Generative AI: Ethical Best Practices for Lawyers and Judges

To provide guidance to Arizona lawyers and judges using generative artificial intelligence (AI), the Arizona Steering Committee on Artificial Intelligence and the Courts issues these ethical best practices.

These best practices are designed to guide lawyers and judges using generative AI, which is defined as AI "capable of generating new content (such as images or text) in response to a submitted prompt (such as a query) by learning from a large reference database of examples."[1] Generative AI makes work more efficient, quickly producing work product that may appear thorough, competent, unbiased, and accurate. This may lure legal professionals into trusting or over-relying on the work product. Despite its polished veneer, however, the work product may be incomplete, incompetent, biased, and inaccurate. The use of generative AI tools may also jeopardize confidential, privileged, or other sensitive information. For these reasons, attorneys and judges considering or using generative AI tools must remain vigilant and remember that all ethical obligations still apply. The sections below provide specific, though non-exhaustive, guidance for attorneys and judges considering or using generative AI tools in the following areas: (1) Competence and Diligence; (2) Confidentiality and Nonpublic Information; (3) Communication to Clients and Supervisors; (4) Billing; (5) Court Disclosure and Candor; (6) Bias and Discrimination; and (7) Supervision.

1. Competence and Diligence

Lawyers and judges have duties of competence and diligence. Lawyers have a duty to keep abreast of the risks and benefits of technology in connection with their law practice,[2] and judges appear to have the same duty in their judicial work.[3] The use of generative AI does not lessen these

---

[1] Merriam-Webster, https://www.merriam-webster.com/dictionary/generativeAI.

[2] Ariz. Rules of Prof'l Conduct Ethical Rule (ER) 1.1 cmt. 6 ("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.") (emphasis added); ER 1.3; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), http://www.wvodc.org/pdf/AILEO24-01.pdf ("To fulfill the lawyer's duty of diligence, a lawyer's use of AI resources requires human input, human oversight, and when necessary human intervention to correct mistakes.").

[3] ARIZ. CODE OF JUDICIAL CONDUCT R. 2.5(A) (stating that judges must "perform judicial and administrative duties competently, diligently, and promptly"). Although the Arizona Code of Judicial Conduct does not currently mention technological competence, judicial ethics opinions in this area conclude that such a duty exists. *See, e.g.*, Mich. Jud. Ethics Op. JI-155 (2023); W.V. Jud. Ethics Op. 2023-22. In an accompanying submission to the Committee, the Ethics Workgroup recommends that the Arizona Code of Judicial Conduct be amended to make this duty explicit.

duties. Legal professionals interacting with generative AI must inform themselves of its benefits and risks, through for example reviewing the terms of service, completing continuing legal education, and consulting with technology experts.[4]

Legal professionals must also check the work product to ensure that any factual or legal information is accurate, relevant, and otherwise appropriate. Because generative AI can err – and indeed it cannot even think – legal professionals must not defer to its judgment. For example, it would be inappropriate to allow an AI tool to decide a case or to recommend a critical course of action for a client.[5] Moreover, attorneys have a duty under Rule 3.1 not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous. . . ."[6] Because generative AI can incorporate or create inaccurate information, legal professionals should not rely on its output without checking every material proposition and source, such as statutory or case citations.[7]

2. Confidentiality and Nonpublic Information

The use of Generative AI also presents the risk of disclosure or use of confidential or otherwise sensitive information. Absent an applicable exception, lawyers must treat confidential all "information relating to the representation of a client . . . ."[8] Unless the legal professional has sufficient guarantees that the AI tool will not share or use confidential or nonpublic information,[9] the legal professional may not enter such information into the tool. Certain tools, for example, are open to all or nearly all but come with little or no guarantees that the inputted information will not be revealed to third parties or used for other purposes.[10] Other tools, in contrast, are enterprise-

---

[4]   ABA Ethics Op. 512 (2024) ("Although there is no single right way to keep up with [generative AI] developments, lawyers should consider reading about [generative AI] tools targeted at the legal profession, attending relevant continuing legal education programs, and . . . consulting others who are proficient in [generative AI] technology.").

[5]   *See, e.g.*, W.V. Jud. Ethics Op. 2023-22 (stating that a judge "should never use AI to reach a conclusion on the outcome of a case," in part "because of perceived biases that may be built into the program" and the judge "alone is responsible for determining the outcome of all proceedings"); Fla. Ethics Op. 24-1 (2024) ("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.").

[6]   ER 3.1; *see also* N.J. Sup. Ct. Comm. on AI and the Courts, Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers (2024).

[7]   ABA Ethics Op. 512 (2024) ("[A] lawyer's reliance on, or submission of, a [generative AI] tool's output—without 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.").

[8]   ER 1.6; Ariz. Code of Judicial Conduct R. 3.5 ("A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties."); Ariz. Code of Conduct for Judicial Employees R. 3.2 ("A judicial employee shall not intentionally disclose or use nonpublic information acquired in an official capacity for any purpose unrelated to the employee's duties.").

[9]   To learn whether confidential or nonpublic information would be subject to third-party disclosure or use, "lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any [generative AI] 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." ABA Ethics Op. 512 (2024).

[10]   A free AI tool may offer little or no protection of the data. Even if the tool provides the user with the option not to use inputted data for training purposes, for example, that does not completely eliminate the risk to

level or customized for the firm or court and may offer more guarantees that the inputted information will not be revealed or used.[11] When in any doubt, legal professionals should refrain from entering confidential or nonpublic information into the tool.[12]

3. Communication to Clients and Supervisors

The ethical rules do not impose an obligation to inform clients about each and every use of AI.[13] If, however, the client would need to know about its use to make an informed decision, disclosure would be required.[14] Likewise, before a lawyer inputs confidential or privileged information into a generative AI tool posing a risk of disclosure or use by third parties, the lawyer should first obtain the client's informed consent to proceed. Furthermore, if clients or prospective clients are interacting with a firm's AI chatbot, rather than a human lawyer or legal assistant, this should be disclosed.[15] For judges and court employees, they should ensure that their contemplated

---

confidentiality. The company behind the tool may decide to update and weaken its privacy policies at a later point, or the company may collect or use data for other purposes beyond training the model.

[11]   *See, e.g.*, Fla. Ethics Op. 24-1 (2024) ("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.").

[12]   *See, e.g.*, ER 1.6(e) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."). A lawyer may nevertheless seek the client's informed consent to use the tool after informing the client of the material risks and reasonable alternatives. ER 1.0(e) (defining informed consent); ABA Ethics Op. 512 (2024) ("[B]ecause many of today's self-learning [generative AI] 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 [the] tool."); W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), http://www.wvodc.org/pdf/AILEO24-01.pdf; *see also* Penn. Ethics Op. 2024-200 (noting that certain AI tools may be inconsistent with the conflicts rules "by using the information developed from one representation to inform another" and concluding that a "lawyer must not input any confidential information of a client into AI that lacks adequate confidentiality and security protections").

[13]   *See, e.g.*, ABA Ethics Op. 512 (2024) ("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.").

[14]   *See* ERs 1.2, 1.4; ABA Ethics Op. 512 (2024) ("[L]awyers should consider whether the specific circumstances warrant client consultation about the use of a [generative AI] 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 [generative AI] tool's importance to a particular task, the significance of that task to the overall representation, how the [generative AI] tool will process the client's information, and the extent to which knowledge of the lawyer's use of the [generative AI] tool would affect the client's evaluation of or confidence in the lawyer's work."). Some out-of-state ethics opinions appear to require additional disclosure to the client. *See, e.g.*, Penn. Ethics Op. 2024-200 ("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."). When in doubt, it is best to discuss the contemplated usage with the client.

[15]   *See, e.g.*, Fla. Ethics Op. 24-1 (2024) ("[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. . . ."); *see also generally* ABA Ethics Op. 506 (2023) (discussing the ethical use of nonlawyer assistants in connection with client intake); Penn. Ethics Op. 2024-200 (citing Rule 5.5) ("To avoid the [unauthorized practice of law], 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.").

use of generative AI is consistent with court policy; when in doubt, they should discuss the matter with their supervising authority in advance.

4. Billing

Some AI is currently free to use, but other AI results in a cost to attorneys. This cost may be viewed as overhead and not billed to clients. Alternatively, if an attorney plans to bill the client for use of AI tools in the client's matter, the attorney must disclose these plans to the client in advance and in writing.[16] In addition, an attorney using an hourly billing arrangement cannot bill the client for the time the attorney saved by using AI.[17] For example, if an attorney would have spent two hours drafting a document that AI generated in less than a minute, the attorney cannot bill the client two hours unless the attorney actually spent two hours querying, checking, and supplementing the document or otherwise working on the client's matter.

5. Court Disclosure and Candor

Although the ethical rules do not currently require disclosure to the court that an attorney has used AI in connection with the litigation, certain courts' general, standing, and case-specific orders require it.[18] Moreover, if a court questions the attorney about its use, the attorney may not give a dishonest answer.[19] Furthermore, if an attorney's submissions to the court rely on AI-generated work, the attorney must be careful not to "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 "offer evidence that the lawyer knows to be false."[20] It is now common knowledge that generative AI can create false or misleading information, and legal professionals using this technology should double-check all information and sources.

6. Bias and Discrimination

---

[16]   *See* ER 1.5(b).

[17]   *See, e.g.*, ER 1.5(a) (prohibiting unreasonable fees); ABA Ethics Op. 512 (2024); ABA Ethics Op. 93-379 (1993); Fla. Ethics Op. 24-1 (2024) ("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."); Gary Marchant & Joseph R. Tiano, Jr., White Paper: Artificial Intelligence and Legal Ethics (2023) (discussing new fee paradigms for machine-aided legal work), https://www.azcourts.gov/Portals/225/AI%20and%20Legal%20Ethics%20Final%20White%20Paper.pdf.

[18]   *See, e.g.*, Sarah Martinson, *Judges and Law Scholars Divided over AI Standing Orders*, Law360, March 22, 2024, https://www.law360.com/pulse/articles/1810715/judges-and-law-scholars-divided-over-ai-standing-orders ("Several federal judges have issued standing orders blocking or putting guidelines on the use of artificial intelligence over accuracy issues with the technology, but a few legal scholars have raised concerns that the orders might discourage attorneys and self-represented litigants from using AI."); *see also* RAILS, Resource: AI Orders, https://rails.legal/resource-ai-orders/ (providing a list of such orders across the country).

[19]   *See, e.g.*, ERs 3.3, 8.4(c) (stating that an attorney may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Although evidentiary considerations are beyond the scope of this publication, we note that trial lawyers should be vigilant about the possibility of false, AI-generated evidence (e.g., deep fakes) received from clients or third parties.

[20]   ER 3.3(a)(1), (3); *see also id.* (a)(3) ("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 necessary, disclosure to the tribunal.").

Legal professionals have an obligation to avoid bias and discrimination.[21] Certain generative AI tools can learn, regurgitate, and even amplify biases, such as gender or racial bias. For example, a tool trained using data primarily from Caucasians may produce outputs biased against other races. As another example, after scouring information posted online, the tool may incorrectly learn that females are worse at certain roles or occupations than males. Legal professionals should be vigilant that any use of generative AI does not promote racial, gender, or other inappropriate biases.[22]

7. Supervision

Lawyers and judges are responsible for supervising subordinate lawyers and employees to ensure that their conduct is consistent with the ethical rules.[23] Their use of generative AI is no exception. Supervising lawyers and judges should consider adopting a written policy, signed or otherwise acknowledged by their supervisees, regulating the use of generative AI.[24] Policies and trainings will help to avoid ethical issues in the areas discussed above, namely, competence, confidentiality, communication, billing, court candor, and bias. Finally, legal professionals must supervise the use and output of their AI tools, just as they must supervise their human supervisees.[25]

---

[21] For example, Rule 2.3 of the Arizona Code of Judicial Conduct commands:

> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice. . . .

[22] *See, e.g.*, Mich. Jud. Ethics Op. JI-155 (2023) (noting that these ethical rules "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. This could occur if the tool's algorithm or training data creates bias.") (citation omitted); Keith Swisher, *Algorithmic Judicial Ethics*, 2024 Wisc. L. Rev. __ (noting that predictive algorithms can produce racially biased outputs).

[23] *See, e.g.*, ER 5.1, 5.3; Ariz. Code of Judicial Conduct R. 2.12; *see also* ABA Ethics Op. 512 (2024) ("Managerial lawyers must establish clear policies regarding the law firm's permissible use of [generative AI], and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using [generative AI] tools.").

[24] *See, e.g.*, Fla. Ethics Op. 24-1 (2024) ("[J]ust 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.").

[25] ER 5.3; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), http://www.wvodc.org/pdf/AILEO24-01.pdf; Ariz. Code of Judicial Conduct R. 2.12.

Conclusion

Although the most common issues have been addressed above, additional or unanticipated issues may arise in the use of generative AI as it evolves.[26] Although generative AI can boost efficiency, its use does not alter or lessen the ethical obligations of judges and attorneys. Judges and attorneys, not AI tools, are responsible for their work product.

---

[26] *See, e.g.*, ABA Ethics Op. 512 (2024) ("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 [generative AI] tools as they develop.").