



2024 Business Litigation Practice Group Seminar

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I Am Not a Robot: The Ethical Use of AI in Litigation

Kandice K. Hull, Moderator
MCNEES WALLACE & NURICK LLC
Harrisburg, Pennsylvania
khull@mcneeslaw.com

How Lawyers are Using AI/Applicable Rules of Professional Conduct

- **General Considerations Before Using AI**
 - Rule 1.1 – Competence
 - “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 8: “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.”
 - Lawyers must identify technology that is needed to efficiently represent the client, and to determine if the use of such technology will improve client services.
 - Lawyers must understand how these tools work – capabilities and limitations, risks and benefits.
 - Professional judgment cannot be delegated to AI.
 - Rule 1.4 – Lawyer-Client Relationship
 - Communication: “(a) A lawyer shall . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished”
 - Includes discussing with the client whether to use AI, the associated risks, benefits, and limitations, and get informed consent.
 - Also includes informing the client if AI will not be used, if using AI would benefit the client.
 - Rule 1.6 – Confidentiality
 - “(c) 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.”
 - Use of AI may require sharing confidential client information with third-party AI providers.
 - What type of information will be provided? How will the information be stored? What security measures are in place? Who will have access to the information? Can the data be anonymized?
 - Review terms of use, security policies, and data privacy policies
- **Document & Invoice Review**
 - Searching discovery documents for relevant evidence
 - Categorizing documents/predictive coding
 - Data extraction
 - Reviewing documents to draft deposition questions or requests for admissions
 - Rules Implicated:
 - Rule 1.1 – Competence
 - If AI predictive coding is used to categorize discovery documents, review a sample set of documents to validate the results.

- If AI coding is used to categorize contract terms, review a sample set of documents to validate the results.
 - Rule 1.6 – Confidentiality
 - Rule 5.2 – Nonlawyer Assistance
- **Contract drafting and brief writing**
 - Rule 1.1 – Competence
 - If AI is used to generate a legal document, review the language, facts, and relevant law to ensure proper consideration.
 - Rule 1.5 – Fees
 - Using AI that produces unreliable outcomes may increase client cost (manual rework, or even regulatory or court fines)
 - Rule 3.3 – Candor Toward the Tribunal
 - “(a) 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 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.”
 - The lawyer must review all AI outputs, including analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court.
 - See also Rule 3.1 (Meritorious Claims & Contentions); Rule 4.1 (Truthfulness in Statements to Others)
- **Legal Research**
 - Generating responses to natural language questions rather than typical Boolean searches
 - Ex: Ross Intelligence (AI program) can produce short legal memos in response to a legal question
 - Rule 1.1 – Competence
 - Rule 1.5 – Fees
 - Rule 1.6 – Confidentiality
 - Rule 5.3 – Nonlawyer Assistance

ABA Model Rules Implicated

Link:

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

- **Rule 1.1 – Competence**
 - “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 8: “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.”
 - Lawyers must identify technology that is needed to efficiently represent the client, and to determine if the use of such technology will improve client services.
 - Lawyers must understand how these tools work – capabilities and limitations, risks and benefits.
 - Lawyers must be diligent to ensure that the product generated by AI is accurate, complete, unbiased, and reflects sound legal knowledge. Professional judgment cannot be delegated to AI.
 - Example: If AI predictive coding is used to categorize discovery documents, review a sample set of documents to validate the results. If AI is used to generate a legal document, review the language, facts, and relevant law to ensure proper consideration.

- **Rule 1.3 – Diligence**
 - “A lawyer shall act with reasonable diligence and promptness in representing a client.”
 - If an AI solution could have avoided the need for an extension or delay, does not using AI violate the promptness requirement?

- **Rule 1.4 – Lawyer-Client Relationship**
 - Communication: “(a) A lawyer shall . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished”
 - Includes discussing with the client whether to use AI, the associated risks, benefits, and limitations, and get informed consent.
 - Also includes informing the client if AI will not be used, if using AI would benefit the client.

- **Rule 1.5 – Fees**
 - Requires that lawyers not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.
 - Would failing to use AI technology that would materially reduce the cost of providing legal services result in a lawyer charging an unreasonable fee to a client?
 - On the other hand, using AI that produces unreliable outcomes may increase client cost (manual re-work, or even regulatory or court fines)

- **Rule 1.6 – Confidentiality**
 - “(c) 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.”
 - Use of AI may require sharing confidential client information with third-party AI providers.
 - What type of information will be provided? How will the information be stored? What security measures are in place? Who will have access to the information? Can the data be anonymized?
 - Review terms of use, security policies, and data privacy policies

- **Rule 3.3 – Candor Toward the Tribunal**
 - “(a) 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 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.”
 - The lawyer must review all AI outputs, including analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court.
 - *See also* Rule 3.1 (Meritorious Claims & Contentions); Rule 4.1 (Truthfulness in Statements to Others)

- **Rule 5.3 – Responsibilities Regarding Nonlawyer Assistance**
 - Comment 3: “A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. . . . When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. . . . When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.”
 - For example, a lawyer using an AI tool must ensure the work product produced by the AI is accurate and complete, and does not create a risk of disclosing client confidential information.

- **Rule 8.4(g) – Misconduct**

- “It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”
- The lawyer must understand potential biases of the AI systems. Predictive analytics can be discriminatory. For example, if the algorithm pulls historical data that is inherently biased, this could perpetuate bias and injustice.