direction, and destination and change routes almost instantly.

**Even if you wanted to avoid AI, AI is really unavoidable in today’s world.**

### **What is Generative AI?**

A generative AI tool generates output typically in response to instructions, called a prompt from a user. The output is based upon an algorithmic model trained to sort through vast amounts of data, which could be text, images, music, computer code or almost any other type on content. Generative AI is different than purely algorithmic based learning technology because it sorts so much data and almost instantaneously creates seemingly new task appropriate content.

## **How is AI Being Used in the Practice of Law?**

(This list is a partial list and there may be other uses not listed here)

### **1. Electronic Discovery and predictive coding**

- categorize documents in a case;
- classification of documents as relevant or irrelevant;
- extrapolate data

### **2. Litigation Analysis and Predictive Analysis**

Analyze caselaw, facts, records, dockets and jury verdicts to provide an intelligent prediction of the outcome of a case.

### **3. Contract Management**

- identify information in contracts
- redline changes easily
- readily compare contracts for differences and preferred clauses or disfavored clauses.

### **4. Document reviews**

- helps with due diligence in identifying key phrases or clauses in documents

### **5. Bad Behavior Detection**

- ability to analyze emails and identify code words to detect poor morale and identification of wrongdoing of employees based upon their use of computers

### **6. Legal Research**

- natural language inquiries
- creation of basic legal memos, pleadings and correspondence

### **7. Courtroom Deception**

- AI programs to detect deception in testimony. Some studies have shown that 92% effective in detecting deception. Being used at Border and at customs in airports to detect when people are being deceptive.

## The Legal Ethics of AI

### **ABA Formal Ethics Opinion - dated 7-29-24**

#### **1. Several Ethics Rules Apply to Lawyers use of AI**

**Duty of Competence- Model Rule 1.1-** Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- Lawyers must understand the technology to improve legal services provided to clients.

Should also know capability and limitations.

- must guard against inaccurate output (example using outdated data or limited data).

- failure AI to decipher context

- possibility of hallucinations (seeming to provide ostensibly plausible responses that have no basis in fact or reality.

- Must independently review output to verify accuracy

Can't replace judgment and experience to advise clients about their legal matters

Lawyer remains fully responsible for all work.

**Duty of Confidentiality- Model Rule 1.6-**to keep confidential all information relating to representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out representation, or disclosure is permitted by an exception.

- Use of AI may require client confidences to be shared with third party vendors.

- must evaluate the risks that the information will be disclosed to outside parties who will not adequately protect information.

- should not use AI if cannot protect information.

- Consent from client must be informed and advised of the risk

- Should read and understand Terms of Use agreements, privacy policy and terms of use before using AI on behalf of a client.

**Duty to Communicate- Model Rule 1.4-** A lawyer must inform the client of any decision which may require informed consent, reasonably consult with the client about the means

by which the client's objectives are to be accomplished. Keep the client reasonably informed about status of matter and promptly comply with reasonable requests for information.

- this duty includes communicating the decision to use AI on client's case.
- should obtain client consent to use AI and consent should be informed.
- Should discuss limitations and risks of AI tool
- May wish to include client consent in engagement agreement.

**Meritorious Claims and Contentions and Candor Toward Tribunal- Model Rule 3.1, 3.3 and 8.4(c)**- Rule 3.1-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-lawyers cannot knowingly make a false statement of law or fact to the tribunal or fail to correct a material false statement of law or fact previously made to a tribunal. Rule 8.4(c)- provides that a lawyer shall not engage in conduct that involves dishonesty, fraud, deceit or misrepresentation.

- issues with lawyers' use of AI output have included citations to nonexistent opinions, inaccurate analysis of authority and use of misleading arguments.
- Courts are moving toward mandatory disclosure when lawyers have or are using AI.

**Supervisory Responsibilities Model Rules 5.1 and 5.3**-address ethical duties of managerial and supervisory lawyers responsibilities to firm, subordinate lawyers and non-lawyers.

- establish clear policies regarding the firm's use of AI and ensure that firms lawyers and nonlawyers comply with their professional obligations using AI tools, including practical and ethical use of AI tools.

**Fees Model Rule 1.5**-governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for use of AI.

- fees and expenses must be reasonable
- communicate what the lawyer will charge for services and expenses at start of case and explain the basis the charge if using AI
- only charge for time expended
- pass along costs and any discounts for using AI to client
- Lawyer should not charge client for time expended on learning how to use new AI.

## **COURT RULES AND RESTRICTIONS ON THE USE OF AI**

As of January 10, 2025, the following 17 Jurisdictions had Standing Orders and Local Rules on the use of AI. Data and case cites and orders for this section provided by **Ropes and Gray**- “Standing Orders and Local Rules on the Use of AI.”

New York

Pennsylvania

New Jersey

Virginia

North Carolina

Ohio

Illinois

Alabama

Missouri

Nebraska

Oklahoma

Texas

Montana

Idaho

Colorado

Arizona

California

District of Columbia

### **Cases Dealing with Use of AI**

There has been some caselaw generated through lawyer use of CHATGPT to conduct legal research. Experience shows that CHATGPT may sometimes provide incorrect answers, make up laws or cite cases that do not exist. Unfortunately, sanctions have been ordered in some of these cases.

***Mata v. Avianca, Inc.*** 2023 WL4114966 at \*3, \*9 (S.D. N.Y. June 22, 2023)-sanctions imposed on attorney who used CHATGPT for legal research even though the attorney was not aware that CHATGPT could make up cases, and attorney failed to check whether the citations were real or accurate.

***Park v. Kim***, 2024 WL 332478 (2d Cir. Jan 30, 2024)- attorney was referred to grievance panel for relying on CHATGPT without checking the results and for citing a non-existent decision in a reply brief.

***People v Crabill***, 2023 WL 8111898, at \*1 (Colo. O.P.D.J Nov. 22, 2023) – attorney suspended for violating various ethical rules by failing to check cases provided by CHATGPT.

### **3<sup>rd</sup> Circuit Standing Orders and Rules Related to Use of AI**

**E.D. Pa. - Judge Joseph Leeson-** issued an initial procedural order in *Young Et Al v. Daniel Boone Area School District*, Docket No. 5:24cv4729, which requires attorneys or pro se litigants “who utilize[] any generative AI tool in the preparation of any document to be filed” to **disclose and certify** “[t]he specific AI tool that was used,” “[t]he portions of the filing prepared by the AI program,” and “[t]hat a person has checked the accuracy of any portion of the document generated by AI, including all citations and legal authority.” The use of the phrase “preparation” (as opposed to “drafting”) could indicate disclosure and verification are required when Gen AI tools are used in any part of the preparatory process, including research. Additionally, the order cautions that failure to comply may result in sanctions and directs parties to review findings from the “Joint Formal Opinion of the Pennsylvania Bar Association and Philadelphia Bar Association regarding the use of Artificial Intelligence.”

**E.D. Pa.- Judge Hodge-**standing order reminds counsel or pro se litigants that the use of Gen AI in connection with filing or discovery must comply with Rules 11(b) and 26(g) of the Federal Rules of Civil Procedure, and any other relevant rule, including all applicable ethical rules.

**M.D. Pa.- Judge Mehalchick -** issued a civil practice order in a recent case (*Marinelli v. Aspen Properties Group, LLC*, Case No. 3:24-CV-574, Dkt. No. 24) which requires any party who uses generative AI in the “preparation” of any court filings to **disclose and certify** which AI tool was used, the portion of the filings prepared by the tool, and that a person has reviewed the filing for accuracy. The order governs generative AI, noting ChatGPT and Bard as examples, and **warns that generative AI may create unsupported or nonexistent legal citations**. Lastly, the order reminds parties that non-compliance may result in sanctions and links to a formal opinion by the Pennsylvania and Philadelphia Bar Associations on ethical issues regarding the use of AI.

**E.D. Pa.- Judge Gene Pratter-** Ordered that these pretrial and trial procedures contain a rule which applies specifically to the use of generative AI. The rule requires both **disclosure** that generative AI was used **and certification** that all legal citations were verified as accurate when generative AI tools are used “in the preparation of” any document filed with the court. The use of the phrase “preparation” (as opposed to “filing” or “drafting”) could indicate disclosure and verification are required when generative AI tools are used in any part of the preparatory process, including research.

**E.D. Pa.- Judge Michael Baylson-** standing order refers generally to “Artificial Intelligence (‘AI’)” and requires **disclosure** if any AI is “used . . . in the preparation of any complaint, answer, motion, brief, or other paper,” **and certification** that all legal citations were verified as accurate. The use of the phrase “preparation” (as opposed to “filing” or “drafting”) could indicate that disclosure and verification are required when AI tools are used in any part of the preparatory process, including research.

**D. Nj. Judge Evelyn Padin-**standing order refers specifically to filings drafted using generative AI, naming several examples of such tools. It requires parties to **identify** both the tool used and which portion(s) of the filings were drafted using gen AI, and to submit a **certification** that the work product was verified as accurate.

### **Bankruptcy Courts**

**S.D. N.Y. Bankruptcy Court** - Local Bankruptcy Rule 9011-1 refers specifically to “generative artificial intelligence services,” and cautions lawyers that GenAI tools “may produce factually or legally inaccurate content.” The rule reminds litigants that they must “review and verify any computer-generated content” to ensure it complies with Federal Rule of Bankruptcy Procedure 9011. There are no prohibitions, disclosure requirements, or other limitations on the use of GenAI tools. The commentary notes that this rule is based on the local rule adopted by the Eastern District of Texas Federal District Court.

### **Delaware Bankruptcy Court**

Is there a position on Use of AI?

## **Delaware Supreme Court Adopts Interim Policy providing guidance on the Use Generative Artificial Intelligence by Judicial Officers and Court Personnel**

October 23, 2024

*Policy does not apply to Lawyers but mirror the ABA Ethics Opinion and likely instructional on how AI use in Delaware Courts would be viewed.*

Policy neither prohibits nor requires use of generative AI. Policy established to provide guardrails.

-Those who use technology are ultimately responsible for the accuracy of whatever is produced. Users have duty to educate themselves on use.

-advises against using AI programs which could make confidential information public

-decision making functions may never be delegated to generative AI

### **The Delaware Personal Data Privacy Act -effective 1/1/25**

-Provides consumers with the right to opt-out of profiling if such profiling is in furtherance of *solely automated decisions that produce legal or similarly significant effects concerning the consumer.*

-Protects "users," defined as any individual that uses an internet website, online or cloud computing service, online application, or mobile application.

-Covers commercial internet website, online or cloud computing service, online application, or mobile application.

-Applies to any "person who owns an internet website, online or cloud computing service, online application, or mobile application" that collects personally identifiable information through the internet about individual users residing in Delaware.

### **Bottom Line**

AI is quickly evolving and it's use is expanding. It is important for lawyers who use Generative AI to check the accuracy of the answers provided by generative AI before relying on it in a document filed with the Court.

Counsel must be aware of the novel risks when using generative AI as the potential for confidential information being submitted through prompts in the AI program.



Courts will continue to issue orders and amend local rules that govern the use of generative AI in court filings and disclosures.

Until that time, it might be wise to disclose the use of AI and certify that you checked it's accuracy when submitting pleadings produced with the assistance of generative AI.