

## **Tuesday Programs**

### **Panel One (8:30 – 9:20) – Alternative Dispute Resolution Panel: “Effective Use of ADR in a High Conflict Case – Early Intervention”**

1. A look at how assessing your case (triage) and determining what ADR tool or tools should be used in combination to best address the needs of a family in a High Conflict Case. An examination of the interplay between Mediation, Arbitration, Financial Tools, Mental Health Tools, Parent Coordination and Guardians
2. Moderator: Jeffrey Fiorello, Esq.
3. Speakers:
  - Derek Freed, Esq.
  - Robin Bogan, Esq.
  - Andrea White, Esq.
  - Candice Drisgula, Esq.
  - Megan Sartor, CPA/ABV/CFF (Sax)
  - Amanda Yu, Esq.
  - Shireen Meistrich
  - Judy Doyle, CPA/ABV (Withum)

### **Panel Two (9:25 – 10:15) – Civil Panel: “Things about Civil Practice Every Family Lawyer Should Know- Tevis and Beyond”**

- Description: A look into the overlap between Family Law and Civil Practice. Tips and tricks to represent your client effectively in both a Tevis claim, as well as using discovery effectively in a matrimonial matter, from both matrimonial and civil practitioners.
1. Moderator: Jenna Shapiro, Esq./Craig Hubert, Esq.
  2. Speakers:
    - Tom Manzo, Esq.
    - William Mergner, Esq.
    - Tom Prol, Esq.
    - Michael Paglione, Esq.
    - Judge Kenneth Grispin
    - Nikki Caruso, Esq.
    - Jason Adesso, CPA
    - Christina Stripp, Esq.

### **Panel Three (10:20 – 11:10): AAML Panel – “Ethics”**

1. Moderator: Sheryl Seiden, Esq.
2. Speakers:
  - Francesca O’Cathain, Esq.
  - Amanda Trigg, Esq.
  - Jeralyn Lawrence, Esq.
  - Carolyn Daly, Esq.
  - Judge Rosenberg

- Mike Saponara (Stout)



# Valuation Services

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## VS Section

### STATEMENTS ON STANDARDS FOR VALUATION SERVICES

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## VS Section 100

### *Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset*

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Source: Statement on Standards for Valuation Services No. 1

June 2007

#### Foreword

##### Why Issued

Valuations of businesses, business ownership interests, securities, or intangible assets (hereinafter collectively referred to in this Foreword as *business valuations*) may be performed for a wide variety of purposes including the following:

1. Transactions (or potential transactions), such as acquisitions, mergers, leveraged buyouts, initial public offerings, employee stock ownership plans and other share based plans, partner and shareholder buy-ins or buyouts, and stock redemptions
2. Litigation (or pending litigation) relating to matters such as marital dissolution, bankruptcy, contractual disputes, owner disputes, dissenting shareholder and minority ownership oppression cases, and employment and intellectual property disputes
3. Compliance-oriented engagements, including (a) financial reporting and (b) tax matters such as corporate reorganizations; S corporation conversions; income, estate, and gift tax compliance; purchase price allocations; and charitable contributions
4. Planning oriented engagements for income tax, estate tax, gift tax, mergers and acquisitions, and personal financial planning

In recent years, the need for business valuations has increased significantly. Performing an engagement to estimate value involves special knowledge and skill.

Given the increasing number of members of the AICPA who are performing business valuation engagements or some aspect thereof, the AICPA Consulting Services Executive Committee has written this standard to improve the consistency and quality of practice among AICPA members performing

business valuations. AICPA members will be required to follow this standard when they perform engagements to estimate value that culminate in the expression of a conclusion of value or a calculated value.

The Consulting Services Executive Committee is a body designated by AICPA Council to promulgate professional standards under the “General Standards Rule” (ET sec. 1.300.001 and 2.300.001) and the “Compliance with Standards Rule” (ET sec. 1.310.001 and 2.310.001) of the AICPA Code of Professional Conduct (the code).

## Introduction and Scope

### .01

This statement establishes standards for AICPA members (hereinafter referred to in this statement as *members*) who are engaged to, or, as part of another engagement, estimate the value of a **business**, [fn.1](#) *business ownership interest, security, or intangible asset* (hereinafter collectively referred to in this statement as **subject interest**). For purposes of this statement, the definition of a business includes not-for-profit entities or activities.

### .02

As described in this statement, the term **engagement to estimate value** refers to an engagement or any part of an engagement (for example, a tax, litigation, or acquisition-related engagement) that involves estimating the value of a subject interest. An engagement to estimate value culminates in the expression of either a **conclusion of value** or a **calculated value** (see paragraph .21). A member who performs an engagement to estimate value is referred to, in this statement, as a **valuation analyst**.

### .03

Valuation analysts should be aware of any governmental regulations and other professional standards applicable to the engagement, including the code and the Statement on Standards for Consulting Services (SSCS) No. 1, *Consulting Services: Definitions and Standards* (CS sec. 100), and the extent to which they apply to engagements to estimate value. Compliance is the responsibility of the valuation analyst.

### .04

In the process of estimating value as part of an engagement, the valuation analyst applies **valuation approaches** and **valuation methods**, as described in this statement, and uses professional judgment. The use of professional judgment is an essential component of estimating value.

## Exceptions From This Statement

### .05

This statement is not applicable to a member who participates in estimating the value of a subject interest as part of performing an attest engagement defined by the “Independence Rule” of the code (ET sec. 1.200.001) (for example, as part of an audit, review, or compilation engagement).

**.06**

This statement is not applicable when the value of a subject interest is provided to the member by the client or a third party, and the member does not apply valuation approaches and methods, as discussed in this statement.

**.07**

This statement is not applicable to internal use assignments from employers to employee members not in public practice, as that term is defined in the code (ET sec. 0.400.42). See also Valuation Interpretation No. 1, “Scope of Applicable Services” (VS sec. 9100), illustrations 24 and 25 (VS sec. 9100 par. .78–.81).

**.08**

This statement is not applicable to engagements that are exclusively for the purpose of determining economic damages (for example, lost profits) unless those determinations include an engagement to estimate value. See also Interpretation No. 1, illustrations 1, 2, and 3 (VS sec. 9100 par. .06–.11).

**.09**

This statement is not applicable to mechanical computations that do not rise to the level of an engagement to estimate value; that is, when the member does not apply valuation approaches and methods and does not use professional judgment. See Interpretation No. 1, illustration 8 (VS sec. 9100 par. .20–.23).

This statement is not applicable when it is not practical or not reasonable to obtain or use relevant information; as a result, the member is unable to apply valuation approaches and methods that are described in this statement. [fn 2](#)

### ***Jurisdictional Exception***

**.10**

If any part of this statement differs from published governmental, judicial, or accounting authority, or such authority specifies valuation development procedures or valuation reporting procedures, then the valuation analyst should follow the applicable published authority or stated procedures with respect to that part applicable to the valuation in which the member is engaged. The other parts of this statement continue in full force and effect (Interpretation No. 1 [VS sec. 9100 par. .01–.89]).

## **Overall Engagement Considerations**

## Professional Competence

### .11

The "General Standards Rule" of the code (ET sec. 1.300.001 and 2.300.001) states that a member shall "undertake only those *professional services* that the *member* or the *member's firm* can reasonably expect to be completed with professional competence." Performing a valuation engagement with professional competence involves special knowledge and skill. A valuation analyst should possess a level of knowledge of valuation principles and theory and a level of skill in the application of such principles that will enable him or her to identify, gather, and analyze data, consider and apply appropriate valuation approaches and methods, and use professional judgment in developing the estimate of value (whether a single amount or a range). An in-depth discussion of valuation theory and principles, and how and when to apply them, is not within the scope of this statement.

### .12

In determining whether he or she can reasonably expect to complete the valuation engagement with professional competence, the valuation analyst should consider, at a minimum, the following:

- a. Subject entity and its industry
- b. Subject interest
- c. **Valuation date**
- d. Scope of the valuation engagement
  - i. Purpose of the valuation engagement
  - ii. **Assumptions and limiting conditions** expected to apply to the valuation engagement (see paragraph .18)
  - iii. Applicable **standard of value** (for example, **fair value** or **fair market value**) and the applicable **premise of value** (for example, going concern)
  - iv. Type of valuation report to be issued (see paragraph .48), intended use and users of the report, and restrictions on the use of the report
- e. Governmental regulations or other professional standards that apply to the subject interest or to the valuation engagement

## Nature and Risks of the Valuation Services and Expectations of the Client

### .13

In understanding the nature and risks of the **valuation services** to be provided, and the expectations of the client, the valuation analyst should consider the matters in paragraph .12, and in addition, at a minimum, the following:

- a. The proposed terms of the valuation engagement
- b. The identity of the client
- c. The nature of the interest and ownership rights in the business, business interest, security, or intangible asset being valued, including **control** characteristics and the degree of **marketability** of the interest
- d. The procedural requirements of a valuation engagement and the extent, if any, to which procedures will be limited by either the client or circumstances beyond the client's or the valuation analyst's control
- e. The use of and limitations of the report, and the conclusion or calculated value
- f. Any obligation to update the valuation

## **Objectivity and Conflict of Interest**

### **.14**

The code requires objectivity in the performance of all professional services, including valuation engagements. Objectivity is a state of mind. The principle of objectivity imposes the obligation to be impartial, intellectually honest, disinterested, and free from conflicts of interest. Where a potential conflict of interest may exist, a valuation analyst should make the disclosures and obtain consent as required by the "Conflicts of Interest" interpretation (ET sec. 1.110.010 and 2.110.010) under the "Integrity and Objectivity Rule" (ET sec. 1.100.001 and 2.100.001).

## **Independence and Valuation**

### **.15**

If valuation services are performed for a client for which the valuation analyst or valuation analyst's firm also performs an attest engagement (defined by the "Independence Rule" of the code), the valuation analyst should meet the requirements included in the interpretations of the "Nonattest Services" subtopic (ET sec. 1.295) under the "Independence Rule" (ET sec. 1.200.001) so as not to impair the member's independence with respect to the client.

## **Establishing an Understanding With the Client**

### **.16**

The valuation analyst should establish an understanding with the client, preferably in writing, regarding the engagement to be performed. If the understanding is oral, the valuation analyst should document that understanding by appropriate memoranda or notations in the working papers. (If the engagement is being performed for an attest client, the "General Requirements for Performing Nonattest Services" interpretation [ET sec. 1.295.040] of the "Independence Rule" [ET sec. 1.200.001] requires the engagement understanding to be in writing.) Regardless of whether the understanding is written or oral, the valuation analyst should modify the understanding if he or she

encounters circumstances during the engagement that make it appropriate to modify that understanding.

**.17**

The understanding with the client reduces the possibility that either the valuation analyst or the client may misinterpret the needs or expectations of the other party. The understanding should include, at a minimum, the nature, purpose, and objective of the valuation engagement, the client's responsibilities, the valuation analyst's responsibilities, the applicable assumptions and limiting conditions, the type of report to be issued, and the standard of value to be used.

### ***Assumptions and Limiting Conditions***

**.18**

Assumptions and limiting conditions are common to valuation engagements. Examples of typical assumptions and limiting conditions for a business valuation are provided in appendix A, "Illustrative List of Assumptions and Limiting Conditions for a Business Valuation" (par. .80). The assumptions and limiting conditions should be disclosed in the valuation report (see paragraphs .52*l*, .68*g*, and .71*m*).

### **Scope Restrictions or Limitations**

**.19**

A restriction or limitation on the scope of the valuation analyst's work, or the data available for analysis, may be present and known to the valuation analyst at the outset of the valuation engagement or may arise during the course of a valuation engagement. Such a restriction or limitation should be disclosed in the valuation report (see paragraphs .52*m*, .68*e*, and .71*n*).

### **Using the Work of Specialists in the Engagement to Estimate Value**

**.20**

In performing an engagement to estimate value, the valuation analyst may rely on the work of a third party specialist (for example, a real estate or equipment appraiser). The valuation analyst should note in the assumptions and limiting conditions the level of responsibility, if any, being assumed by the valuation analyst for the work of the third party specialist. At the option of the valuation analyst, the written report of the third party specialist may be included in the valuation analyst's report.

## **Development**

### **Types of Engagement**

**.21**

There are two types of engagements to estimate value—a ***valuation engagement*** and a

**calculation engagement.** The valuation engagement requires more procedures than does the calculation engagement. The valuation engagement results in a conclusion of value. The calculation engagement results in a calculated value. The type of engagement is established in the understanding with the client (see paragraphs .16 and .17):

- a. *Valuation engagement.* A valuation analyst performs a valuation engagement when (1) the engagement calls for the valuation analyst to estimate the value of a subject interest and (2) the valuation analyst estimates the value (as outlined in paragraphs .23–.45) and is free to apply the valuation approaches and methods he or she deems appropriate in the circumstances. The valuation analyst expresses the results of the valuation as a conclusion of value; the conclusion may be either a single amount or a range.
- b. *Calculation engagement.* A valuation analyst performs a calculation engagement when (1) the valuation analyst and the client agree on the valuation approaches and methods the valuation analyst will use and the extent of procedures the valuation analyst will perform in the process of calculating the value of a subject interest (these procedures will be more limited than those of a valuation engagement) and (2) the valuation analyst calculates the value in compliance with the agreement. The valuation analyst expresses the results of these procedures as a calculated value. The calculated value is expressed as a range or as a single amount. A calculation engagement does not include all of the procedures required for a valuation engagement (see paragraph .46).

## Hypothetical Conditions

### .22

Hypothetical conditions affecting the subject interest may be required in some circumstances. When a valuation analyst uses hypothetical conditions during a valuation or calculation engagement, he or she should indicate the purpose for including the hypothetical conditions and disclose these conditions in the valuation or calculation report (see paragraphs .52n, .71o, and .74).

## Valuation Engagement

### .23

In performing a valuation engagement, the valuation analyst should do the following:

- Analyze the subject interest (paragraphs .25–.30)
- Consider and apply appropriate valuation approaches and methods (paragraphs .31–.42)
- Prepare and maintain appropriate documentation (paragraphs .44–.45)

### .24

Even though the list in paragraph .23 and some requirements and guidance in this statement are presented in a manner that suggests a sequential valuation process, valuations involve an ongoing

process of gathering, updating, and analyzing information. Accordingly, the sequence of the requirements and guidance in this statement may be implemented differently at the option of the valuation analyst.

### ***Analysis of the Subject Interest***

#### **.25**

The analysis of the subject interest will assist the valuation analyst in considering, evaluating, and applying the various valuation approaches and methods to the subject interest. The nature and extent of the information needed to perform the analysis will depend on, at a minimum, the following:

- Nature of the subject interest
- Scope of the valuation engagement
- Valuation date
- Intended use of the valuation
- Applicable standard of value
- Applicable **premise of value**
- Assumptions and limiting conditions
- Applicable governmental regulations or other professional standards

#### **.26**

In analyzing the subject interest, the valuation analyst should consider financial and nonfinancial information. The type, availability, and significance of such information vary with the subject interest.

### ***Nonfinancial Information***

#### **.27**

The valuation analyst should, as available and applicable to the valuation engagement, obtain sufficient nonfinancial information to enable him or her to understand the subject entity, including the following:

- Nature, background, and history
- Facilities
- Organizational structure
- Management team (which may include officers, directors, and key employees)
- Classes of **equity** ownership interests and rights attached thereto
- Products or services, or both



- Economic environment
- Geographical markets
- Industry markets
- Key customers and suppliers
- Competition
- **Business risks**
- Strategy and future plans
- Governmental or regulatory environment

### ***Ownership Information***

#### **.28**

The valuation analyst should obtain, where applicable and available, ownership information regarding the subject interest to enable him or her to

- determine the type of ownership interest being valued and ascertain whether that interest exhibits control characteristics.
- analyze the different ownership interests of other owners and assess the potential effect on the value of the subject interest.
- understand the classes of equity ownership interests and rights attached thereto.
- understand the rights included in, or excluded from, each intangible asset.
- understand other matters that may affect the value of the subject interest, such as the following:
  - *For a business, business ownership interest, or security:* Shareholder agreements, partnership agreements, operating agreements, voting trust agreements, buy-sell agreements, loan covenants, restrictions, and other contractual obligations or restrictions affecting the owners and the subject interest.
  - *For an intangible asset:* Legal rights, licensing agreements, sublicense agreements, nondisclosure agreements, development rights, commercialization or exploitation rights, and other contractual obligations.

### ***Financial Information***

#### **.29**

The valuation analyst should obtain, where applicable and available, financial information on the subject entity such as the following:

- Historical financial information (including annual and interim financial statements and key financial statement ratios and statistics) for an appropriate number of years
- Prospective financial information (for example, budgets, forecasts, and projections)
- Comparative summaries of financial statements or information covering a relevant time period
- Comparative common size financial statements for the subject entity for an appropriate number of years
- Comparative common size industry financial information for a relevant time period
- Income tax returns for an appropriate number of years
- Information on compensation for owners including benefits and personal expenses
- Information on key man or officers' life insurance
- Management's response to inquiry regarding the following:
  - Advantageous or disadvantageous contracts
  - Contingent or off-balance-sheet assets or liabilities
  - Information on prior sales of company stock

**.30**

The valuation analyst should read and evaluate the information to determine that it is reasonable for the purposes of the engagement.

### ***Valuation Approaches and Methods***

**.31**

In developing the valuation, the valuation analyst should consider the three most common valuation approaches:

- **Income (income-based) approach**
- **Asset (asset-based) approach** (used for businesses, business ownership interests, and securities) or **cost approach** (used for intangible assets)
- **Market (market-based) approach**

**.32**

The valuation analyst should use the valuation approaches and methods that are appropriate for the valuation engagement. General guidance on the use of approaches and methods appears in paragraphs .33–.41, but detailed guidance on specific valuation approaches and methods and their applicability is outside the scope of this statement.

**.33**

*Income Approach.* Two frequently used valuation methods under the income approach include the **capitalization of benefits method** (for example, earnings or cash flows) and the **discounted future benefits method** (for example, earnings or cash flows). When applying these methods, the valuation analyst should consider a variety of factors, including but not limited to, the following:

- a. *Capitalization of benefits (for example, earnings or cash flows) method.* The valuation analyst should consider the following:
  - i. **Normalization** adjustments
  - ii. Nonrecurring revenue and expense items
  - iii. Taxes
  - iv. Capital structure and financing costs
  - v. Appropriate capital investments
  - vi. Noncash items
  - vii. Qualitative judgments for risks used to compute discount and **capitalization rates**
  - viii. Expected changes (growth or decline) in future benefits (for example, earnings or cash flows)
- b. *Discounted future benefits method (for example, earnings or cash flows).* In addition to the items in item a, the valuation analyst should consider the following:
  - i. Forecast or projection assumptions
  - ii. Forecast or projected earnings or cash flows
  - iii. **Terminal value**
- c. For an intangible asset, the valuation analyst should also consider, when relevant, the following:
  - i. Remaining useful life
  - ii. Current and anticipated future use of the intangible asset
  - iii. Rights attributable to the intangible asset
  - iv. Position of intangible asset in its life cycle
  - v. Appropriate discount rate for the intangible asset
  - vi. Appropriate **capital or contributory asset charge**, if any
  - vii. Research and development or marketing expense needed to support the intangible asset in its existing state
  - viii. Allocation of income (for example, **incremental income**, **residual income**, or **profit split income**) to intangible asset

- ix. Whether any tax amortization benefit would be included in the analysis
- x. Discounted multi-year excess earnings
- xi. Market royalties
- xii. Relief from royalty

### ***Asset Approach and Cost Approach***

#### **.34**

A frequently used method under the asset approach is the adjusted net asset method. When using the adjusted net asset method in valuing a business, business ownership interest, or security, the valuation analyst should consider, as appropriate, the following information related to the premise of value:

- Identification of the assets and liabilities
- Value of the assets and liabilities (individually or in the aggregate)
- Liquidation costs (if applicable)

#### **.35**

When using methods under the cost approach to value intangible assets, the valuation analyst should consider the type of cost to be used (for example, reproduction cost or replacement cost), and, where applicable, the appropriate forms of depreciation and obsolescence and the remaining useful life of the intangible asset.

### ***Market Approach***

#### **.36**

Three frequently used valuation methods under the market approach for valuing a business, business ownership interest, or security are as follows:

- **Guideline public company method**
- ***Guideline company transactions method***
- Guideline sales of interests in the subject entity, such as business ownership interests or securities

Three frequently used market approach valuation methods for intangible assets are as follows:

- Comparable uncontrolled transactions method (which is based on arm's-length sales or licenses of guideline intangible assets)
- Comparable profit margin method (which is based on comparison of the profit margin

earned by the subject entity that owns or operates the intangible asset to profit margins earned by guideline companies)

- **Relief from royalty method** (which is based on the royalty rate, often expressed as a percentage of revenue that the subject entity that owns or operates the intangible asset would be obligated to pay to a hypothetical third-party licensor for the use of that intangible asset)

For the methods involving guideline intangible assets (for example, the comparable profit margin method), the valuation analyst should consider the subject intangible asset's remaining useful life relative to the remaining useful life of the guideline intangible assets, if available.

### **.37**

In applying the methods listed in paragraph .36 or other methods to determine valuation pricing multiples or metrics, the valuation analyst should consider the following:

- Qualitative and quantitative comparisons
- Arm's-length transactions and prices
- The dates and, consequently, the relevance of the market data

### **.38**

The valuation analyst should set forth in the report the rationale and support for the valuation methods used (see paragraph .47).

### **.39**

*Rules of Thumb.* Although technically not a valuation method, some valuation analysts use rules of thumb or industry benchmark indicators (hereinafter, collectively referred to as **rules of thumb**) in a valuation engagement. A rule of thumb is typically a reasonableness check against other methods used and should generally not be used as the only method to estimate the value of the subject interest.

## **Valuation Adjustments**

### **.40**

During the course of a valuation engagement, the valuation analyst should consider whether valuation adjustments (discounts or premiums) should be made to a **pre-adjustment** value. Examples of valuation adjustments for valuation of a business, business ownership interest, or security include a **discount for lack of marketability or liquidity** and a **discount for lack of control**. An example of a valuation adjustment for valuation of an intangible asset is obsolescence.

### **.41**

When valuing a controlling ownership interest under the income approach, the value of any **non-operating assets**, non-operating liabilities, or **excess or deficient operating assets** should be excluded from the computation of the value based on the operating assets and should be added to or deleted from the value of the operating entity. When valuing a non-controlling ownership

interest under the income approach, the value of any non-operating assets, non-operating liabilities, or excess or deficient operating assets may or may not be used to adjust the value of the operating entity depending on the valuation analyst's assessment of the influence exercisable by the non-controlling interest. In the asset-based or cost approach, it may not be necessary to separately consider non-operating assets, non-operating liabilities, or excess or deficient operating assets.

### **Conclusion of Value**

#### **.42**

In arriving at a conclusion of value, the valuation analyst should

- a. correlate and reconcile the results obtained under the different approaches and methods used.
- b. assess the reliability of the results under the different approaches and methods using the information gathered during the valuation engagement.
- c. determine, based on items *a* and *b*, whether the conclusion of value should reflect
  - i. the results of one valuation approach and method, or
  - ii. a combination of the results of more than one valuation approach and method.

### **Subsequent Events**

#### **.43**

The valuation date is the specific date at which the valuation analyst estimates the value of the subject interest and concludes on his or her estimation of value. Generally, the valuation analyst should consider only circumstances existing at the valuation date and events occurring up to the valuation date. An event that could affect the value may occur subsequent to the valuation date; such an occurrence is referred to as a **subsequent event**. Subsequent events are indicative of conditions that were not known or knowable at the valuation date, including conditions that arose subsequent to the valuation date. The valuation would not be updated to reflect those events or conditions. Moreover, the valuation report would typically not include a discussion of those events or conditions because a valuation is performed as of a point in time—the valuation date—and the events described in this subparagraph, occurring subsequent to that date, are not relevant to the value determined as of that date. In situations in which a valuation is meaningful to the intended user beyond the valuation date, the events may be of such nature and significance as to warrant disclosure (at the option of the valuation analyst) in a separate section of the report in order to keep users informed (see paragraphs .52*p*, .71*r*, and .74). Such disclosure should clearly indicate that information regarding the events is provided for informational purposes only and does not affect the determination of value as of the specified valuation date.

### **Documentation**

#### **.44**

Documentation is the principal record of information obtained and analyzed, procedures performed, valuation approaches and methods considered and used, and the conclusion of value. The quantity, type, and content of documentation are matters of the valuation analyst's professional judgment. Documentation may include the following:

- Information gathered and analyzed to obtain an understanding of matters that may affect the value of the subject interest (paragraphs .25–.30)
- Assumptions and limiting conditions (paragraph .18)
- Any restriction or limitation on the scope of the valuation analyst's work or the data available for analysis (paragraph .19)
- Basis for using any **valuation assumption** during the valuation engagement
- Valuation approaches and methods considered
- Valuation approaches and methods used including the rationale and support for their use
- If applicable, information relating to subsequent events considered by the valuation analyst (paragraph .43)
- For any rule of thumb used in the valuation, source(s) of data used, and how the rule of thumb was applied (paragraph .39)
- Other documentation considered relevant to the engagement by the valuation analyst

#### **.45**

The valuation analyst should retain the documentation for a period of time sufficient to meet the needs of applicable legal, regulatory, or other professional requirements for records retention.

## **Calculation Engagement**

#### **.46**

In performing a calculation engagement, the valuation analyst should consider, at a minimum, the following:

- a. Identity of the client
- b. Identity of the subject interest
- c. Whether or not a business interest has ownership control characteristics and its degree of marketability
- d. Purpose and intended use of the calculated value
- e. Intended users of the report and the limitations on its use
- f. Valuation date

- g. Applicable premise of value
- h. Applicable standard of value
- i. Sources of information used in the calculation engagement
- j. Valuation approaches or valuation methods agreed upon with the client
- k. Subsequent events, if applicable (see paragraph .43)

In addition, the valuation analyst should comply with the documentation requirements listed in paragraphs .44 and .45. The quantity, type, and content of documentation are matters of the valuation analyst's professional judgment.

## The Valuation Report

### .47

A valuation report is a written or oral communication to the client containing the conclusion of value or the calculated value of the subject interest. Reports issued for purposes of certain controversy proceedings are exempt from this reporting standard (see paragraph .50).

### .48

The three types of written reports that a valuation analyst may use to communicate the results of an engagement to estimate value are as follows: either a detailed report or a summary report for a valuation engagement and a calculation report for a calculation engagement:

- a. *Valuation engagement—detailed report.* This report may be used only to communicate the results of a valuation engagement (conclusion of value); it should not be used to communicate the results of a calculation engagement (calculated value) (paragraph .51).
- b. *Valuation engagement—summary report.* This report may be used only to communicate the results of a valuation engagement (conclusion of value); it should not be used to communicate the results of a calculation engagement (calculated value) (paragraph .71). For a valuation engagement, the determination of whether to prepare a detailed report or a summary report is based on the level of reporting detail agreed to by the valuation analyst and the client.
- c. *Calculation engagement—calculation report.* This type of report should be used only to communicate the results of a calculation engagement (calculated value); it should not be used to communicate the results of a valuation engagement (conclusion of value) (see paragraph .73).

### .49

The valuation analyst should indicate in the valuation report the restrictions on the use of the report (which may include restrictions on the users of the report, the uses of the report by such users, or both) (paragraph .65d).



## Reporting Exemption for Certain Controversy Proceedings

### .50

A valuation performed for a matter before a court, an arbitrator, a mediator or other facilitator, or a matter in a governmental or administrative proceeding, is exempt from the reporting provisions of this statement. The reporting exemption applies whether the matter proceeds to trial or settles. The exemption applies only to the reporting provisions of this statement (see paragraphs .47–.49 and .51–.78). The developmental provisions of the statement (see paragraphs .21–.46) still apply whenever the valuation analyst expresses a conclusion of value or a calculated value (Interpretation No. 1 [VS sec. 9100 par. .01–.89]).

## Detailed Report

### .51

The *detailed report* is structured to provide sufficient information to permit intended users to understand the data, reasoning, and analyses underlying the valuation analyst's conclusion of value. A detailed report should include, as applicable, the following sections titled using wording similar in content to that shown:

- Letter of transmittal
- Table of contents
- Introduction
- Sources of information
- Analysis of the subject entity and related nonfinancial information
- Financial statement or financial information analysis
- Valuation approaches and methods considered
- Valuation approaches and methods used
- Valuation adjustments
- Non-operating assets, non-operating liabilities, and excess or deficient operating assets (if any)
- Representation of the valuation analyst
- Reconciliation of estimates and conclusion of value
- Qualifications of the valuation analyst
- Appendixes and exhibits

The report sections previously listed and the detailed information within the sections described in

the following paragraphs .52–.77 may be positioned in the body of the report or elsewhere in the report at the discretion of the valuation analyst.

## Introduction

### .52

This section should provide an overall description of the valuation engagement. The information in the section should be sufficient to enable the intended user of the report to understand the nature and scope of the valuation engagement, as well as the work performed. The introduction section may include, among other things, the following information:

- a. Identity of the client
- b. Purpose and intended use of the valuation
- c. Intended users of the valuation
- d. Identity of the subject entity
- e. Description of the subject interest
- f. Whether the business interest has ownership control characteristics and its degree of marketability
- g. Valuation date
- h. Report date
- i. Type of report issued (namely, a detailed report) (paragraph .51)
- j. Applicable premise of value
- k. Applicable standard of value
- l. Assumptions and limiting conditions (alternatively, these often appear in an appendix) (paragraph .18)
- m. Any restrictions or limitations in the scope of work or data available for analysis (paragraph .19)
- n. Any hypothetical conditions used in the valuation engagement, including the basis for their use (paragraph .22)
- o. If the work of a specialist was used in the valuation engagement, a description of how the specialist's work was relied upon (paragraph .20)
- p. Disclosure of subsequent events in certain circumstances (paragraph .43)
- q. Any application of the jurisdictional exception (paragraph .10)
- r. Any additional information the valuation analyst deems useful to enable the user(s) of the report to understand the work performed

If the items previously listed are not included in the introduction, they should be included elsewhere

in the valuation report.

### **Sources of Information**

#### **.53**

This section of the report should identify the relevant sources of information used in performing the valuation engagement. It may include, among other things, the following:

- a. For valuation of a business, business ownership interest, or security, whether and to what extent the subject entity's facilities were visited
- b. For valuation of an intangible asset, whether the legal registration, contractual documentation, or other tangible evidence of the asset was inspected
- c. Names, positions, and titles of persons interviewed and their relationships to the subject interest
- d. Financial information (paragraphs .54 and .56)
- e. Tax information (paragraph .55)
- f. Industry data
- g. Market data
- h. Economic data
- i. Other empirical information
- j. Relevant documents and other sources of information provided by or related to the entity

#### **.54**

If the financial information includes financial statements that were reported on (audit, review, compilation, or attest engagement performed under the Statements on Standards for Attestation Engagements [SSAEs] [AT sec. 20–701]) by the valuation analyst's firm, the valuation report should disclose this fact and the type of report issued. If the valuation analyst or the valuation analyst's firm did not audit, review, compile, or attest under the SSAEs (AT sec. 20–701) to the financial information, the valuation analyst should so state and should also state that the valuation analyst assumes no responsibility for the financial information.

#### **.55**

The financial information may be derived from or may include information derived from tax returns. With regard to such derived information and other tax information (see paragraph .53e), the valuation analyst should identify the tax returns used and any existing relationship between the valuation analyst and the tax preparer. If the valuation analyst or the valuation analyst's firm did not audit, review, compile, or attest under the SSAEs (AT sec. 20–701) to any financial information derived from tax returns that is used during the valuation engagement, the valuation analyst should so state and should also state that the valuation analyst assumes no responsibility for that derived information.

#### **.56**

If the financial information used was derived from financial statements prepared by management

that were not the subject of an audit, review, compilation, or attest engagement performed under the SSAEs, the valuation report should do the following:

- Identify the financial statements
- State that, as part of the valuation engagement, the valuation analyst did not audit, review, compile, or attest under the SSAEs (AT sec. 20–710) to the financial information and assumes no responsibility for that information

### ***Analysis of the Subject Entity and Related Nonfinancial Information***

#### **.57**

The valuation analyst should include a description of the relevant nonfinancial information listed and discussed in paragraph .27.

### ***Financial Statement or Financial Information Analysis***

#### **.58**

This section should include a description of the relevant information listed in paragraph .29. Such description may include the following:

- a. The rationale underlying any normalization or **control adjustments** to financial information
- b. Comparison of current performance with historical performance
- c. Comparison of performance with industry trends and norms, where available

### ***Valuation Approaches and Methods Considered***

#### **.59**

This section should state that the valuation analyst has considered the valuation approaches discussed in paragraph .31.

### ***Valuation Approaches and Methods Used***

#### **.60**

In this section, the valuation analyst should identify the valuation methods used under each valuation approach and the rationale for their use.

#### **.61**

This section should also identify the following for each of the three approaches (if used):

- a. Income approach:
  - Composition of the representative benefit stream
  - Method(s) used, and a summary of the most relevant risk factors considered in

selecting the appropriate **discount rate**, the capitalization rate, or both

- Other factors as discussed in paragraph .33

*b.* Asset-based approach or cost approach:

- *Asset-based approach.* Any adjustments made by the valuation analyst to the relevant balance sheet data
- *Cost approach.* The type of cost used, how this cost was estimated, and, if applicable, the forms of and costs associated with depreciation and obsolescence used under the approach and how those costs were estimated

*c.* Market approach:

- For the guideline public company method:
  - The selected guideline companies and the process used in their selection
  - The pricing multiples used, how they were used, and the rationale for their selection. If the pricing multiples were adjusted, the rationale for such adjustments
- For the guideline company transactions method, the sales transactions and pricing multiples used, how they were used, and the rationale for their selection; if the pricing multiples were adjusted, the rationale for such adjustments
- For the guideline sales of interests in the subject entity method, the sales transactions used, how they were used, and the rationale for determining that these sales are representative of arm's length transactions

**.62**

When a rule of thumb is used in combination with other methods, the valuation report should disclose the source(s) of data used and how the rule of thumb was applied (see paragraph .39).

### ***Valuation Adjustments***

**.63**

This section should (a) identify each valuation adjustment considered and determined to be applicable, for example, discount for lack of marketability, (b) describe the rationale for using the adjustment and the factors considered in selecting the amount or percentage used, and (c) describe the pre-adjustment value to which the adjustment was applied (see paragraph .40).

### ***Non-Operating Assets and Excess Operating Assets***

**.64**

When the subject interest is a business, business ownership interest, or security, the valuation report should identify any related non-operating assets, non-operating liabilities, or excess or deficient operating assets and their effect on the valuation (see paragraph .41).

***Representation of the Valuation Analyst*****.65**

Each written report should contain the representation of the valuation analyst. The representation is the section of the report wherein the valuation analyst summarizes the factors that guided his or her work during the engagement. Examples of these factors include the following:

- a. The analyses and conclusion of value included in the valuation report are subject to the specified assumptions and limiting conditions (see paragraph .18), and they are the personal analyses and conclusion of value of the valuation analyst.
- b. The economic and industry data included in the valuation report have been obtained from various printed or electronic reference sources that the valuation analyst believes to be reliable (any exceptions should be noted). The valuation analyst has not performed any corroborating procedures to substantiate that data.
- c. The valuation engagement was performed in accordance with the American Institute of Certified Public Accountants Statement on Standards for Valuation Services.
- d. The parties for which the information and use of the valuation report is restricted are identified; the valuation report is not intended to be and should not be used by anyone other than such parties (see paragraph .49).
- e. The analyst's compensation is fee-based or is contingent on the outcome of the valuation.
- f. The valuation analyst used the work of one or more outside specialists to assist during the valuation engagement. (An outside specialist is a specialist other than those employed in the valuation analyst's firm.) If the work of such a specialist was used, the specialist should be identified. The valuation report should include a statement identifying the level of responsibility, if any, the valuation analyst is assuming for the specialist's work.
- g. The valuation analyst has no obligation to update the report or the conclusion of value for information that comes to his or her attention after the date of the report.
- h. The valuation analyst and, if applicable, the person(s) assuming responsibility for the valuation should sign the representation in their own name(s). The names of those providing significant professional assistance should be identified.

***Representations Regarding Information Provided to the Valuation Analyst*****.66**

It may be appropriate for the valuation analyst to obtain written representations regarding information that the subject entity's management provides to the valuation analyst for purposes of his or her performing the valuation engagement. The decision whether to obtain a representation

letter is a matter of judgment for the valuation analyst.

### **Qualifications of the Valuation Analyst**

#### **.67**

The report should contain information regarding the qualifications of the valuation analyst.

### **Conclusion of Value**

#### **.68**

This section should present a reconciliation of the valuation analyst's estimate or various estimates of the value of the subject interest. In addition to a discussion of the rationale underlying the conclusion of value, this section should include the following or similar statements:

- a. A valuation engagement was performed, including the subject interest and the valuation date.
- b. The analysis was performed solely for the purpose described in this report, and the resulting estimate of value should not be used for any other purpose.
- c. The valuation engagement was conducted in accordance with the Statement(s) on Standards for Valuation Services of the American Institute of Certified Public Accountants.
- d. A statement that the estimate of value resulting from a valuation engagement is expressed as a conclusion of value.
- e. The scope of work or data available for analysis is explained, including any restrictions or limitations (see paragraph .19).
- f. A statement describing the conclusion of value, either a single amount or a range.
- g. The conclusion of value is subject to the assumptions and limiting conditions (see paragraph .18) and to the valuation analyst's representation (see paragraph .65).
- h. The report is signed in the name of the valuation analyst or the valuation analyst's firm.
- i. The date of the valuation report is included.
- j. The valuation analyst has no obligation to update the report or the conclusion of value for information that comes to his or her attention after the date of the report.

#### **.69**

The following is an example of report language that could be used, but is not required, when reporting the results of a valuation engagement:

We have performed a *valuation engagement*, as that term is defined in the Statement on Standards for Valuation Services (SSVS) of the American Institute of Certified Public Accountants, of [DEF Company, GHI business ownership interest of DEF Company, GHI security of DEF Company, or GHI intangible asset of DEF Company] as of [valuation date]. This valuation was performed solely to assist in the matter of [purpose of the valuation]; the resulting estimate of value should not be used for any other purpose or by

any other party for any purpose. This valuation engagement was conducted in accordance with the SSVS. The estimate of value that results from a valuation engagement is expressed as a conclusion of value.

*[If applicable]* We were restricted or limited in the scope of our work or data available for analysis as follows: *[describe restrictions or limitations]*.

Based on our analysis, as described in this valuation report, the estimate of value of *[DEF Company, GHI business ownership interest of DEF Company, GHI security of DEF Company, or GHI intangible asset of DEF Company]* as of *[valuation date]* was *[value, either a single amount or a range]*. This conclusion is subject to the Statement of Assumptions and Limiting Conditions found in *[reference to applicable section of valuation report]* and to the Valuation Analyst's Representation found in *[reference to applicable section of valuation report]*. We have no obligation to update this report or our conclusion of value for information that comes to our attention after the date of this report.

*[Signature]*

*[Date]*

## **Appendixes and Exhibits**

### **.70**

Appendixes or exhibits may be used for required information or information that supplements the detailed report. Often, the assumptions and limiting conditions and the valuation analyst's representation are provided in appendixes to the detailed report.

## **Summary Report**

### **.71**

A summary report is structured to provide an abridged version of the information that would be provided in a detailed report, and therefore, need not contain the same level of detail as a detailed report. However, a summary report should, at a minimum, include the following:

- a. Identity of the client
- b. Purpose and intended use of the valuation
- c. Intended users of the valuation
- d. Identity of the subject entity
- e. Description of the subject interest
- f. The business interest's ownership control characteristics, if any, and its degree of marketability
- g. Valuation date
- h. Valuation report date



- i.* Type of report issued (namely, a summary report) (paragraph .48)
- j.* Applicable premise of value
- k.* Applicable standard of value
- l.* Sources of information used in the valuation engagement
- m.* Assumptions and limiting conditions of the valuation engagement (paragraph .18)
- n.* The scope of work or data available for analysis including any restrictions or limitations (paragraph .19)
- o.* Any hypothetical conditions used in the valuation engagement, including the basis for their use (paragraph .22)
- p.* If the work of a specialist was used in the valuation (paragraph .20), a description of how the specialist's work was used, and the level of responsibility, if any, the valuation analyst is assuming for the specialist's work
- q.* The valuation approaches and methods used
- r.* Disclosure of subsequent events in certain circumstances (paragraph .43)
- s.* Any application of the jurisdictional exception (paragraph .10)
- t.* Representation of the valuation analyst (paragraph .65)
- u.* The report is signed in the name of the valuation analyst or the valuation analyst's firm
- v.* A section summarizing the reconciliation of the estimates and the conclusion of value as discussed in paragraphs .68 and .69
- w.* A statement that the valuation analyst has no obligation to update the report or the conclusion of value for information that comes to his or her attention after the date of the valuation report

## **.72**

Appendixes or exhibits may be used for required information (see paragraph .70) or information that supplements the summary report. Often, the assumptions, limiting conditions, and the valuation analyst's representation are provided in appendixes to the summary report.

## **Calculation Report**

### **.73**

As indicated in paragraph .48, a calculation report is the only report that should be used to report the results of a calculation engagement. The report should state that it is a calculation report. The calculation report should include the representation of the valuation analyst similar to that in paragraph .65, but adapted for a calculation engagement.

**.74**

The calculation report should identify any hypothetical conditions used in the calculation engagement, including the basis for their use (paragraph .22), any application of the jurisdictional exception (paragraph .10), and any assumptions and limiting conditions applicable to the engagement (paragraph .18). If the valuation analyst used the work of a specialist (paragraph .20), the valuation analyst should describe in the calculation report how the specialist's work was used and the level of responsibility, if any, the valuation analyst is assuming for the specialist's work. The calculation report may also include a disclosure of subsequent events in certain circumstances (paragraph .43).

**.75**

Appendixes or exhibits may be used for required information (paragraph .72) or information that supplements the calculation report. Often, the assumptions and limiting conditions and the valuation analyst's representation are provided in appendixes to the calculation report.

**.76**

The calculation report should include a section summarizing the calculated value. This section should include the following (or similar) statements:

- a. Certain calculation procedures were performed; include the identity of the subject interest and the calculation date.
- b. Describe the calculation procedures and the scope of work performed or reference the section(s) of the calculation report in which the calculation procedures and scope of work are described.
- c. Describe the purpose of the calculation procedures, including that the calculation procedures were performed solely for that purpose and that the resulting calculated value should not be used for any other purpose or by any other party for any purpose.
- d. The calculation engagement was conducted in accordance with the Statement on Standards for Valuation Services of the American Institute of Certified Public Accountants.
- e. A description of the business interest's characteristics, including whether the subject interest exhibits control characteristics, and a statement about the marketability of the subject interest.
- f. The estimate of value resulting from a calculation engagement is expressed as a calculated value.
- g. A general description of a calculation engagement is given, including that
  - i. a calculation engagement does not include all of the procedures required for a valuation engagement, and
  - ii. had a valuation engagement been performed, the results may have been different.

- h. The calculated value, either a single amount or a range, is described.
- i. The report is signed in the name of the valuation analyst or the valuation analyst's firm.
- j. The date of the valuation report is given.
- k. The valuation analyst has no obligation to update the report or the calculation of value for information that comes to his or her attention after the date of the report.

## **.77**

The following is an example of report language that could be used, but is not required, in reporting a calculation engagement:

We have performed a *calculation engagement*, as that term is defined in the Statement on Standards for Valuation Services (SSVS) of the American Institute of Certified Public Accountants. We performed certain calculation procedures on [DEF Company, GHI business ownership interest of DEF Company, GHI security of DEF Company, or GHI intangible asset of DEF Company] as of [calculation date]. The specific calculation procedures are detailed in paragraphs [reference to paragraph numbers] of our calculation report. The calculation procedures were performed solely to assist in the matter of [purpose of valuation procedures], and the resulting calculation of value should not be used for any other purpose or by any other party for any purpose. This calculation engagement was conducted in accordance with the SSVS. The estimate of value that results from a calculation engagement is expressed as a calculated value.

In a calculation engagement, the valuation analyst and the client agree on the specific valuation approaches and valuation methods the valuation analyst will use and the extent of valuation procedures the valuation analyst will perform to estimate the value of the subject interest. A calculation engagement does not include all of the procedures required in a *valuation engagement*, as that term is defined in the SSVS. Had a valuation engagement been performed, the results might have been different.

Based on our calculations, as described in this report, which are based solely on the procedures agreed upon as previously referred to, the resulting calculated value of [DEF Company, GHI business ownership interest of DEF Company, GHI security of DEF Company, or GHI intangible asset of DEF Company] as of [valuation date] was [calculated value, either a single amount or a range]. This calculated value is subject to the Statement of Assumptions and Limiting Conditions found in [reference to applicable section of valuation report] and to the Valuation Analyst's Representation found in [reference to applicable section of valuation report]. We have no obligation to update this report or our calculation of value for information that comes to our attention after the date of this report.

[Signature]

[Date]

## **Oral Report**

**.78**

An oral report may be used in a valuation engagement or a calculation engagement. An oral report should include all information the valuation analyst believes necessary to relate the scope, assumptions, limitations, and the results of the engagement so as to limit any misunderstandings between the analyst and the recipient of the oral report. The member should document in the working papers the substance of the oral report communicated to the client.

## Effective Date

**.79**

This statement applies to engagements to estimate value accepted on or after January 1, 2008. Earlier application is encouraged.

## Appendix A

### Illustrative List of Assumptions and Limiting Conditions for a Business Valuation

**.80**

The valuation report or calculation report should include a list of assumptions and limiting conditions under which the engagement was performed. This appendix includes an illustrative list of assumptions and limiting conditions that may apply to a business valuation.

#### Illustrative List of Assumptions and Limiting Conditions

1. The conclusion of value (or the calculated value) arrived at herein is valid only for the stated purpose as of the date of the valuation.
2. Financial statements and other related information provided by [*ABC Company*] or its representatives, in the course of this engagement, have been accepted without any verification as fully and correctly reflecting the enterprise's business conditions and operating results for the respective periods, except as specifically noted herein. [*Valuation Firm*] has not audited, reviewed, or compiled the financial information provided to us and, accordingly, we express no audit opinion or any other form of assurance on this information.
3. Public information and industry and statistical information have been obtained from sources we believe to be reliable. However, we make no representation as to the accuracy or completeness of such information and have performed no procedures to corroborate the information.
4. We do not provide assurance on the achievability of the results forecasted by [*ABC Company*] because events and circumstances frequently do not occur as expected; differences between actual and expected results may be material; and achievement of the forecasted results is dependent on actions, plans, and assumptions of management.
5. The conclusion of value (or the calculated value) arrived at herein is based on the assumption that the current level of management expertise and effectiveness would continue to be

maintained, and that the character and integrity of the enterprise through any sale, reorganization, exchange, or diminution of the owners' participation would not be materially or significantly changed.

6. This report and the conclusion of value (or the calculated value) arrived at herein are for the exclusive use of our client for the sole and specific purposes as noted herein. They may not be used for any other purpose or by any other party for any purpose. Furthermore the report and conclusion of value (or the calculated value) are not intended by the author and should not be construed by the reader to be investment advice in any manner whatsoever. The stated valuation represents the considered conclusion of value (or the calculated value) of [Valuation Firm], based on information furnished to them by [ABC Company] and other sources.
7. Neither all nor any part of the contents of this report (especially the conclusion of value [or the calculated value], the identity of any valuation specialist(s), or the firm with which such valuation specialists are connected or any reference to any of their professional designations) should be disseminated to the public through advertising media, public relations, news media, sales media, mail, direct transmittal, or any other means of communication without the prior written consent and approval of [Valuation Firm].
8. Future services regarding the subject matter of this report, including, but not limited to testimony or attendance in court, shall not be required of [Valuation Firm] unless previous arrangements have been made in writing.
9. [Valuation Firm] is not an environmental consultant or auditor, and it takes no responsibility for any actual or potential environmental liabilities. Any person entitled to rely on this report, wishing to know whether such liabilities exist, or the scope and their effect on the value of the property, is encouraged to obtain a professional environmental assessment. [Valuation Firm] does not conduct or provide environmental assessments and has not performed one for the subject property.
10. [Valuation Firm] has not determined independently whether [ABC Company] is subject to any present or future liability relating to environmental matters (including, but not limited to CERCLA/Superfund liability) nor the scope of any such liabilities. [Valuation Firm]'s valuation takes no such liabilities into account, except as they have been reported to [Valuation Firm] by [ABC Company] or by an environmental consultant working for [ABC Company], and then only to the extent that the liability was reported to us in an actual or estimated dollar amount. Such matters, if any, are noted in the report. To the extent such information has been reported to us, [Valuation Firm] has relied on it without verification and offers no warranty or representation as to its accuracy or completeness.
11. [Valuation Firm] has not made a specific compliance survey or analysis of the subject property to determine whether it is subject to, or in compliance with, the American Disabilities Act of 1990, and this valuation does not consider the effect, if any, of noncompliance.
12. [Sample wording for use if the jurisdictional exception is invoked.] The conclusion of value (or the calculated value) in this report deviates from the Statement on Standards for Valuation Services as a result of published governmental, judicial, or accounting authority.
13. No change of any item in this report shall be made by anyone other than [Valuation Firm],

and we shall have no responsibility for any such unauthorized change.

14. Unless otherwise stated, no effort has been made to determine the possible effect, if any, on the subject business due to future Federal, state, or local legislation, including any environmental or ecological matters or interpretations thereof.
15. If prospective financial information approved by management has been used in our work, we have not examined or compiled the prospective financial information and therefore, do not express an audit opinion or any other form of assurance on the prospective financial information or the related assumptions. Events and circumstances frequently do not occur as expected and there will usually be differences between prospective financial information and actual results, and those differences may be material.
16. We have conducted interviews with the current management of *[ABC Company]* concerning the past, present, and prospective operating results of the company.
17. Except as noted, we have relied on the representations of the owners, management, and other third parties concerning the value and useful condition of all equipment, real estate, investments used in the business, and any other assets or liabilities, except as specifically stated to the contrary in this report. We have not attempted to confirm whether or not all assets of the business are free and clear of liens and encumbrances or that the entity has good title to all assets.

## Appendix B

### International Glossary of Business Valuation Terms <sup>fn \*</sup>

.81

To enhance and sustain the quality of business valuations for the benefit of the profession and its clientele, the subsequently identified societies and organizations have adopted the definitions for the terms included in this glossary.

The performance of business valuation services requires a high degree of skill and imposes upon the valuation professional a duty to communicate the valuation process and conclusion in a manner that is clear and not misleading. This duty is advanced through the use of terms whose meanings are clearly established and consistently applied throughout the profession.

If, in the opinion of the business valuation professional, one or more of these terms needs to be used in a manner which materially departs from the enclosed definitions, it is recommended that the term be defined as used within that valuation engagement.

This glossary has been developed to provide guidance to business valuation practitioners by further memorializing the body of knowledge that constitutes the competent and careful determination of value and, more particularly, the communication of how that value was determined.

Departure from this glossary is not intended to provide a basis for civil liability and should not be presumed to create evidence that any duty has been breached.

**American Institute of Certified Public Accountants**

**American Society of Appraisers**  
**Canadian Institute of Chartered Business Valuators**  
**National Association of Certified Valuation Analysts**  
**The Institute of Business Appraisers**

**Adjusted Book Value Method**—a method within the asset approach whereby all assets and liabilities (including off-balance sheet, intangible, and contingent) are adjusted to their fair market values. {NOTE: In Canada on a going concern basis}

**Adjusted Net Asset Method** —see **Adjusted Book Value Method**.

**Appraisal**—see **Valuation**.

**Appraisal Approach**—see **Valuation Approach**.

**Appraisal Date**—see **Valuation Date**.

**Appraisal Method**—see **Valuation Method**.

**Appraisal Procedure**—see **Valuation Procedure**.

**Arbitrage Pricing Theory**—a multivariate model for estimating the cost of equity capital, which incorporates several systematic risk factors.

**Asset (Asset-Based) Approach**—a general way of determining a value indication of a business, business ownership interest, or security using one or more methods based on the value of the assets net of liabilities.

**Beta**—a measure of systematic risk of a stock; the tendency of a stock's price to correlate with changes in a specific index.

**Blockage Discount**—an amount or percentage deducted from the current market price of a publicly traded stock to reflect the decrease in the per share value of a block of stock that is of a size that could not be sold in a reasonable period of time given normal trading volume.

**Book Value**—see **Net Book Value**.

**Business**—see **Business Enterprise**.

**Business Enterprise**—a commercial, industrial, service, or investment entity (or a combination thereof) pursuing an economic activity.

**Business Risk**—the degree of uncertainty of realizing expected future returns of the business resulting from factors other than financial leverage. See **Financial Risk**.

**Business Valuation**—the act or process of determining the value of a business enterprise or ownership interest therein.

**Capital Asset Pricing Model (CAPM)**—a model in which the cost of capital for any stock or portfolio of stocks equals a risk-free rate plus a risk premium that is proportionate to the systematic risk of the stock or portfolio.

**Capitalization**—a conversion of a single period of economic benefits into value.

**Capitalization Factor**—any multiple or divisor used to convert anticipated economic benefits of a

single period into value.

**Capitalization of Earnings Method**—a method within the income approach whereby economic benefits for a representative single period are converted to value through division by a capitalization rate.

**Capitalization Rate**—any divisor (usually expressed as a percentage) used to convert anticipated economic benefits of a single period into value.

**Capital Structure**—the composition of the invested capital of a business enterprise; the mix of debt and equity financing.

**Cash Flow**—cash that is generated over a period of time by an asset, group of assets, or business enterprise. It may be used in a general sense to encompass various levels of specifically defined cash flows. When the term is used, it should be supplemented by a qualifier (for example, "discretionary" or "operating") and a specific definition in the given valuation context.

**Common Size Statements**—financial statements in which each line is expressed as a percentage of the total. On the balance sheet, each line item is shown as a percentage of total assets, and on the income statement, each item is expressed as a percentage of sales.

**Control**—the power to direct the management and policies of a business enterprise.

**Control Premium**—an amount or a percentage by which the pro rata value of a controlling interest exceeds the pro rata value of a non-controlling interest in a business enterprise to reflect the power of control.

**Cost Approach**—a general way of determining a value indication of an individual asset by quantifying the amount of money required to replace the future service capability of that asset.

**Cost of Capital**—the expected rate of return that the market requires in order to attract funds to a particular investment.

**Debt-Free**—*we discourage the use of this term.* See **Invested Capital**.

**Discount for Lack of Control**—an amount or percentage deducted from the pro rata share of value of 100% of an equity interest in a business to reflect the absence of some or all of the powers of control.

**Discount for Lack of Marketability**—an amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability.

**Discount for Lack of Voting Rights**—an amount or percentage deducted from the per share value of a minority interest voting share to reflect the absence of voting rights.

**Discount Rate**—a rate of return used to convert a future monetary sum into present value.

**Discounted Cash Flow Method**—a method within the income approach whereby the present value of future expected net cash flows is calculated using a discount rate.

**Discounted Future Earnings Method**—a method within the income approach whereby the



present value of future expected economic benefits is calculated using a discount rate.

**Economic Benefits**—inflows such as revenues, net income, net cash flows, etc.

**Economic Life**—the period of time over which property may generate economic benefits.

**Effective Date**—see **Valuation Date**.

**Enterprise**—see **Business Enterprise**.

**Equity**—the owner's interest in property after deduction of all liabilities.

**Equity Net Cash Flows**—those cash flows available to pay out to equity holders (in the form of dividends) after funding operations of the business enterprise, making necessary capital investments, and increasing or decreasing debt financing.

**Equity Risk Premium**—a rate of return added to a risk-free rate to reflect the additional risk of equity instruments over risk free instruments (a component of the cost of equity capital or equity discount rate).

**Excess Earnings**—that amount of anticipated economic benefits that exceeds an appropriate rate of return on the value of a selected asset base (often net tangible assets) used to generate those anticipated economic benefits.

**Excess Earnings Method**—a specific way of determining a value indication of a business, business ownership interest, or security determined as the sum of a) the value of the assets derived by capitalizing excess earnings and b) the value of the selected asset base. Also frequently used to value intangible assets. See **Excess Earnings**.

**Fair Market Value**—the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. {NOTE: In Canada, the term "*price*" should be replaced with the term "*highest price*."}

**Fairness Opinion**—an opinion as to whether or not the consideration in a transaction is fair from a financial point of view.

**Financial Risk**—the degree of uncertainty of realizing expected future returns of the business resulting from financial leverage. See **Business Risk**.

**Forced Liquidation Value**—liquidation value, at which the asset or assets are sold as quickly as possible, such as at an auction.

**Free Cash Flow**—*we discourage the use of this term*. See **Net Cash Flow**.

**Going Concern**—an ongoing operating business enterprise.

**Going Concern Value**—the value of a business enterprise that is expected to continue to operate into the future. The intangible elements of Going Concern Value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place.

**Goodwill**—that intangible asset arising as a result of name, reputation, customer loyalty, location,

products, and similar factors not separately identified.

**Goodwill Value**—the value attributable to goodwill.

**Guideline Public Company Method**—a method within the market approach whereby market multiples are derived from market prices of stocks of companies that are engaged in the same or similar lines of business and that are actively traded on a free and open market.

**Income (Income-Based) Approach**—a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more methods that convert anticipated economic benefits into a present single amount.

**Intangible Assets**—nonphysical assets such as franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities, and contracts (as distinguished from physical assets) that grant rights and privileges and have value for the owner.

**Internal Rate of Return**—a discount rate at which the present value of the future cash flows of the investment equals the cost of the investment.

**Intrinsic Value**—the value that an investor considers, on the basis of an evaluation or available facts, to be the "true" or "real" value that will become the market value when other investors reach the same conclusion. When the term applies to options, it is the difference between the exercise price or strike price of an option and the market value of the underlying security.

**Invested Capital**—the sum of equity and debt in a business enterprise. Debt is typically (a) all interest-bearing debt or (b) long-term, interest-bearing debt. When the term is used, it should be supplemented by a specific definition in the given valuation context.

**Invested Capital Net Cash Flows**—those cash flows available to pay out to equity holders (in the form of dividends) and debt investors (in the form of principal and interest) after funding operations of the business enterprise and making necessary capital investments.

**Investment Risk**—the degree of uncertainty as to the realization of expected returns.

**Investment Value**—the value to a particular investor based on individual investment requirements and expectations. {NOTE: in Canada, the term used is "*Value to the Owner.*"}

**Key Person Discount**—an amount or percentage deducted from the value of an ownership interest to reflect the reduction in value resulting from the actual or potential loss of a key person in a business enterprise.

**Levered Beta**—the beta reflecting a capital structure that includes debt.

**Limited Appraisal**—the act or process of determining the value of a business, business ownership interest, security, or intangible asset with limitations in analyses, procedures, or scope.

**Liquidity**—the ability to quickly convert property to cash or pay a liability.

**Liquidation Value**—the net amount that would be realized if the business is terminated and the assets are sold piecemeal. Liquidation can be either "orderly" or "forced."

**Majority Control**—the degree of control provided by a majority position.

**Majority Interest**—an ownership interest greater than 50% of the voting interest in a business enterprise.

**Market (Market-Based) Approach**—a general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.

**Market Capitalization of Equity**—the share price of a publicly traded stock multiplied by the number of shares outstanding.

**Market Capitalization of Invested Capital**—the market capitalization of equity plus the market value of the debt component of invested capital.

**Market Multiple**—the market value of a company's stock or invested capital divided by a company measure (such as economic benefits, number of customers).

**Marketability**—the ability to quickly convert property to cash at minimal cost.

**Marketability Discount**—see **Discount for Lack of Marketability**.

**Merger and Acquisition Method**—a method within the market approach whereby pricing multiples are derived from transactions of significant interests in companies engaged in the same or similar lines of business.

**Mid-Year Discounting**—a convention used in the Discounted Future Earnings Method that reflects economic benefits being generated at midyear, approximating the effect of economic benefits being generated evenly throughout the year.

**Minority Discount**—a discount for lack of control applicable to a minority interest.

**Minority Interest**—an ownership interest less than 50% of the voting interest in a business enterprise.

**Multiple**—the inverse of the capitalization rate.

**Net Book Value**—with respect to a business enterprise, the difference between total assets (net of accumulated depreciation, depletion, and amortization) and total liabilities as they appear on the balance sheet (synonymous with Shareholder's Equity). With respect to a specific asset, the capitalized cost less accumulated amortization or depreciation as it appears on the books of account of the business enterprise.

**Net Cash Flows**—when the term is used, it should be supplemented by a qualifier. See **Equity Net Cash Flows** and **Invested Capital Net Cash Flows**.

**Net Present Value**—the value, as of a specified date, of future cash inflows less all cash outflows (including the cost of investment) calculated using an appropriate discount rate.

**Net Tangible Asset Value**—the value of the business enterprise's tangible assets (excluding excess assets and nonoperating assets) minus the value of its liabilities.

**Nonoperating Assets**—assets not necessary to ongoing operations of the business enterprise. {NOTE: in Canada, the term used is "*Redundant Assets*." }

**Normalized Earnings**—economic benefits adjusted for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

**Normalized Financial Statements**—financial statements adjusted for nonoperating assets and liabilities and/or for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

**Orderly Liquidation Value**—liquidation value at which the asset or assets are sold over a reasonable period of time to maximize proceeds received.

**Premise of Value**—an assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation; for example, going concern, liquidation.

**Present Value**—the value, as of a specified date, of future economic benefits and/or proceeds from sale, calculated using an appropriate discount rate.

**Portfolio Discount**—an amount or percentage deducted from the value of a business enterprise to reflect the fact that it owns dissimilar operations or assets that do not fit well together.

**Price/Earnings Multiple**—the price of a share of stock divided by its earnings per share.

**Rate of Return**—an amount of income (loss) and/or change in value realized or anticipated on an investment, expressed as a percentage of that investment.

**Redundant Assets**—see **Nonoperating Assets**.

**Report Date**—the date conclusions are transmitted to the client.

**Replacement Cost New**—the current cost of a similar new property having the nearest equivalent utility to the property being valued.

**Reproduction Cost New**—the current cost of an identical new property.

**Required Rate of Return**—the minimum rate of return acceptable by investors before they will commit money to an investment at a given level of risk.

**Residual Value**—the value as of the end of the discrete projection period in a discounted future earnings model.

**Return on Equity**—the amount, expressed as a percentage, earned on a company's common equity for a given period.

**Return on Investment**—See **Return on Invested Capital** and **Return on Equity**.

**Return on Invested Capital**—the amount, expressed as a percentage, earned on a company's total capital for a given period.

**Risk-Free Rate**—the rate of return available in the market on an investment free of default risk.

**Risk Premium**—a rate of return added to a risk-free rate to reflect risk.

**Rule of Thumb**—a mathematical formula developed from the relationship between price and certain variables based on experience, observation, hearsay, or a combination of these; usually industry specific.

**Special Interest Purchasers**—acquirers who believe they can enjoy post-acquisition economies

of scale, synergies, or strategic advantages by combining the acquired business interest with their own.

**Standard of Value**—the identification of the type of value being utilized in a specific engagement; for example, fair market value, fair value, investment value.

**Sustaining Capital Reinvestment**—the periodic capital outlay required to maintain operations at existing levels, net of the tax shield available from such outlays.

**Systematic Risk**—the risk that is common to all risky securities and cannot be eliminated through diversification. The measure of systematic risk in stocks is the beta coefficient.

**Tangible Assets**—physical assets (such as cash, accounts receivable, inventory, property, plant and equipment, etc.).

**Terminal Value**—See **Residual Value**.

**Transaction Method**—See **Merger and Acquisition Method**.

**Unlevered Beta**—the beta reflecting a capital structure without debt.

**Unsystematic Risk**—the risk specific to an individual security that can be avoided through diversification.

**Valuation**—the act or process of determining the value of a business, business ownership interest, security, or intangible asset.

**Valuation Approach**—a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more valuation methods.

**Valuation Date**—the specific point in time as of which the valuator's opinion of value applies (also referred to as "Effective Date" or "Appraisal Date").

**Valuation Method**—within approaches, a specific way to determine value.

**Valuation Procedure**—the act, manner, and technique of performing the steps of an appraisal method.

**Valuation Ratio**—a fraction in which a value or price serves as the numerator and financial, operating, or physical data serve as the denominator.

**Value to the Owner**—see **Investment Value**.

**Voting Control**—*de jure* control of a business enterprise.

**Weighted Average Cost of Capital (WACC)**—the cost of capital (discount rate) determined by the weighted average, at market value, of the cost of all financing sources in the business enterprise's capital structure.

## Appendix C

### Glossary of Additional Terms

**assumptions and limiting conditions.** Parameters and boundaries under which a valuation is performed, as agreed upon by the valuation analyst and the client or as acknowledged or understood by the valuation analyst and the client as being due to existing circumstances. An example is the acceptance, without further verification, by the valuation analyst from the client of the client's financial statements and related information.

**business ownership interest.** A designated share in the ownership of a business (business enterprise).

**calculated value.** An estimate as to the value of a business, business ownership interest, security, or intangible asset, arrived at by applying valuation procedures agreed upon with the client and using professional judgment as to the value or range of values based on those procedures.

**calculation engagement.** An engagement to estimate value wherein the valuation analyst and the client agree on the specific valuation approaches and valuation methods that the valuation analyst will use and the extent of valuation procedures the valuation analyst will perform to estimate the value of a subject interest. A calculation engagement generally does not include all of the valuation procedures required for a valuation engagement. If a valuation engagement had been performed, the results might have been different. The valuation analyst expresses the results of the calculation engagement as a calculated value, which may be either a single amount or a range.

**capital or contributory asset charge.** A fair return on an entity's *contributory assets*, which are tangible and intangible assets used in the production of income or cash flow associated with an intangible asset being valued. In this context, *income or cash flow* refers to an applicable measure of income or cash flow, such as net income, or operating cash flow before taxes and capital expenditures. A capital charge may be expressed as a percentage return on an economic rent associated with, or a profit split related to, the contributory assets.

**capitalization of benefits method.** A method within the income approach whereby expected future benefits (for example, earnings or cash flow) for a representative single period are converted to value through division by a capitalization rate.

**comparable profits method.** A method of determining the value of intangible assets by comparing the profits of the subject entity with those of similar uncontrolled companies that have the same or similar complement of intangible assets as the subject company.

**comparable uncontrolled transaction method.** A method of determining the value of intangible assets by comparing the subject transaction to similar transactions in the market place made between independent (uncontrolled) parties.

**conclusion of value.** An estimate of the value of a business, business ownership interest, security, or intangible asset, arrived at by applying the valuation procedures appropriate for a valuation engagement and using professional judgment as to the value or range of values based on those procedures.

**control adjustment.** A valuation adjustment to financial statements to reflect the effect of a controlling interest in a business. An example would be an adjustment to owners' compensation that is in excess of market compensation.

**engagement to estimate value.** An engagement, or any part of an engagement (for example, a tax, litigation, or acquisition-related engagement), that involves determining the value of a business, business ownership interest, security, or intangible asset. Also known as *valuation service*.

**excess operating assets.** Operating assets in excess of those needed for the normal operation of a business.

**fair value.** In valuation applications, there are two commonly used definitions for fair value:

- (1) For financial reporting purposes only, the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. *Source:* Financial Accounting Standards Board *Accounting Standards Codification* glossary.
- (2) For state legal matters only, some states have laws that use the term *fair value* in shareholder and partner matters. For state legal matters only, therefore, the term may be defined by statute or case law in the particular jurisdiction.

**guideline company transactions method.** A method within the market approach whereby market multiples are derived from the sales of entire companies engaged in the same or similar lines of business.

**hypothetical condition.** That which is or may be contrary to what exists, but is supposed for the purpose of analysis.

**incremental income.** Additional income or cash flow attributable to an entity's ownership or operation of an intangible asset being valued, as determined by a comparison of the entity's income or cash flow with the intangible asset to the entity's income or cash flow without the intangible asset. In this context, *income or cash flow* refers to an applicable measure of income or cash flow, such as license royalty income or operating cash flow before taxes and capital expenditures.

**normalization.** See ***Normalized Earnings*** in appendix B, "International Glossary of Business Valuation Terms." (see paragraph .81).

**pre-adjustment value.** The value arrived at prior to the application, if appropriate, of valuation discounts or premiums.

**profit split income.** With respect to the valuation of an intangible asset of an entity, a percentage allocation of the entity's income or cash flow whereby (1) a split (or percentage) is allocated to the subject intangible and (2) the remainder is allocated to all of the entity's tangible and other intangible assets. In this context, *income or cash flow* refers to an applicable measure of income or cash flow, such as net income or operating cash flow before taxes and capital expenditures.

**relief from royalty method.** A valuation method used to value certain intangible assets (for example, trademarks and trade names) based on the premise that the only value that a purchaser of the assets receives is the exemption from paying a royalty for its use. Application of this method usually involves estimating the fair market value of an intangible asset by quantifying the present value of the stream of market-derived royalty payments that

the owner of the intangible asset is exempted from or "relieved" from paying.

**residual income.** For an entity that owns or operates an intangible asset being valued, the portion of the entity's income or cash flow remaining after subtracting a capital charge on all of the entity's tangible and other intangible assets. *Income or cash flows* can refer to any appropriate measure of income or cash flow, such as net income or operating cash flow before taxes and capital expenditures.

**security.** A certificate evidencing ownership or the rights to ownership in a business enterprise that (1) is represented by an instrument or by a book record or contractual agreement, (2) is of a type commonly dealt in on securities exchanges or markets or, when represented by an instrument, is commonly recognized in any area in which it is issued or dealt in as a medium for investment, and (3) either one of a class or series or, by its terms, is divisible into a class or series of shares, participations, interests, rights, or interest-bearing obligations.

**subject interest.** A business, business ownership interest, security, or intangible asset that is the subject of a valuation engagement.

**subsequent event.** An event that occurs subsequent to the valuation date.

**valuation analyst.** For purposes of this statement, an AICPA member who performs an engagement to estimate value that culminates in the expression of a conclusion of value or a calculated value.

**valuation assumptions.** Statements or inputs utilized in the performance of an engagement to estimate value that serve as a basis for the application of particular valuation methods.

**valuation engagement.** An engagement to estimate value in which a valuation analyst determines an estimate of the value of a subject interest by performing appropriate valuation procedures, as outlined in the AICPA Statement on Standards for Valuation Services, and is free to apply the valuation approaches and methods he or she deems appropriate in the circumstances. The valuation analyst expresses the results of the valuation engagement as a conclusion of value, which may be either a single amount or a range.

**valuation service.** See **engagement to estimate value**.

[Revised, June 2009, to reflect conforming changes necessary due to the issuance of FASB ASC; Revised, January 2015, to reflect the revised Code of Professional Conduct.]

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**Footnotes (VS Section 100 — Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset):**

**fn.1** This statement includes two glossaries. Appendix B, "International Glossary of Business Valuation Terms" (par. .81), is a verbatim reproduction of the glossary jointly developed by the AICPA, the American Society of Appraisers (ASA), the Canadian Institute of Chartered Business Valuators, the National Association of Certified Valuation Analysts, and the Institute of Business Appraisers. Appendix C, "Glossary of Additional Terms" (par. .82), provides definitions for terms included in this statement but not defined in the jointly developed glossary. The terms defined in appendix B are in boldface type the first time they appear in this statement; the terms defined in appendix C are in italicized boldface type the first time they appear in this statement.



<sup>fn.2</sup> Unless prohibited by statute or by rule, a member may use the client's estimates for compliance reporting to a third party if the member determines that the estimates are reasonable (based on the facts and circumstances known to the member). See Interpretation No. 1, "Scope of Applicable Services" (VS sec. 9100 par. .01–.89), and Statement for Standards on Tax Services No. 4, *Use of Estimates* (TS sec. 400).

<sup>fn.\*</sup> Reproduced verbatim from the International Glossary of Business Valuation Terms (the Glossary), which appears at [www.aicpa.org/InterestAreas/ForensicAndValuation/Membership/DownloadableDocuments/Intl%20Glossary%20of%20BV%20Terms.pdf](http://www.aicpa.org/InterestAreas/ForensicAndValuation/Membership/DownloadableDocuments/Intl%20Glossary%20of%20BV%20Terms.pdf). Note that the phrase, "we discourage the use of this term," that appears herein is also reproduced verbatim.

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## VS Section 9100

### ***Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset: Valuation Services Interpretations of Section 100***

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#### 1. Scope of Applicable Services

##### ***Background***

###### **.01**

The Statement on Standards for Valuation Services (SSVS) No. 1, *Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset* [VS section 100] establishes standards of performance and reporting for all AICPA members performing those valuation services that are within the scope of the Statement. When originally proposed on March 30, 2005, the Exposure Draft contained a list of questions and answers (Appendix A of the March 30, 2005 Exposure Draft) that were intended to assist members in determining if an engagement, particularly with regard to litigation or tax engagements, fell within the scope of the Statement. Through the Exposure Draft process, it was determined that the questions and answers were an integral part of the Statement and should be made authoritative. This Interpretation is part of the AICPA's continuing efforts at self-regulation of its members in valuation practice, and its desire to provide guidance to members when providing valuation services. The Interpretation does not change or elevate any level of conduct prescribed by any standard. Its goal is to clarify existing standards.

##### ***General Interpretation***

###### **.02**

The SSVSs apply to an engagement to estimate value if, as all or as part of another engagement, a member determines the value of a business, business ownership interest, security, or intangible asset (SSVS No. 1, paragraphs 1 and 2 [VS section 100.01–.02]). In the process of estimating value, professional judgment is used to apply valuation approaches and valuation methods as described in the SSVS No. 1, paragraph 4 [VS section 100.04].

###### **.03**

In determining whether a particular service falls within the scope of the Statement, a member should consider those services that are specifically excluded:

- Audit, review, and compilation engagements (SSVS No. 1, paragraph 5 [VS section 100.05])
- Use of values provided by the client or a third party (SSVS No. 1, paragraph 6 [VS section 100.06])
- Internal use assignments from employers to employee members not in the *practice of public accounting* (SSVS No. 1, paragraph 7 [VS section 100.07])
- Engagements that are exclusively for the purpose of determining economic damages (for example, lost profits) and that do not include an engagement to estimate value (SSVS No. 1, paragraph 8 [VS section 100.08])
- Mechanical computations that do not rise to the level of an engagement to estimate value (SSVS No. 1, paragraph 9(a) [VS section 100.09a])
- Engagements where it is not practical or reasonable to obtain or use relevant information and, therefore, the member is unable to apply valuation approaches and methods described in this Statement. (SSVS No. 1, paragraph 9(b) [VS section 100.09b])
- Engagements meeting the jurisdictional exception (SSVS No. 1, paragraph 10 [VS section 100.10])

#### **.04**

A member should be diligent in determining if an engagement falls within the scope of the Statement. Unless specifically excluded by the SSVS, if the engagement requires a member to apply valuation approaches and methods, and use professional judgment in applying those approaches and methods, the SSVS would apply. In determining the scope and requirements of the engagement, a member should consider the clients needs, or the requirements of a third party for which the valuation is intended, including governmental, judicial, and accounting authorities. In addition, a member should consider other professional standards that might apply.

### ***Specific Illustrations***

#### **.05**

The following illustrations address general fact patterns. Accordingly, the application of the guidance discussed in the "General Interpretation" section to variations in general facts, or to particular facts and circumstances, may lead to different conclusions. In each illustration, there is no authority other than that indicated.

### ***Illustrations Relating to Litigation Engagements and Certain Controversy Proceedings***

#### **.06**

*Illustration 1.* Do lost profits damage computations fall within the scope of the Statement?

**.07**

*Conclusion.* No, unless the computations are undertaken as part of an engagement to estimate value (SSVS No. 1, paragraphs 1, 2, and 8 [VS section 100.01, .02, and .08]).

**.08**

*Illustration 2.* Is an economic damages computation that incorporates a terminal value within the scope of the Statement?

**.09**

*Conclusion.* The use of a terminal value exclusively for the determination of lost profits is not within the scope of this statement unless that determination will be used as part of an engagement to estimate value (*Illustration 1*).

**.10**

*Illustration 3.* If a start-up business is destroyed, is the economic damages computation within the scope of the Statement?

**.11**

*Conclusion.* There are two common measures of damages: lost profits and loss of value. If a valuation analyst performs an engagement to estimate value to determine the loss of value of a business or intangible asset, the Statement applies. Otherwise, the Statement does not apply (*Illustration 1*). In order to determine whether the Statement applies, a member acting as an expert witness should evaluate whether the particular damages calculation constitutes an engagement to estimate value with respect to the business, business interest, security, or intangible asset or whether it constitutes a lost-profits computation.

**.12**

*Illustration 4.* Does the Statement include any exceptions relating to litigation or controversy proceedings?

**.13**

*Conclusion.* Yes, the Statement includes a reporting exemption for certain controversy proceedings (SSVS No. 1, paragraph 50 [VS section 100.50]); however, there is no litigation or controversy proceeding exemption from the developmental provisions of the Statement (SSVS No. 1, paragraphs 21–46 [VS section 100.21–.46]) in circumstances in which an engagement to estimate

value is performed (*Illustration 1*).

**.14**

*Illustration 5.* Is the Statements reporting exemption for litigation or controversy proceedings (see SSVS No. 1, paragraph 50 [VS section 100.50]) the same as the "litigation exemption" in the AICPA attestation standards?

**.15**

*Conclusion.* No, the so-called "litigation exemption" is provided for in the AICPA attestation standards and is further discussed in the attestation interpretations. The attestation standards do not apply to engagements in which a practitioner is engaged to testify as an expert witness in accounting, auditing, taxation, or other matters, given certain stipulated facts. This is clarified in the attestation interpretation, which states, in part, that the attestation standards do not apply to litigation services engagements when (among other requirements) the practitioner "has not been engaged to issue and does not issue an examination, a review, or an agreed-upon procedures report on the subject matter, or an assertion about the subject matter that is the responsibility of another party." (Interpretation No. 3, "Applicability of Attestation Standards to Litigation Services," of Chapter 1, "Attest Engagements," of Statement on Standards for Attestation Engagements No. 10, *Attestation Standards: Revision and Recodification*, as revised [AT section 9101.34–.42]). However, unlike the AICPA attestation standards, which do not apply in any capacity to litigation or controversy proceeding situations, as discussed above, the Statements exemption for litigation or certain controversy proceedings is an exemption from the reporting provisions of the Statement (SSVS No. 1, paragraphs 47–78 [VS section 100.47–.78]).

### ***Illustrations Relating to Tax Engagements***

**.16**

*Illustration 6.* When does the Statement apply to members who determine values related to tax reporting and planning engagements?

**.17**

*Conclusion.* The Statement applies when the member is engaged to estimate the value of a business, business ownership interest, security, or intangible asset (SSVS No. 1, paragraph 1 [VS section 100.01]). The application of valuation approaches and methods and the use of professional judgment (SSVS No. 1, paragraph 4 [VS section 100.04]) are required, unless an exception applies (SSVS No. 1, paragraphs 5–10 [VS section 100.05–.10]).

**.18**

*Illustration 7.* If the sole purpose of an engagement is reporting a value in a tax return and the

Statement applies to this engagement, are any separate reports (specifically, valuation reports) required to be issued? To whom are those reports required to be provided? Is a report required to be attached to the tax return? Are any specific disclosures required?

#### .19

*Conclusion.* The Statement requires the preparation of a written or oral valuation report (SSVS No. 1, paragraphs 47–78 [VS section 100.47–.78]) that is communicated to the client (SSVS No. 1, paragraph 47 [VS section 100.47]) but does not require that any report be attached to the tax return or mandate any other tax-specific disclosures. In limited circumstances, a taxing authority may require its own report, which would obviate the need for a separate valuation report (SSVS No. 1, paragraph 10 [VS section 100.10] and *Illustration 18*). There is also a reporting exemption for certain controversy proceedings (SSVS No. 1, paragraph 50 [VS section 100.50] and *Illustration 4*).

#### .20

*Illustration 8.* Are mechanical computations of value, for example, computations using actuarial tables, excluded from the Statement?

#### .21

*Conclusion.* Mechanical computations of value are excluded from the Statement if they do not rise to the level of an engagement to estimate value, that is, if the member does not apply valuation approaches and methods, and does not use professional judgment, as described in the Statement (SSVS No. 1, paragraph 9(a) [VS section 100.09a]).

#### .22

Examples of services that do **not** rise to the level of an engagement to estimate value include: (a) computations of a remainder interest under a grantor retained annuity trust (GRAT) using actuarial tables; (b) determining the value of relatively small blocks (relative to the total amount of corporate stock outstanding) of publicly traded stock whose per share price is readily ascertainable; (c) preparing a tax return using the valuation of a business that was provided by a third-party appraiser, or by the client (SSVS No. 1, paragraph , [VS section 100.06]); and (d) calculating cash "hold back" requirements for tax contingencies (SSVS No. 1, paragraphs 4 and 9(a) [VS section 100.01, .04, and .09a]).

#### .23

Examples of services that rise to the level of an engagement to estimate value include: (a) valuing a block of publicly traded stock, if the analysis includes consideration of a discount for blockage, lock-up, or other contractual or market restrictions such that valuation approaches and methods are applied, and professional judgment is used to determine the fair value, fair market value, or other applicable standard of value; (b) valuing stock that is not publicly traded; and (c) computing the fair

market value of assets in a charitable remainder trust (CRT), if the engagement requires the application of valuation approaches and methods, and the use of professional judgment to estimate the fair market value.

**.24**

*Illustration 9.* Does the "jurisdictional exception" (SSVS No. 1, paragraph 10 [VS section 100.10]) provide that an engagement to estimate value is not subject to the Statement if a member determines and reports values using procedures mandated or allowed by the Internal Revenue Code (IRC), Internal Revenue Service (IRS) regulations, court cases, or other published guidance and other sources of federal, state, and local law solely for purposes of tax return preparation and other tax services using these methods?

**.25**

*Conclusion.* No, the "jurisdictional exception" would not exempt the engagement from this Statement, even if the engagements sole purpose was to value a subject interest (SSVS No. 1, paragraph 1 [VS section 100.01]) for tax reporting purposes. Only the portion of the Statement that differs from the published governmental or judicial authority is superseded for purposes of the engagement. The remainder of the Statement applies to the engagement.

**.26**

*Illustration 10.* Is an interest in a publicly traded partnership whose shares are frequently traded considered a "security" under the Statement? Is an interest in a family limited partnership (FLP), or in another nontraded partnership, considered a "security" under the Statement?

**.27**

*Conclusion.* Whether interest constitutes a "security" is a legal determination. However, where the value of a security is readily ascertainable, a valuation analyst does not need to apply valuation approaches and methods and use professional judgment. Accordingly, the valuation of such an interest would not be subject to the Statement (SSVS No. 1, paragraphs 1 and 9(a) [VS section 100.01 and .09a]). An interest in a nonpublicly traded partnership, such as an FLP, whether considered a security or not, is a business ownership interest. The valuation of such nonpublicly traded interest requires the application of valuation approaches and methods and the use of professional judgment, and, accordingly, would be subject to the Statement (SSVS No. 1, paragraphs 1, 4, [VS section 100.01 and .04], and *Illustration 6*), unless the exception under SSVS No. 1, paragraph 9(b) [VS section 100.09b] applies (*Illustration 13e*). If the engagement requires the valuation analyst to consider and apply adjustments, for example, valuation discounts or premiums, then the engagement would be subject to the Statement.

**.28**

*Illustration 11.* A client engages a member to provide advice for planning purposes (such as estate planning, personal financial planning, or merger and acquisitions planning). The client holds an ownership interest in a family business being operated as a limited liability company, an interest in a private real estate limited partnership, publicly traded stock, a personal residence, and a retirement account (not an IRA). Is this a valuation engagement subject to the Statement?

**.29**

*Conclusion.* It depends. Providing technical advice, without reference to values for the various assets, is not subject to the Statement. However, if a member calculates a value to illustrate various planning options, he or she may fall under the Statement with regard to various assets. If one or more of the assets for which value is to be determined for purposes of the plan illustrations is a business, business ownership interest, security, or intangible asset, and the client or a third party does not provide the values for these assets, or the member does not use assumed or hypothetical values as part of the overall engagement, the member performing the valuation(s) is subject to the Statement with regard to these assets (SSVS No. 1, paragraph 1, [VS section 100.01] and *Illustration 6*). In this example, if the member applies valuation approaches and methods and uses professional judgment to determine the value of the ownership interest in the family business or the interest in the private real estate limited partnership in order to provide planning advice, the Statement would apply. In contrast, if the client or a third party provides the values for these assets, or the member uses assumed or hypothetical values, the Statement would not apply because the member would not be applying valuation approaches and methods and using professional judgment. In addition, the exception under SSVS No. 1, paragraph 9(b), [VS section 100.09b], where it is not practical or reasonable to obtain or use relevant information, could apply (see *Illustration 13e*). The computation of the "estimated estate tax" or other taxes once the values have been determined, assumed, or provided is not subject to the Statement, as the computation is a tax computation but would be subject to the Statements on Standards for Tax Services [TS sections 100–900] (*Illustration 10* at paragraph .27 of this Interpretation).

**.30**

*Illustration 12.* There are many instances where a tax engagement involves the need for a member to estimate value. The estimation of value may not be the primary purpose of the engagement, but rather a necessary task to perform or item to consider, when making a tax determination concerning the reporting of a transaction on a tax return. Consider the following practice situations:

**.31**

*Illustration 12a.* A member has been engaged to determine the deductibility of interest on a nonrecourse loan. Under applicable regulations, interest on a nonrecourse loan cannot be deducted if it is clear that the company will be unable to service the debt. For purposes of tax reporting, a conclusion must be reached concerning the ability of the company to service the debt. Is this considered a valuation engagement subject to the Statement?

**.32**

*Conclusion.* This is not a valuation engagement covered by the Statement because it is not the valuation of a subject interest (SSVS No. 1, paragraph 1 [VS section 100.01]). This example is a debt-service analysis.

**.33**

*Illustration 12b.* There are compliance filings that require an estimate of the value of a company. For example, the "market value" of "intangible personal property," as defined by a states taxing authority may need to be reported annually on an intangible personal property tax return. A client has a subject interest that is considered intangible personal property for purposes of the return. The member has been engaged to prepare the tax return. Is this a valuation engagement subject to the Statement?

**.34**

*Conclusion.* It depends. If the state requires an estimation of the value of a subject interest, and the estimation of value requires the application of valuation approaches and methods and the use of professional judgment (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]), the Statement applies. If, however, the client or a third-party appraiser provides the value of the subject interest to the member, the Statement does not apply (SSVS No. 1, paragraphs 1 and 6 [VS section 100.01 and .06]). In addition, the exception under SSVS No. 1, paragraph 9(b) [VS section 100.09b], where it is not practical or reasonable to obtain or use relevant information, could apply (*Illustration 13e*). Alternatively, if the state follows more informal rules where the application of valuation approaches or valuation methods are not necessary, the Statement does not apply (SSVS No. 1, paragraph 4 [VS section 100.04]).

**.35**

*Illustration 12c.* There are times when a member must allocate value among various assets. For example, IRC sections 1060 and 338 require the allocation to assets, based on relative values, of consideration paid. In partnership taxation, there may be allocations under IRC sections 754, 743, and 734 and special tax basis adjustments for partnerships (sales or exchanges and transfers at or upon death) may require an allocation of value among various partnership assets. Are these types of allocations engagements to estimate value subject to the Statement?

**.36**

*Conclusion.* It depends. If one or more of the assets to which value is to be allocated is a subject interest (that is, a business, business ownership interest, security, or intangible asset), and the client or a third party did not provide the member with a value for those assets, then the member performing the allocation would be subject to the Statement, and the member is required to apply valuation approaches and methods, and use professional judgment to value those assets (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04], and *Illustration 6*), unless an exception



applies (SSVS No. 1, paragraphs 5–10 [VS section 100.05–.10]). For example, in an IRC section 1060 allocation, after the allocation of purchase price to cash, receivables, inventory, and depreciable tangible assets, there is a residual amount of value allocable to goodwill or going concern. The mechanical assignment of the residual amount to goodwill or going concern is not subject to the Statement. However, if the member allocates this residual amount to specific intangible assets (such as to various customer-based and supplier-based intangibles), such allocation is based on the assets relative values. Because the member applies valuation approaches and methods and uses professional judgment to value those specific intangible assets, the Statement applies.

**.37**

*Illustration 12d.* If the member does not apply any discount and simply computes the fair market value of an interest in a family limited partnership (FLP) for tax purposes, is this a valuation engagement subject to the Statement?

**.38**

*Conclusion.* Yes, the Statement applies if the member determines the value of the FLP or an interest in an FLP. The application of valuation approaches and methods, and the use of professional judgment are required, unless an exception applies (SSVS No. 1, paragraphs 5–10 [VS section 100.05–.10]). The fact that the member does not apply a discount does not exempt the engagement from the Statement (SSVS No. 1, paragraphs 1–4 and 9(a) [VS section 100.01–.04 and .09a]).

**.39**

*Illustration 12e.* Would the Statement apply to the computation of the fair market value of assets in, or the computation of the required distribution of, a charitable remainder trust (CRT)?

**.40**

*Conclusion.* It depends on the underlying assets held by the CRT. The Statement would apply only if the member determines the value of a business, business ownership interest, security, or intangible asset (SSVS No. 1, paragraph 1 [VS section 100.01]). To the extent that the CRT holds assets that, to be valued, require the application of valuation approaches and methods, and the use of professional judgment, such as an interest in a limited liability corporation (LLC), the Statement would apply. However, if the CRT only holds publicly traded stock with a readily ascertainable value, the Statement would not apply because valuation approaches and methods and professional judgment would not be needed in the computation (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04], and *Illustration 6*).

**.41**

*Illustration 12f.* In circumstances in which the value of assets contributed by partners to a partnership differ from their cost basis, each difference must be tracked for tax purposes under IRC section 704(c) so that amounts of gain or loss can be properly assigned to the contributing partners. Are these types of asset value assignments valuation engagements subject to the Statement?

**.42**

*Conclusion.* It depends. If one or more of the assets for which value is relevant under IRC section 704(c) is a subject interest that is, a business, business ownership interest, security, or intangible asset, and the client or a third party does not provide the valuation, and the member applies valuation approaches and methods and uses professional judgment to value these assets for IRC section 704(c) tax purposes, then the Statement applies (SSVS No. 1, paragraphs 1 and 6 [VS section 100.01 and .06], and *Illustration 6*).

**.43**

*Illustration 12g.* A member has been engaged to perform a cost segregation study. The study involves an analysis of the costs of building a structure and the allocation of such costs to the real and personal property components of the structure so that depreciation of those components may be properly computed. Is this a valuation engagement subject to the Statement?

**.44**

*Conclusion.* No, none of the assets constitutes a subject interest (SSVS No. 1, paragraph 1 [VS section 100.01]).

**.45**

*Illustration 12h.* A member has been engaged to provide advice to a company regarding the tax planning for income from discharge of indebtedness under IRC section 108. The company has advised the member that the company will be able to negotiate a settlement in complete satisfaction of an obligation at 30 cents on the dollar. Is this a valuation engagement subject to the Statement?

**.46**

*Conclusion.* It depends. Under IRC section 108(a), gross income of the company excludes income from discharge of indebtedness only under certain circumstances. One of those circumstances is the insolvency of the company. Under IRC section 108(d) (3), insolvency results from an excess of liabilities over the fair market value of assets. If (a) the company must rely on the insolvency provisions of IRC section 108; (b) one or more of the assets for which value is relevant under IRC section 108 is a subject interest (that is, a business, business ownership interest, security, or intangible asset); (c) the company or a third party does not provide the valuation; and (d) the member applies valuation approaches and methods, and uses professional judgment to value the subject interest(s) for purposes of the IRC section 108(d)(3) insolvency determination, the

Statement applies.

**.47**

*Illustration 13.* An executor has engaged a member to prepare an estate tax return, which requires determining values for the following estate assets: (a) shares in a publicly traded company, "TI Corporation," whose shares are infrequently traded; (b) a large block of stock in "LB Corporation," a publicly traded company; (c) a brokerage account consisting of shares in various publicly traded companies; (d) "CHB Corporation," a closely held business owned by the decedent and the decedent's family; and (e) a 5 percent interest in "RP," a privately held rental real estate partnership. Does the Statement apply to any of the following assets owned by the estate? (See *Illustration 10* at paragraph .27 of this Interpretation regarding the valuation of a security.)

**.48**

*Illustration 13a.* Does the Statement apply to shares in a publicly traded company, "TI Corporation," whose shares are traded infrequently?

**.49**

*Conclusion.* It depends; although the price of a share of publicly traded stock is ascertainable from published sources, there are no definitive criteria that would indicate when the Statement applies to shares that are infrequently traded. A key consideration is the average daily trading volume of TI Corporation stock on or around the valuation date. The concept of fair market value incorporates the notions that (1) cash could have been received for the stock at the valuation date, and (2) the share price of an infrequently traded stock could decrease if a relatively large block of the stock were to be put on the market on that date. If the subject shares held by the estate do not represent a significant percentage of the daily trading volume of TI stock on or around the valuation date, and the price of a share of the stock is readily ascertainable on the valuation date, then the resulting value (the quoted share price times the number of shares owned) represents a cash price that could have been received at the valuation date for the block, and the Statement does not apply because the calculation of value is mechanical (SSVS No. 1, paragraph 9(a) [VS section 100.09a]). If, however, the subject shares held by the estate represent a large percentage of the average daily trading volume of the stock, the quoted market price for a share may not be adequate for purposes of determining the fair market value of the block of shares on the valuation date. In that case, the Statement applies because valuation approaches and methods need to be applied, and professional judgment needs to be used in determining the value of the block (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]) (See *Illustration 10* at paragraph .27 of this Interpretation regarding the valuation of a security.)

**.50**

*Illustration 13b.* Does the Statement apply to a large block of stock in "LB Corporation," a publicly traded company?

**.51**

*Conclusion.* The answer depends on the amount of shares to be valued in relation to the average daily trading volume in LB Corporation on or around the valuation date. There are no definitive criteria that would indicate when the Statement applies to the valuation of a large block of publicly traded stock. The concept of fair market value incorporates the notion that cash could have been received from a sale of the block on the valuation date. A large block could decrease the share price if sold on the valuation date. The Statement would typically not apply to the valuation of a large block (for example, 200,000 shares) of a large and actively-traded public company. Even though the value of the estate's stock may be large in absolute terms, the daily trading volume in such stock on the valuation date may be sufficiently high that a sale of the block on the valuation date would not affect the market price of a company's shares. In such a case, the quoted market price of a share times the number of shares held by the estate may be considered to reflect the fair market value of the subject block of stock, and because it would not be the case that valuation approaches and methods would need to be applied and professional judgment used, the Statement would not apply. If, however, the large block of publicly traded shares represents a significant percentage of the daily trading volume, the Statement would apply because valuation approaches and methods would need to be applied and professional judgment used to determine the value (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]).

**.52**

*Illustration 13c.* Does the Statement apply to a brokerage account consisting of shares in various publicly traded companies?

**.53**

*Conclusion.* The Statement would not apply to the determination of the value of a brokerage account consisting of publicly traded securities, except as discussed in paragraphs .49 and .51 of this Interpretation. Absent certain scenarios involving infrequently traded securities or large blocks of stock, the application of valuation approaches and methods and the use of professional judgment are not necessary in that determination (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]).

**.54**

*Illustration 13d.* Does the Statement apply to "CHB Corporation," a closely held business owned by the decedent and the decedent's family?

**.55**

*Conclusion.* The Statement would apply to the determination of value of CHB Corporation because valuation approaches and methods need to be applied, and professional judgment needs to be used to determine the fair market value of the ownership interest in CHB (SSVS No. 1, paragraphs 1 and

4 [VS section 100.01 and .04]).

**.56**

*Illustration 13e.* Does the Statement apply to a 5 percent interest in a privately held rental real estate partnership (RP)?

**.57**

*Conclusion.* The Statement would apply to the determination of value of the 5 percent interest in rental real estate partnership (RP) because valuation approaches and methods need to be applied and professional judgment needs to be used to determine the fair market value of the ownership of a fractional interest in a privately held partnership (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]). However, where it is not practical or not reasonable to obtain or use relevant information and, therefore, the member is unable to apply valuation approaches and methods, the Statement would not apply. For example, the member has requested from RP's general partner financial information the member needs in order to apply valuation approaches and methods. The general partner is not responsive to the member's requests, and the due date for filing the estate tax return is near. Given the small ownership interest, and given that RP is likely a relatively small percent of the total estate, unless prohibited by statute or by rule, the member may then use the taxpayer's estimates if the member determines that the estimates are reasonable (based on the facts and circumstances known to the member) (SSVS No. 1, paragraph 9(b) [VS section 100.09b]).

**.58**

*Illustration 14.* Would the answers to *Illustration 13* change if the values were provided by the client or a client-engaged third party?

**.59**

*Conclusion.* The Statement would not apply if the values were provided by the client or by a client-engaged third party because the member is not applying valuation approaches and methods and using professional judgment to determine value (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]). However, the member would be subject to Statement on Standards for Tax Services No. 3, *Certain Procedural Aspects of Preparing Returns* [TS section 300], in providing appropriate due diligence with respect to the values provided to the member. It is also recommended that the understanding between member and client in these circumstances include documentation of the fact that the member is not determining but rather is being provided with the value of the subject interest.

**.60**

*Illustration 15.* Would the answers to *Illustration 13* change if the values were provided by an outside third-party specialist hired by the member?

**.61**

*Conclusion.* If the member engages an outside third-party specialist to assist with the member's work, and it is the member expressing a conclusion or calculated value, the member will be applying valuation approaches and methods and using professional judgment; thus, the Statement would apply (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]; SSVS No. 1, paragraph 20, "Using the Work of Specialists in the Valuation Engagement," [VS section 100.20]). If, however, the third-party specialist is determining the value in his or her own name and providing that value to the client, and the member will not be applying valuation approaches and methods or using professional judgment (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04], and *Illustration 6*), the Statement would not apply, but the member would be subject to Statement on Standards for Tax Services No. 3, *Certain Procedural Aspects of Preparing Returns* [TS section 300] in providing appropriate due diligence with respect to the values provided.

**.62**

*Illustration 16.* The client and the member agree that the member will value a partnership interest and then apply an "average" discount that the member is to determine (based on the results of various studies and case law). Does the Statement apply? If so, is this a valuation engagement or a calculation engagement?

**.63**

*Conclusion.* Yes, the Statement applies because the member determined the value of the partnership interest by applying valuation approaches and valuation methods and using professional judgment. This would be considered a calculation engagement because the member and the client have agreed on the specific valuation approaches or valuation methods the valuation analyst will use and the extent of valuation procedures the valuation analyst will perform (SSVS No. 1, paragraph 21(b) [VS section 100.21b] and *Illustration 6*).

**.64**

*Illustration 17.* Would the Statement apply if a member has an informal conversation or communicates in writing with a client regarding the alternative tax consequences of gifting versus selling a business using a presumption of a specific value of the business?

**.65**

*Conclusion.* No, the Statement would not apply. The member is providing tax advice using an assumed or hypothetical value of a business and is not determining value, applying valuation approaches and methods, and using professional judgment to value a business (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04], and *Illustration 6*).

**.66**

*Illustration 18.* Would the Statement apply to a transfer pricing study (IRC section 482) that involves the use of specific methodologies, data, terminology, and documentation requirements that are provided in the IRS regulations and procedures, and whose methodologies and documentation requirements differ from those contained in the Statement?

**.67**

*Conclusion.* No. To the extent that the transfer pricing study applies, for example, to the valuation of inventory or services, the Statement would not apply (see SSVS No. 1, paragraph 1 [VS section 100.01] and *Illustration 6*). To the extent that the transfer pricing study applies to the valuation of intangible assets, the Statement would normally apply. However, because the IRS regulations require that the taxpayer reasonably calculate an arm's-length price according to the best method that is determined using third-party comparable data under explicit IRS rules and documentation procedures, and to the extent these IRS rules and procedures differ from the Statement, the jurisdictional exception (SSVS No. 1, paragraph 10 [VS section 100.10]) would exempt the valuation of the intangible assets from the developmental provisions of the Statement (SSVS No. 1, paragraphs 25–48 [VS section 100.25–.48]). In addition, to the extent that the IRS regulations (such as IRS regulation section 1.6662-6(d) (2) (iii)) and procedures provide specific documentation requirements for avoiding potential penalties, and if a transfer pricing report is provided to a client according to such IRS documentation requirements, the jurisdictional exception would apply to the reporting provisions of the Statement (SSVS No. 1, paragraphs 50–78 [VS section 100.50–.78]) and thus a valuation report would not be necessary.

**.68**

*Illustration 19.* In a situation where the Statement applies to members who determine value as part of tax engagements, would the member also be required to be in compliance with the Statements on Standards for Tax Services (SSTs) [TS sections 100–900]?

**.69**

*Conclusion.* Yes, the Statement would apply only to the valuation determination and reporting aspects of the engagement but the SSTs would apply to all aspects of the engagement. For example, even though the Statement would govern the determination of value of an applicable asset reported on a tax return, the member would also have to be in compliance with SSTS No. 1, *Tax Return Positions*, [TS section 100], for that valuation.

**.70**

*Illustration 21.* Do settlements or negotiations of value in offers-in-compromise or tax disputes fall under the Statement?

**.71**

*Conclusion.* No, settlements or negotiations of value in offers-in-compromise or tax disputes are part of a tax process. However, if a member prepares a valuation in preparation for a settlement or negotiation of value, and the valuation involves the application of valuation approaches and methods and the use of professional judgment, the valuation would fall under the developmental aspects of the Statement. The settlement or negotiation process itself is not a valuation and would not fall under the Statement. In addition, the Statement's reporting exemption for certain controversy proceedings would apply as the valuation was performed specifically for the administrative matter (SSVS No. 1, paragraph 50 [VS section 100.50]).

### ***Illustrations Relating to Other Engagements***

#### **.72**

*Illustration 20.* Does determining the value of accounts receivable fall under the Statement?

#### **.73**

*Conclusion.* No, accounts receivable constitute **tangible assets** under the Statement (SSVS No. 1, Appendix B [VS section 100.81], and do not constitute a subject interest (SSVS No. 1, paragraph 1 [VS section 100.01]).

#### **.74**

*Illustration 22.* In the course of performing a valuation under the Statement, if a valuation analyst prepares prospective financial information (for example, as part of a discounted cash flow or discounted earnings analysis within the income approach), does this require the valuation analyst to examine or compile such information in accordance with the Statements on Standards for Attestation Engagements (SSAEs) [AT sections 20–701]?

#### **.75**

*Conclusion.* No, Chapter 1, "Attest Engagements," of SSAE No. 10, *Attestation Standards: Revision and Recodification*, as amended [AT section 101.01] states that the attestation standards apply when a practitioner is "engaged to issue or does issue an examination, a review, or an agreed-upon procedures report on subject matter, or an assertion about the subject matter..., that is the responsibility of another party." If the valuation analyst has not been engaged to examine, compile, assemble, review, or apply agreed-upon procedures to prospective financial information, and does not issue an examination, compilation, assembly, or agreed-upon report on prospective financial information, the SSAEs [AT sections 20–701] do not apply (SSARS 14 [AR section 120]).

#### **.76**

*Illustration 23.* Under a valuation engagement, a valuation analyst is free to select any and all valuation approaches and methods the valuation analyst deems appropriate in the circumstances.



Under a calculation engagement, the valuation analyst and the client agree to the specific approaches or methods the valuation analyst will use or the extent of calculation procedures the valuation analyst will perform. (SSVS No. 1, paragraph 21 [VS section 100.21]) Under SSVS No. 1, paragraph 18 [VS section 100.18], a restriction or limitation on the scope of the valuation analyst's work, or the data available for analysis may be present and known to the valuation analyst at the outset of the engagement, or may arise during the course of an engagement (and such restriction or limitation should be disclosed in the report). Is it possible to have a restriction or limitation that is of such a degree that a valuation analyst engaged to perform a valuation engagement should propose altering the engagement to be a calculation engagement?

**.77**

*Conclusion.* Although the two engagements represent two different types of service performed by valuation analysts, the possibility exists. If, in the course of a valuation engagement, restrictions, or limitations on the scope of the valuation analyst's work or the data available for analysis are so significant that the valuation analyst believes that he or she cannot, even with disclosure in the valuation report of the restrictions or limitations, adequately perform a valuation engagement leading to a conclusion of value, the valuation analyst should determine whether he or she has the ability to adequately complete the engagement as a calculation engagement or should consider resigning from the engagement.

**.78**

*Illustration 24.* If a member employed in industry, government, or education "moonlights" doing engagements to estimate value, do the Standards apply?

**.79**

*Conclusion.* Yes, the Standard applies. By moonlighting, the member is holding him or herself out as a certified public account and as being in public practice. The Standard would apply just as it would to any other member in public practice unless one of the exceptions applies.

**.80**

*Illustration 25.* Does the Statement apply to an assignment from an employer to an employee member not in public practice to prepare a valuation for internal financial reporting purposes?

**.81**

*Conclusion.* No, SSVS No. 1, paragraph 7 [VS section 100.07] exempts internal use assignments from an employer to an employee member not in the practice of public accounting. However, if the valuation is to be used for financial reporting purposes, the employer and the employee may wish to consider whether the work will be accepted by the employer's outside auditors if the statement is not followed.

## **Illustrations for PFP-Specific Engagements**

*These illustrations assume the member has not been engaged to perform a business valuation.*

**.82**

*Illustration 26.* When does the Statement apply to members who determine values related to personal financial planning engagements?

**.83**

*Conclusion.* The Statement applies to personal financial planning engagements when the member determines the value of a business, business ownership interest, security, or intangible asset (SSVS No. 1, paragraph 1 [VS section 100.01]) and in the process of determining the value applies valuation approaches and methods and uses professional judgment (SSVS No. 1, paragraph 4 [VS section 100.04]) unless an exception applies (SSVS No. 1, paragraphs 5–10 [VS section 100.05–.10]).

**.84**

*Illustration 27.* If a member is engaged to provide personal financial planning services to a client and, in the course of the engagement, estimates the proceeds from a hypothetical future sale of the client's business interest, does the Statement apply?

**.85**

*Conclusion.* No. The Statement does not apply because estimate of future sales proceeds does not in itself constitute a valuation engagement (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]).

**.86**

*Illustration 28.* A member is engaged to provide personal financial planning services to a client and, in the course of the engagement, estimates the proceeds from a hypothetical future sale of the client's business interest. As part of that engagement, the member shares general industry knowledge to assist the client in estimating the current value of the business interest. Does the Statement apply?

**.87**

*Conclusion:*

(a) If, in the process of determining the current value from which the member estimates future sales proceeds, the member applies valuation approaches and methods and uses professional judgment, the Statement applies to the determination of the current value (SSVS No. 1, paragraph 4

[VS section 100.04]). However, the Statement does not apply when the member shares general industry knowledge with the client instead of applying professional judgment.

(b) If the client or another party provides the current value, and the member does not apply valuation approaches and methods, the Statement does not apply (SSVS No. 1, paragraphs 4 and 6 [VS section 100.04 and .06]).

(c) If the member uses a hypothetical or assumed value as the starting point for the calculation of future sales proceeds and does not apply valuation approaches and methods, the Statement does not apply (SSVS No. 1, paragraphs 1 and 4 [VS section 100.01 and .04]). The Statement does not apply to a general discussion with the client of valuation concepts or industry price multiples based on the member's industry knowledge, which assists the client in determining a hypothetical or assumed value (SSVS No. 1, paragraphs 4 and 6 [VS section 100.04 and .06]).

**.88**

*Illustration 29.* The client has asked the member to prepare a personal financial plan that includes an estimate of future proceeds from a sale of the business interest at retirement. The member estimates the future proceeds based on an estimate of the business' current value by applying a rule of thumb for the business' industry, but the member does not consider the risk factors of the subject interest or exercise other professional judgment in applying the multiple. Does the Statement apply?

**.89**

*Conclusion.* No, the Statement does not apply because the member did not use professional judgment (SSVS No. 1, paragraph 4 [VS section 100.04]). If the member considers specific risk factors of the business interest in applying the price multiple, the Statement applies.

*This Statement titled Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset was unanimously adopted by the assenting votes of the AICPA Consulting Services Executive Committee.*



**User Name:** Derek Freed

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## Document (1)

1. [N.J. Court Rules, R. 5:1-5](#)

**Client/Matter:** SeidenFreed

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**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

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-None-

## [N.J. Court Rules, R. 5:1-5](#)

Current with all changes received through February 18, 2024

***NJ - New Jersey State & Federal Court Rules > Rules Governing the Courts of the State of New Jersey > PART V. Rules Governing Practice in the Chancery Division, Family Part > CHAPTER I. Actions Cognizable; Scope and Applicability of Rules; General Provisions; Process; Venue; Pleadings; Process; Appearances > RULE 5:1. Cognizability of Actions; Scope and Applicability of Rules***

### **Rule 5:1-5. Arbitration.**

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**(a)** Scope of Rule. This Rule applies to all Agreements to Arbitrate (“Agreements”) and all Consent Orders to Arbitrate (“Consent Orders”), including but not limited to those entered into pursuant to the Uniform Arbitration Act, [N.J.S.A. 2A:23B-1](#) et seq., the New Jersey Alternative Procedure for Dispute Resolution Act, [N.J.S.A. 2A:23A-1](#) et seq., or any other agreed upon framework for arbitration or resolution of disputes between and among parties to any proceeding heard in the family part, except: (A) the entry of the final judgment of annulment or dissolution of relationship; (B) actions involving the Division of Child Protection and Permanency; (C) domestic violence actions; (D) juvenile delinquency actions; (E) family crisis actions; and (F) adoption actions, which may not be arbitrated.

**(b)** Prerequisites.

**(1)** The Arbitration Questionnaire. The Arbitration Questionnaire, which is set forth in Appendix XXIX-A, shall be signed by each party, attached to the Agreement or Consent Order, and filed with the court.

**(2)** The Arbitrator Disclosure Form. The Arbitrator/Umpire Disclosure Form, which is set forth in Appendix XXIX-D, shall be signed by the arbitrator/umpire, attached to the Agreement or Consent Order, and filed with the court. The parties must file the Arbitration Questionnaire, the Arbitrator Disclosure Form, and the Agreement or Consent Order before the case is placed on the arbitration track.

**(A)** The Agreement or Consent Order shall be signed by the parties and shall state:

**(i)** the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right;

**(ii)** the parties are aware of the limited circumstances under which a challenge to the award may be advanced and agree to those limitations;

**(iii)** the parties have had sufficient time to consider the implications of their decision to arbitrate; and

**(iv)** the parties have entered into the Agreement or Consent Order freely and voluntarily, after due consideration of the consequences of doing so.

**(B)** In addition, in all family proceedings involving child-custody and parenting-time issues, the Agreement or Consent Order shall provide that:

**(i)** a record of all documentary evidence shall be kept;

**(ii)** all testimony shall be recorded verbatim; and

**(iii)** the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests of the child standard.

## N.J. Court Rules, R. 5:1-5

**(C)** Further, in all family proceedings involving child support issues, the Agreement or Consent Order shall provide that the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests standard, and consistent with [R. 5:6A](#) and Rules Appendix IX.

**(D)** Appendix XXIX-B is a template form of agreement to arbitrate pursuant to [N.J.S.A. 2A:23B-1](#) et seq.

**(E)** Appendix XXIX-C is a template form of agreement to resolve disputes pursuant to [N.J.S.A. 2A:23A-1](#) et seq.

**(F)** Appendix XXIX-D is a form arbitrator/umpire disclosure.

**(3)** Agreement or Consent Order.

**(c)** Arbitration Track. Any action, pre- or post-judgment, pending at the time that an Agreement or Consent Order to arbitrate is reached shall be placed on the Arbitration Track referenced in [R. 5:1-4](#) for no more than one year following Arbitration Track assignment, which term may be extended by the court for good cause shown. Cases assigned to the Arbitration Track should be given scheduling consideration when fixing court appearances in other matters.

## History

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Note: Adopted July 27, 2015 to be effective September 1, 2015; subparagraph (b)(1); amended, new subparagraph (b)(2) adopted, subparagraphs (b)(2) and (b)(3) redesignated as subparagraphs (b)(3) and (b)(4) July 29, 2019 to be effective September 1, 2019; subparagraphs (b)(1) and (b)(2); amended, subparagraph (b)(4) deleted, and paragraph (c); amended July 30, 2021 to be effective September 1, 2021.

New Jersey State & Federal Court Rules

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## [N.J. Stat. § 2A:23C-4](#)

\*\*\* Current through New Jersey 221st First Annual Session, L. 2024, c. 109 and J.R. 6 \*\*\*

**LexisNexis® New Jersey Annotated Statutes > Title 2A. Administration of Civil and Criminal Justice (Subts. 1 — 12) > Subtitle 6. Specific Civil Actions (Chs. 22 — 65) > Chapter 23C. Mediation (§§ 2A:23C-1 — 2A:23C-13)**

### **§ 2A:23C-4. Privilege against disclosure; admissibility; discovery**

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- a. Except as otherwise provided in section 6 of [P.L. 2004, c. 157 \(C. 2A:23C-6\)](#), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of [P.L. 2004, c. 157 \(C. 2A:23C-5\)](#).
- b. In a proceeding, the following privileges shall apply:
- (1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
  - (2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
  - (3) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
- c. Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

### **History**

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L. [2004, c. 157](#), § 4, eff. Nov. 22, 2004.

Annotations

### **Notes**

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#### **Effective Dates:**

Section 14 of L. [2004, c. 157](#) provides: "This act shall take effect immediately and shall apply to any agreements to mediate made on or after the effective date of this act." Chapter 157, L. 2004, was approved on November 22, 2004.

### **CASE NOTES**

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**Civil Procedure: Alternative Dispute Resolution: General Overview**

**Evidence: Privileges**

**Evidence: Privileges: Government Privileges: Waiver****Civil Procedure: Alternative Dispute Resolution: General Overview**

In a divorce case, a trial court erred by allowing the parties' mediator to testify at a hearing on remand and then using the mediator's letter and memorandum of understanding that was not accepted or approved in writing by either party as the basis for a purported settlement and entering a judgment of divorce based on that purported settlement; [N.J. Ct. R. 1:40-4\(c\)](#) clearly restricted the mediator from testifying at any subsequent hearing or trial regarding the mediated matter and established confidentiality with regard to mediation proceedings, and no party had waived such provisions. Trial court's finding that a binding settlement had been reached by the parties based on the mediator's memorandum was unsupported by the evidence since the mediator's own letter and testimony stated that no binding settlement was reached and that 13 issues remained unresolved between the parties, three of which involved financial matters with regard to the husband's child support obligation, the parties' responsibilities with regard to their children's college education expenses, and interim marital expenses. [Lehr v. Afflitto, 382 N.J. Super. 376, 889 A.2d 462, 2006 N.J. Super. LEXIS 8 \(App.Div. 2006\)](#).

**Evidence: Privileges**

Mediator was properly excluded from testifying in defendant's criminal trial for assault and weapon possession, which resulted after mediation was unsuccessful between defendant and the victim. Defendant did not make the requisite showings to overcome the mediation privilege as set forth in [N.J. Ct. R. 1:40-4\(c\)](#) in asserting that the testimony was needed to prove his self-defense argument. [State v. Williams, 184 N.J. 432, 877 A.2d 1258, 2005 N.J. LEXIS 934 \(N.J. 2005\)](#).

**Evidence: Privileges: Government Privileges: Waiver**

In a divorce case, a trial court erred by allowing the parties' mediator to testify at a hearing on remand and then using the mediator's letter and memorandum of understanding that was not accepted or approved in writing by either party as the basis for a purported settlement and entering a judgment of divorce based on that purported settlement; [N.J. Ct. R. 1:40-4\(c\)](#) clearly restricted the mediator from testifying at any subsequent hearing or trial regarding the mediated matter and established confidentiality with regard to mediation proceedings, and no party had waived such provisions. Trial court's finding that a binding settlement had been reached by the parties based on the mediator's memorandum was unsupported by the evidence since the mediator's own letter and testimony stated that no binding settlement was reached and that 13 issues remained unresolved between the parties, three of which involved financial matters with regard to the husband's child support obligation, the parties' responsibilities with regard to their children's college education expenses, and interim marital expenses. [Lehr v. Afflitto, 382 N.J. Super. 376, 889 A.2d 462, 2006 N.J. Super. LEXIS 8 \(App.Div. 2006\)](#).

**Research References & Practice Aids**

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**Cross References:**

Scope, see [2A:23C-3](#).

Waiver and preclusion of privilege, see [2A:23C-5](#).

Exceptions to privilege, see [2A:23C-6](#).

Mediator's disclosure of conflicts of interest; background, see [2A:23C-9](#).



**LAW REVIEWS & JOURNALS:**

[31 Seton Hall Legis. J. 65](#), ARTICLE: BE CAREFUL WHAT YOU SAY: ONE COURT'S LOOK AT CONFIDENTIALITY UNDER THE UNIFORM MEDIATION ACT.

**PRACTICE GUIDES & TREATISES:**

[Employment Litigation in New Jersey § 7.07\[6\]](#), UMA: Confidentiality of Mediation Proceedings and Related Issues

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## *Minkowitz v. Israeli*

Superior Court of New Jersey, Appellate Division  
April 30, 2013, Argued; September 25, 2013, Decided  
DOCKET NO. A-2335-11T2

### Reporter

433 N.J. Super. 111 \*; 77 A.3d 1189 \*\*; 2013 N.J. Super. LEXIS 144 \*\*\*; 2013 WL 5336454

BARBARA MINKOWITZ, PLAINTIFF-APPELLANT, v. RON S. ISRAELI, DEFENDANT-RESPONDENT.

**Subsequent History:** [\*\*\*1] Approved for Publication September 25, 2013.

**Prior History:** On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-2087-08.

## Core Terms

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arbitrator, parties, mediation, arbitration award, vacate, confirming, disputes, documents, binding arbitration, certification, calculation, Memorandum, orders, conferences, provisions, appointed, discovery, matters, proceedings, settlement, arbitration proceedings, arbitration hearing, child support, commencement, quotation, waived, marks, arbitration agreement, dispute resolution, recommendation

## Case Summary

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### Overview

**HOLDINGS:** [1]-In a divorce proceeding wherein the wife was seeking to set aside five separate orders confirmation arbitration awards, the court affirmed the orders confirming the arbitration awards incorporating the parties' written mediated settlement agreements; [2]-The court vacated the orders confirming the arbitration awards issued after the parties executed the mediated agreements because the parties' arbitrator improperly served as the mediator and, therefore, could not again function as the arbitrator; [3]-The court held that an arbitrator may not conduct arbitration hearings once he or she functioned as a mediator.

### Outcome

Court affirmed the orders confirming the settlement agreements reached by the parties, vacated the orders confirming substantive arbitration awards issued subsequent to the parties' execution of the mediated agreements; and, remanded the case to the trial court for the parties to select a new arbitrator. Court further ordered the wife to receive the requested documentation back from the arbitrator.

## LexisNexis® Headnotes

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Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

### [HN1](#) **Arbitration, Arbitrability**

Once an arbitrator functions as a mediator in a divorce action, he may not then conduct arbitration hearings. A new arbitrator must be selected, who will conduct a binding arbitration hearing on any remaining disagreements.

Evidence > ... > Testimony > Expert Witnesses > General Overview

### [HN2](#) **Testimony, Expert Witnesses**

[R. 5:3-3\(e\)](#) provides that the expert shall not communicate with the court except upon prior notice to the parties and their attorneys who shall be afforded an opportunity to be present and to be heard during any such communication between the expert and the court.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

### [HN3](#) **Arbitration, Arbitrability**

In New Jersey, arbitration is a favored means of dispute resolution. It is well-settled that New Jersey's strong public policy favors settlement of disputes through arbitration. The Revised Uniform Arbitration Act (the Act), [N.J.S.A. 2A:23B-1 to 2A:23B-32](#), continues New Jersey's long-standing policy to favor voluntary arbitration as a means of dispute resolution. Increasingly, parties elect to side step the judicial process and enter arbitration agreements in a myriad of areas other than labor-management disputes. New Jersey courts have long noted our public policy that encourages the use of arbitration proceedings as an alternate forum.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

### [HN4](#) **Arbitration, Arbitrability**

In *Fawzy*, the New Jersey Supreme Court has reinforced the benefits of using arbitration in family litigation. The Supreme Court concludes: It is fair and reasonable that parties who have agreed to be bound by arbitration in a formal, written separation agreement should be so bound. Rather than frowning on arbitration of alimony disputes, public policy supports it. The Supreme Court recognizes that in many cases arbitration of matrimonial disputes may offer an effective alternative method of dispute resolution. A significant advantage of arbitration, likely the controlling motivation in this matter, is the opportunity for resolution of sensitive matters in a private and informal forum, rather than presentation of the matter in the public arena of an open courtroom. Arbitration conducted in a less formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties' own choosing, is

often far less antagonistic and nasty than typical courthouse litigation. In sum, the benefits of arbitration in the family law setting appear to be well established.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

#### [HN5](#) **Arbitration, Arbitrability**

The object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements  
Civil Procedure > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

#### [HN6](#) **Arbitration, Arbitrability**

Arbitration is a creature of contract. Like its federal counterpart, the Federal Arbitration Act, [9 U.S.C.S. 1-16](#), the Revised Uniform Arbitration Act (the Act), [N.J.S.A. 2A:23B-1 to 2A:23B-32](#), strives for uniformity. [N.J.S.A. 2A:23B-29](#) provides that in applying and construing the uniform Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it. Accordingly, the Act recognizes the contractual nature of the arbitration remedy and sets forth the details of the arbitration procedure that will apply unless varied or waived by contract, [N.J.S.A. 2A:23B-4](#). It is understood that when parties in marriage dissolution proceedings agree to arbitrate their dispute, the general rules governing the conduct of arbitration shall apply, [N.J.S.A. 2A:23B-1 to 2A:23B-32](#). Accordingly, only those issues may be arbitrated which the parties have agreed shall be.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements  
Civil Procedure > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

#### [HN7](#) **Arbitration, Arbitrability**

The written arbitration agreement may, subject to the restriction of [N.J.S.A. 2A:23B-4\(b\)](#), define the arbitration procedures, including the method for initiation of arbitration proceedings, [N.J.S.A. 2A:23B-9](#); the manner the process is conducted, [N.J.S.A. 2A:23B-15](#); and the issuance of the award, [N.J.S.A. 2A:23B-19](#). The Revised Uniform Arbitration Act (the Act), [N.J.S.A. 2A:23B-1 to 2A:23B-32](#), authorizes courts to recognize and enforce

arbitration agreements. [N.J.S.A. 2A:23B-5](#) and [2A:23B-6](#). In adopting the Act, the New Jersey Legislature intends to follow the Federal Arbitration Act, [9 U.S.C.S. 1-16](#), which states that arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C.S. 2](#).

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

### [HN8](#) **Arbitration, Arbitrability**

Once parties agree to proceed in an arbitral forum, the court's role is significantly narrowed. Although, pending the arbitrator's appointment, the court may act provisionally to address urgent relief, [N.J.S.A. 2A:23B-8\(b\)\(2\)](#), after an arbitrator is appointed and is authorized and able to act, it is the arbitrator who may issue orders for provisional remedies, including interim awards, as necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and pursuant to the same conditions as if the controversy were the subject of a civil action. [N.J.S.A. 2A:23B-8\(b\)\(1\)](#). The Act permits a less formal process than a court proceeding. [N.J.S.A. 2A:23B-15\(a\)](#).

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
 Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

### [HN9](#) **Arbitration, Arbitrability**

See [N.J.S.A. 2A:23B-15\(a\)](#).

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
 Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

### [HN10](#) **Arbitration, Arbitrability**

Once arbitration commences, the arbitrator may subpoena witnesses or records; permit depositions; permit appropriate discovery to consider, among other things, the desirability of making the proceeding fair, expeditious, and cost effective; order compliance with discovery orders or subpoenas the arbitrator issues and take action

against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in the State of New Jersey; and issue protective orders. [N.J.S.A. 2A:23B-17\(a\) to \(e\)](#).

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

### [HN11](#) **Arbitration, Arbitrability**

When binding arbitration is contracted for by litigants, the judiciary's role to determine the substantive matters subject to arbitration ends. Arbitration should spell litigation's conclusion, rather than its beginning. It is, after all, meant to be a substitute for and not a springboard for litigation. From the judiciary's perspective, once parties contract for binding arbitration, all that remains is the possible need to: enforce orders or subpoena issued by the arbitrator, which have been ignored, [N.J.S.A. M 2A:23B-17\(g\)](#); confirm the arbitration award, [N.J.S.A. 2A:23B-22](#); correct or modify an award, [N.J.S.A. 2A:23B-24](#), and in very limited circumstances, vacate an award [N.J.S.A. 2A:23B-23](#). If not for that limitation on judicial intervention of arbitration awards, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined. It also is well settled that there is a strong preference for judicial confirmation of arbitration awards. Consistent with the defined salutary purposes, courts grant arbitration awards considerable deference.

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

### [HN12](#) **Alternative Dispute Resolution, Judicial Review**

A party seeking to vacate an arbitration award must first obtain trial court review of the award. The court's review is informed by the authority bestowed on the arbitrator by the Revised Uniform Arbitration Act, [N.J.S.A. 2A:23B-23](#).

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

### [HN13](#) **Alternative Dispute Resolution, Judicial Review**

See [N.J.S.A. 2A:23B-23](#).

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

### [HN14](#) **Alternative Dispute Resolution, Judicial Review**

The New Jersey Supreme Court has instructed an arbitration award may be vacated where it violates a clear mandate of public policy. However, such intervention is appropriate only where the public-policy question is not reasonably debatable.

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
 Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

Evidence > Burdens of Proof > Allocation

### [HN15](#) **Alternative Dispute Resolution, Judicial Review**

Parties may agree to a broader review than provided for by the default provisions in the Revised Uniform Arbitration Act, [N.J.S.A. 2A:23B-23](#). Their agreement must accurately reflect the circumstances under which a party may challenge the award and the level of review agreed upon. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. A party seeking to vacate an arbitration award bears the burden of demonstrating fraud, corruption, or similar wrongdoing on the part of the arbitrator. Because of the strong judicial presumption in favor of the validity of an arbitral award, the party seeking to vacate it bears a heavy burden.

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
 Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

### [HN16](#) **Alternative Dispute Resolution, Judicial Review**

The scope of review of an arbitration award is narrow. Otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined. As the decision to vacate an arbitration award is a decision of law, the appellate court reviews the denial of a motion to vacate an arbitration award de novo. No special deference is accorded the trial judge's interpretation of the law and the legal consequences that flow from established facts.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

### [HN17](#) **Arbitration, Arbitrability**

Although parties contract to arbitrate, settlement negotiations are not foreclosed by the Revised Uniform Arbitration Act (the Act), [N.J.S.A. 2A:23B-1 to 2A:23B-32](#). [N.J.S.A. 2A:23B-15\(a\)](#) authorizes an arbitrator to hold conferences with the parties to the arbitration proceeding before the hearing. Indeed, New Jersey courts have found that the settlement of litigation ranks high in the public policy of the State of New Jersey. So long as the parties acknowledge that the agreement was reached voluntarily and is for them, at least, fair and equitable, it should be enforced. Advancing that public policy is imperative where matrimonial proceedings have increasingly overwhelmed the docket. With more divorces being granted now than in history, and with filings on the rise, fair, reasonable, equitable and, to the extent possible, conclusive settlements must be reached, or the inexorable and inordinate passage of time from initiation of suit to final trial will be absolutely devastating.

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

### [HN18](#) **Alternative Dispute Resolution, Mediation**

Mediation, although a form of alternate dispute resolution, differs from binding arbitration. Mediation is governed by the Uniform Mediation Act, [N.J.S.A. 2A:23C-1 to 2A:23C-13](#), [R. 1:40-4](#), and [R. 1:40-5\(b\)](#). Similar to arbitration, mediation provides an alternate, more informal forum than litigation, allowing confidential and candid exchange of information between the parties and the mediator to aid the parties' efforts in reaching an accord on disputes. Mediated agreements, like other contracts, must be knowingly and voluntarily reached. A settlement agreement, reached in mediation, which is incorporated into an executed, signed written agreement is enforceable.

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

### [HN19](#) **Alternative Dispute Resolution, Mediation**

[R. 1:40-5\(b\)\(3\)](#) provides that in mediation of economic aspects of family actions, parties are required to provide accurate and complete information to the mediator and to each other, including but not limited to tax returns, Case Information Statements, and appraisal reports.

Family Law > ... > Support Obligations > Computation of Child Support > Guidelines

Family Law > Child Support > Procedures

### [HN20](#) **Computation of Child Support, Guidelines**

A child support award is not simply a guidelines calculation. Necessary information required by [N.J.S.A. 2A:34-23\(a\)](#), includes not only plaintiff's income, but also defendant's income, the children's needs, and other funds available, including any income or assets of the children.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

### [HN21](#) **Dissolution & Divorce, Procedures**

The termination of a marriage involves an economic mosaic comprised of equitable distribution, alimony and child support and those financial components interface.

Family Law > ... > Support Obligations > Modification > Changed Circumstances



Family Law > Child Support > Procedures

### [HN22](#) **Modification, Changed Circumstances**

Significant changes in circumstances warrant review and potential modification of a child support award.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN23](#) **Arbitration, Arbitrability**

Mediation and arbitration both allow for resolution of disputes outside the court process, and the hallmark of a mediator and an arbitrator is neutrality. [R. 1:40-2\(1\)\(a\)\(1\)](#) defines arbitration as a process by which each party and/or its counsel presents its case to a neutral third party, who then renders a specific award. Nevertheless, the New Jersey Supreme Court concludes that the differences in the roles of those two types of dispute resolution professionals necessitate that a mediator, who may become privy to party confidences in guiding disputants to a mediated resolution, cannot thereafter retain the appearance of a neutral factfinder necessary to conduct a binding arbitration proceeding. Consequently, absent the parties' agreement, an arbitrator appointed under the Revised Uniform Arbitration Act, [N.J.S.A. 2A:23B-1 to 2A:23B-32](#), may not assume the role of mediator and, thereafter, resume the role of arbitrator.

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN24](#) **Alternative Dispute Resolution, Mediation**

Mediation is included as a Facilitative Process, which is defined as a process by which a mediator facilitates communication between parties in an effort to promote settlement without imposition of the mediator's own judgment regarding the issues in dispute. [R. 1:40-2\(c\)](#). A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues and encouraging parties to accommodate each other's interests. As a facilitator, a mediator is not tasked with reaching a final decision in a matter, but rather instills trust and confidence of the participants in the mediation process, allowing them to resolve their differences.

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
 Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN25](#) **Alternative Dispute Resolution, Mediation**

Mediations are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts. Admittedly, mediation encourages confidential disclosures to the mediator, whose training is designed to utilize these confidential positions to aid the parties to evaluate their positions, promote understanding of the other side's position, and reach a consensus. Those confidences are insured only if the participants trust that information conveyed to the mediator will remain in confidence. Mediation communications, which would not exist but for the settlement attempt, are made by parties without the expectation that they will later be bound by them. Successful mediation, with its emphasis on conciliation, depends on confidentiality perhaps more than any other form of alternate dispute resolution. Indeed, mediation stands in stark contrast to formal adjudication, and

arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

### [HN26](#) **Arbitration, Arbitrability**

An arbitrator's role is evaluative, requiring the parties to present their evidence for a final determination. [R. 1:40-2\(b\)\(2\)](#) defines evaluative process to include neutral fact finding: A process by which a neutral, agreed upon by the parties, investigates and analyzes a dispute involving complex or technical issues, and who then makes non-binding findings and recommendations. Arbitrators essentially weigh evidence, assess credibility, and apply the law when determining whether a party has proven his or her request for relief. An arbitrator makes a final decision, which binds the parties. [N.J.S.A. 2A:23B-1](#) defines an arbitrator as an individual appointed to render an award in a controversy that is subject to an agreement to arbitrate. Thus, arbitrators should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

### [HN27](#) **Arbitration, Arbitrability**

The Revised Uniform Arbitration Act, [N.J.S.A. 2A:23B-15\(a\)](#), vests arbitrators with broad discretion over discovery and other procedural matters to conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties before the hearing. The statute's broad conferral of authority does not require any particular procedures, mandate discovery, compel the maintenance of a record, command a statement by the arbitrator regarding his findings and conclusions, or an expression of the reasons why he reached the result that he did, unless expressly required under the parties' arbitration agreement.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN28](#) **Arbitration, Arbitrability**

While the Superior Court of New Jersey, Appellate Division recognizes the Revised Uniform Arbitration Act, [N.J.S.A. 2A:23B-15\(a\)](#), envisions a need for flexibility to meet a wide variety of situations presented in arbitration proceedings, the Court is not persuaded the Act intended an appointed arbitrator may first assume the role of mediator then switch back to conduct final arbitration hearings. An effective mediator gains each party's confidence and offers advice to steer them toward settlement. Those confidential communications gained in mediation are

precluded from being considered in a court contest, and would similarly be precluded from consideration in an arbitration hearing. Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding. The Court is aware that [R. 1:40-2\(d\)](#) identifies as a Hybrid Process of complementary dispute resolution mediation-arbitration, which it defined as a process by which, after an initial mediation, unresolved issues are then arbitrated. The rule does not address whether the same party may perform both functions or whether issues attempted to be mediated may then be arbitrated.

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

Family Law > Guardians > Appointment

Family Law > Child Custody > Guardians Ad Litem

### [HN29](#) **Alternative Dispute Resolution, Mediation**

[R. 1:40-5\(c\)](#) specifies a custody and parenting time mediator may not subsequently act as an evaluator in the proceeding or make any recommendation to the court respecting the issues. A practical reading of the rules and common sense precludes the possible dual role of mediator and guardian ad litem.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN30](#) **Arbitration, Arbitrability**

[N.J.S.A. 34:13A-16\(b\)\(2\)](#) requires any mediation or factfinding invoked pursuant to the section shall terminate immediately upon the filing of a petition for arbitration.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN31](#) **Arbitration, Arbitrability**

The Superior Court of New Jersey, Appellate Division concludes that the positions of arbitrator and mediator are in conflict. An arbitrator must maintain broad public confidence in the integrity and fairness of the arbitration process. If the same person acts as a mediator, obtains party confidences or offers opinions on the issues in dispute, a conflict arises were he or she to then switch roles to act as an arbitrator, making the final call. The Court finds the need for an arbitrator's complete objectivity bears heavily on the integrity of the arbitration process. That concern becomes even more problematic when arbitrating matrimonial disputes between already suspicious adverse parties.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN32](#) **Arbitration, Arbitrability**

In the family law context, the Superior Court of New Jersey, Appellate Division could envision parties agreeing in writing to allow one person to perform the roles of mediator and arbitrator regarding separate issues; for example, mediation of custody matters and arbitration of financial issues. However, that should be the parties' choice. Absent a specific agreement clearly defining and accepting the complementary dispute resolution professional's roles, dual roles are to be avoided. It is advisable for parties to exhaust all applicable dispute resolution alternatives, including settlement conferences and mediation before undertaking arbitration. Once those available courses are exhausted and arbitration is chosen, the arbitrator should promptly commence hearings and resolve matters expeditiously.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Mediation  
Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Mediation

### [HN33](#) **Arbitration, Arbitrability**

Absent the parties' contract to the contrary, once a neutral assumes the role of mediator, he or she may not assume the role of arbitrator.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

### [HN34](#) **Arbitration, Arbitrability**

[N.J.S.A. 2A:23B-21](#) affords an arbitrator's authority to award exemplary relief and reasonable attorney's fees.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

### [HN35](#) **Discovery, Relevance of Discoverable Information**

Certain discovery limitations must be made in the interest of making the hearing fair, expeditious, and cost effective.  
[N.J.S.A. 2A:23B-17\(c\)](#).

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

**[HN36](#)  Alternative Dispute Resolution, Judicial Review**

A court may vacate an arbitration award when it is procured by undue means or resulted from an arbitrator exceeding his designated powers. [N.J.S.A. 2A:24-8\(a\)](#). The judicial inquiry must consider more than whether a mere mistake occurred. Rather, that formulation requires that the arbitrator must have clearly intended to decide according to law, must have clearly mistaken the legal rule, and that mistake must appear on the face of the award. In addition, the error, to be fatal, must result in a failure of intent or be so gross as to suggest fraud or misconduct.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
 Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
 Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

**[HN37](#)  Arbitration, Arbitrability**

Arbitration, particularly binding arbitration, must be purposefully chosen, and the parameters must be designated in a contract between the parties. If binding arbitration is selected as the forum for resolution of disputes, a litigant cannot jump back and forth between the court and the arbitral forum. By its very nature, arbitration does not permit such a hybrid system. Further, arbitration should be a fast and inexpensive way to achieve final resolution of disputes and not merely a way-station on route to the courthouse. Attempts to return to the court, except to confirm the final arbitration award, are at odds with that objective.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope  
 Civil Procedure > ... > Arbitration > Federal Arbitration Act > Scope

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Judicial Review  
 Business & Corporate Compliance > Alternative Dispute Resolution > Judicial Review

**[HN38](#)  Arbitration, Arbitrability**

The provisions of the Revised Uniform Arbitration Act (the Act), [N.J.S.A. 2A:23B-1 to 2A:23B-32](#), are unmistakable: once binding arbitration is chosen and the arbitrator named, the court is no longer involved in reviewing or determining the substantive issues. The court's role is circumscribed to confirm a final arbitration award, correct obvious errors, and consider whether the award should be vacated, only when one of the limited bases set forth in [N.J.S.A. 2A:23B-23](#) has occurred.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability  
 Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

**[HN39](#)  Arbitration, Arbitrability**

The Superior Court of New Jersey, Appellate Division does not mean to suggest parties who seek to arbitrate disputes should abandon all hope of amicable resolution. The Court urges parties to exhaust possible settlement alternatives prior to contracting for arbitration. If arbitration is accepted, parameters for settlement discussions should be set by the arbitrator.

**Counsel:** *Karin Duchin Haber* argued the cause for appellant (*Haber Silver & Simpson*, attorneys; *Ms. Haber*, of counsel; *Jani Wase Vinick*, on the brief).

*Nancy C. Richmond* argued the cause for respondent (*Ceconic & Cheifetz, LLC*, attorneys; *Cary Cheifetz*, of counsel, *Ms. Richmond*, on the brief).

**Judges:** Before Judges MESSANO, LIHOTZ and OSTRER. The opinion of the court was delivered by LIHOTZ, J.A.D.

**Opinion by:** LIHOTZ

## Opinion

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[\*119] [\*\*1194] The opinion of the court was delivered by

LIHOTZ, J.A.D.

This matter considers what role, if any, the Family Part should play after parties in a matrimonial action agree to submit their disputes to binding arbitration and whether the arbitrator, having [\*120] first mediated disputes, may thereafter resume the role of arbitrator. Following the commencement of divorce proceedings, plaintiff Barbara Minkowitz and defendant Ron Israeli agreed to forgo judicial determination of all financial issues in favor of binding arbitration and agreed all custody and parenting time issues would be reviewed in non-binding arbitration. The parties consented to engage a [\*\*\*2] single arbitrator and a jointly chosen forensic accounting expert. After the arbitrator met with them, but prior to the commencement of arbitration proceedings, the parties opted to engage in settlement discussions and mediation to narrow the issues for final determination. As matters were resolved, written documents incorporating the parties' understanding were prepared. After more than one year had elapsed and a majority of their disagreements were settled without commencement of an arbitration hearing, plaintiff retained new counsel, who sought the underlying documentation supporting the financial agreements. The request was declined and, thereafter, plaintiff moved before the arbitrator for release of the documents. He barred release and counsel re-filed the requests before the Family Part. The Family Part judge generally denied the motions and ultimately confirmed the "arbitration awards" as final judgments.

On appeal, plaintiff challenges five separate orders confirming arbitration awards. She maintains each must be set aside under [N.J.S.A. 2A:23B-23](#) or, alternatively, requests the final judgment of divorce be vacated, pursuant to [Rule 4:50-1](#). Plaintiff argues procedural violations, [\*\*\*3] the arbitrator's [\*\*1195] bias and substantive errors caused an unconscionable result, which cannot stand.

Following our review, we affirm the orders confirming the settlement agreements reached by the parties. However, we conclude [HN1](#) [↑] once the arbitrator functioned as a mediator, he may not then conduct arbitration hearings. Consequently, we vacate those orders confirming substantive arbitration awards issued subsequent to the parties' execution of the mediated agreements. The matter is remanded to the Family Part for the parties to select a new arbitrator, who will conduct a binding arbitration hearing on [\*121] any remaining financial disagreements. We also conclude under the terms of the parties' arbitration agreement, plaintiff has an entitlement to the requested documentation, the provision of which shall be addressed by the new arbitrator, once appointed.

I.

Plaintiff filed her complaint for divorce on March 18, 2008, after fourteen years of marriage. The parties have two children who are now teenagers.

The parties executed an agreement engaging a designated arbitrator, to "arbitrate the matter" and "render a written opinion incorporating his findings and conclusions of law in support of the award[.]" **\*\*\*4** The arbitration agreement provided, in pertinent part:

1. The issues to be arbitrated shall be identified by the parties and placed on the record prior to the commencement of any hearing. The record will further reflect those issues that are being submitted to nonbinding, as distinguished from binding, arbitration.

....

7. The Arbitrator shall have the power to issue subpoenas and to order depositions or other discovery in accordance with the provisions of [N.J.S.A. 2A:23B-17](#).

8. The [A]rbitrator shall have the power to order equitable remedies, if appropriate, unless the parties agree otherwise, in writing.

....

10. Unless waived by the parties, in writing, the Arbitrator shall render a written opinion incorporating his findings and conclusions of law in support of the award.

....

13. The Agreement shall be subject to the Arbitration Act[,]. . . [N.J.S.A. 2A:23B-1 to -32](#)[.

Attached to the three-page arbitration agreement was a two-page document, which the parties also signed, entitled "STATEMENT OF RIGHTS AND RESPONSIBILITIES OF ARBITRATING PERSONS." Among the rights listed was "[a]rbitrating [p]ersons have the right to be provided copies of all documents presented to the [a]rbitrator **\*\*\*5** by their spouse."

**\*122** The parties and their respective counsel also executed a consent order, filed with the Family Part, memorializing the agreement to arbitrate. The order reiterated those issues submitted to binding and non-binding arbitration; recited the designated arbitrator and payment of his retainer; and allocated the party's respective obligations for future payment of arbitration fees and costs. Finally, the order directed the arbitrator to schedule a "preliminary [c]ase [m]anagement [c]onference with the parties and the [c]ourt-appointed accountant" and, concurrently, set "a case management date . . . with the court for . . . September 3, 2008." The parties mutually stipulated and the court subsequently appointed Seymour Rubin of Rubin-Goertz & Company as their "joint forensic accounting" expert.

Although the arbitrator had been appointed and met with the parties, they **\*\*1196** filed a joint application before the Family Part seeking a protective order, which prescribed "[c]onfidential [m]aterial" could be disclosed only to the parties, their attorneys, their attorneys' respective staff, Rubin, the arbitrator, and the court. The protective order filed on January 27, 2009, defined "confidential **\*\*\*6** material" as "information pertaining to . . . parties and/or all entities" listed on an attached schedule, which included the parties' business interests.

The arbitrator met with the parties and their attorneys in August 2008. Thereafter, counsel and the parties' respective accountants, but not the parties themselves, conferenced to review Rubin's financial evaluations. The parties chose to defer commencement of arbitration, pending efforts to settle some disputes. The parties, their counsel, Rubin, and at times, the arbitrator discussed their respective positions and submitted documentation. Rubin would offer a recommendation regarding resolution, and, if the parties accepted, a written agreement would be prepared. Following this process, the parties executed four agreements in 2009, which we collectively refer to as the 2009 agreements.

The first of the 2009 agreements, reached in February 2009, was presented to the Family Part via a consent order. The April **\*123** 1, 2009 order simply stated: "The [a]rbitration [c]onsent [o]rder as to [e]quitable [d]istribution of [m]edical [p]ractices, attached hereto, is hereby incorporated herein and made a part hereof[,] and shall have the



full force [\*\*\*7] and effect of an [o]rder of this [c]ourt." The "arbitration consent order" included the Superior Court caption, but was signed by the arbitrator, the parties and counsel, and provided:

Each party on the recommendation of the joint forensic accounting expert . . . Rubin . . . and after discussions with their respective counsel agree that he and she shall waive any right, title and/or interest . . . in the medical practice of the other party and each party shall retain their own respective medical practice(s) free and clear of any claim by the other.

The "arbitration consent order" also stated it "shall be incorporated into any [p]roperty [s]ettlement [a]greement and/or [j]udgment of [d]ivorce entered into by the parties and the [c]ourt."

Informal discussions continued with an eye toward resolving the parties' respective claims for equitable distribution. On July 8, 2009, the parties executed their second agreement, a "MEMORANDUM OF UNDERSTANDING," which provided:

This memorandum . . . shall describe the outline of an Agreement that was reached between the parties . . . after mediation with the assistance of . . . "the [a]rbitrator" and Seymour Rubin, C.P.A.

It is understood that this Memorandum [\*\*\*8] shall be binding with respect to the issues recited herein, although a formal Agreement will be prepared and subsequently executed.

This Memorandum is the result of many months of negotiations and many conferences with [the arbitrator] and Mr. Rubin. The parties are entering into this Memorandum freely and voluntarily after conferring with their attorneys and anyone else with whom they wish to confer. The parties agree that this Memorandum represents a fair compromise of the issues. They acknowledge that by entering into this Memorandum, they are waiving their rights to participate in Arbitration hearings and waive the right to have the issues set forth in this Memorandum decided by the Arbitrator.

[\*\*1197] In this agreement, the parties restated the confidentiality of the financial disclosures; mutually waived alimony, and fixed child support; divided household furnishings, disposed and distributed various realty, retirement assets, stock and bank accounts, divided other joint assets; agreed to "pay their own counsel fees[.]" "equally share" the fees of the arbitrator and Rubin; and waived [\*124] present and future claims for "prior, present or future claims" against one another. In the event of any [\*\*\*9] further disputes, the memorandum required "written presentations from each attorney" to be submitted to the arbitrator.

Defendant's counsel prepared a draft of a proposed property settlement agreement (PSA), purportedly memorializing the parties' agreements reached on the identified issues. However, a disagreement regarding the value and disposition of the former marital home occurred, which was resolved consensually in a three-page handwritten "Amendment to Memorandum of Understanding" dated September 22, 2009, the parties' third agreement. Next, a conference call, conducted by the arbitrator, settled 2008 tax issues, the terms of which were included in a memorandum of agreement dated October 15, 2009, which represents the fourth agreement.

Plaintiff hired co-counsel to assist in drafting and finalizing the PSA. She corresponded with Rubin explaining her role and requesting a meeting "to review his forensic findings," which served as the underpinnings of the parties' agreements. Defendant objected, claiming all matters were settled, except for relatively minor financial concerns. In a series of letters, Rubin consulted the arbitrator, who advised against his meeting with co-counsel, [\*\*\*10] absent a formal application. On behalf of plaintiff, co-counsel wrote to the arbitrator requesting Rubin be instructed to meet with her and plaintiff "to review the financial information and compilation of forensic information and analyses" prepared by him. The arbitrator denied plaintiff's request to meet with Rubin in a letter dated November 23, 2009, advising:

Prior to the execution of the [m]emorandum of [u]nderstanding and the [a]mendment thereto, Mr. Rubin spent many hours discussing the financial and property issues with [plaintiff's original counsel, plaintiff] and her accountant (as he did with [defendant's counsel, defendant] and his accountant). . . . [Plaintiff's original counsel] and your client's accountant should be able to explain the reasons why the issues recited in both agreements were resolved to the satisfaction of both parties.

Mr. Rubin has already reviewed his forensic findings in great detail with [plaintiff's original counsel, plaintiff] and her accountant.



**[\*125]** At this point, plaintiff's original counsel filed an application before the Family Part to substitute co-counsel as plaintiff's representative and requested he be relieved. Plaintiff then moved before the **[\*\*\*11]** Family Part for an order requiring Rubin's production of all evaluations of the parties' respective incomes and/or cash flow prepared "in accordance with the [p]rotective [c]onsent [o]rder entered in this matter." On the return date, substituted counsel, now acting as plaintiff's attorney, challenged the lack of disclosure provided to her and argued the 2009 agreements were "invalid." The Family Part judge dismissed the motion stating, "[t]he parties ha[d] previously agreed that all financial aspects [we]re subject to binding arbitration. Any application seeking to modify this agreement must be made to the agreed upon arbitrator." Later that afternoon, the parties reached a settlement on custody and parenting time, which was placed on the record.

A consent dual judgment of divorce (JOD) was filed on March 8, 2010. The **[\*\*1198]** JOD specifically referenced and incorporated the parties' custody and parenting time agreement, set forth a timeline for resolving remaining financial issues, and noted any subsequent confirmed arbitration awards would be incorporated into the JOD, nunc pro tunc. Finally, plaintiff's demand for the production of financial documents was referred to the arbitrator.

As provided **[\*\*\*12]** in the JOD, plaintiff filed a motion before the arbitrator, using the Family Part caption, seeking his recusal, or alternatively, requiring production of Rubin's financial documents, including reports regarding the parties' respective incomes and/or cash flow. Plaintiff's supporting certification inferred bias, stating the arbitrator had acted as both mediator and arbitrator throughout the proceeding. She also explained her need to obtain copies of Rubin's underlying documentation and attached a certification from her accountant, asserting the meeting with Rubin did not allow sufficient time to review the calculations or the underlying documentation.

Defendant opposed plaintiff's requests and filed a cross-motion for payment of attorney's fees. He included certifications from his **[\*126]** accountant, who refuted the characterization of the Rubin meetings. Rubin also filed a certification challenging facts asserted by plaintiff. He avowed the conference resulting in the agreement to distribute the medical practices lasted more than two-and-one-half hours, during which he presented "a detailed analysis of the federal income tax returns for the calendar years 2003, 2004, 2005 and 2006 as filed **[\*\*\*13]** jointly by [the parties]."

An April 27, 2010 arbitration hearing addressed the issues raised in the cross-motions. In his decision, later incorporated in a May 25, 2010 award, the arbitrator denied plaintiff's application for recusal, explaining: "My role . . . was to make recommendations, when requested, on the various financial issues. . . . At no time did I assume the role of mediator. I did not participate in the discussions of the financial information." The arbitrator rejected plaintiff's contention she was denied sufficient information to knowledgeably make the decisions set forth in the 2009 agreements, quoting extensively from correspondence sent by her former counsel. The arbitrator also drew an adverse inference because plaintiff had not included a certification from former counsel, who the arbitrator found interacted directly with Rubin and participated in the conferences.

Plaintiff returned to the Family Part seeking to set aside the May 25, 2010 arbitration order, requesting the same relief denied by the arbitrator. Defendant opposed plaintiff's motion in all respects and moved to disqualify counsel, confirm the May 25, 2010 arbitration order, and finalize outstanding issues.

On **[\*\*\*14]** July 16, 2010, the trial court entered an order summarily denying plaintiff's motion in its entirety, denying defendant's cross-motion to disqualify counsel and confirming the May 25, 2010 arbitration decision. Plaintiff moved for reconsideration, which was summarily denied.

The parties returned to arbitration. In a November 10, 2010 proceeding conducted by the arbitrator, the parties agreed to a proposed allocation of debits and credits as computed by Rubin. Also, Rubin testified as to his proposed net distribution of assets **[\*127]** based on the 2009 agreements. The arbitrator stopped plaintiff's cross-examination of Rubin, when he determined she attempted to open the issues resolved by the 2009 agreements. During these proceedings, defendant requested a reduction in the amount of his child support, claiming plaintiff no longer incurred child care and counseling costs. Plaintiff objected, asserting defendant failed to show any change of circumstances because the underlying **[\*\*1199]** calculation of the child support award and his current income were not disclosed. Finalization of the issue was adjourned pending additional submissions.

On December 10, 2010, for the first time, Rubin agreed to meet with [\*\*\*15] plaintiff, her counsel, her accountant and Thomas Hoberman, plaintiff's newly hired forensic accounting expert. Following the meeting Hoberman prepared a report, challenging Rubin's findings regarding plaintiff's projected 2008 income and identifying errors in his analysis.

The arbitrator corresponded with the parties, who had not complied with his directions for further submissions. More specifically, neither party had filed proposed resolutions regarding the outstanding property issues, and defendant had not submitted information supporting his child support modification request. Shortly thereafter, plaintiff renewed her demand for the arbitrator to recuse himself, this time claiming he engaged in ex parte communications with Rubin, in violation of [Rule 5:3-3\(e\)](#).<sup>1</sup>

In a decision letter, the arbitrator provided a procedure for distributing personalty, noting neither party provided proof of value. He denied plaintiff's request to set aside the 2009 agreements, stating his "communications with Mr. Rubin have been limited to scheduling issues and most recently to correct a factual [\*128] error[.]" The arbitrator noted defendant had withdrawn his child support modification request; however, he ordered each party to address the basis for the award's deviation from the child support guidelines. Defendant responded; plaintiff renewed her request to set aside the 2009 agreements. The arbitrator, after reading certifications, made "credibility determinations" and adopted defendant's explanation of the calculation of the amount of support, Rubin's recommendation for proposed credits and allocation of debts. In doing so, the arbitrator again drew an adverse inference from plaintiff's omission of the certification of prior counsel regarding his participation in the Rubin conferences. The arbitrator relied on prior counsel's correspondence sent on behalf of plaintiff, wherein the parties relinquished "any equitable distribution claims against their [\*\*\*17] respective practices only." The arbitrator again reserved finalization of the allocation of fees and costs.

Rubin submitted a certification supporting the calculation of child support, reporting he met with the parties and their attorneys in the arbitrator's office on June 24, 2009 (the arbitrator was not present). At that time, Rubin made adjustments to the income figures supplied by the parties' accountants, calculating plaintiff's and defendant's 2008 incomes. Rubin found defendant's annual salary from all sources exceeded plaintiff's by less than \$5000. Rubin attached the schedules he had prepared and discussed with the parties at that conference. The schedules were used to fix defendant's child support obligation and promote the mutual waiver of alimony. Plaintiff again requested the 2009 agreements be voided and discovery reopened based on Hoberman's March 2, 2011 letter, which rebutted Rubin's methodology used to calculate plaintiff's projected 2008 income. After correcting what he asserted were errors, Hoberman concluded plaintiff's [\*\*1200] projected 2008 income would be less than half the sum Rubin calculated.

On March 17, 2011, the arbitrator entered an arbitration order incorporating [\*\*\*18] the parties' 2009 agreements, Rubin's spreadsheets calculating debits and credits, and the income schedules Rubin [\*129] prepared supporting the calculation of child support, all of which were attached to the order. The order also directed "the final [a]rbitration [a]wards/[d]ecision shall be incorporated into an [a]mended [JOD], effective nunc pro tunc to February 4, 2010." The arbitrator reserved determination of any allocation of counsel, expert, and arbitration fees, pending further submissions by the parties. A subsequent agreement resolved distribution of personal property which also was incorporated in the JOD.

Plaintiff continued to press her request to vacate the 2009 agreements along with the arbitration orders. Relying on the certification of defendant's ex-fiance, Jamie Silverman, plaintiff believed Rubin was not objective and had been aiding defendant. Silverman certified defendant "advised" he actually earned almost twice the sum Rubin had calculated and frequently spoke with Rubin, whom he allegedly referred to as "Uncle Seymour." Further, Silverman reportedly overheard a telephone conversation between defendant and Rubin, after which defendant informed her

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<sup>1</sup> [Rule 5:3-3\(e\) HN2](#) [↑] provides "[t]he expert shall not communicate with the court except upon prior notice to the parties and their attorneys who shall be afforded an opportunity to be present and to be heard during any such communication between the expert and the court." However, nothing in the retainer agreement prohibits the expert's communication with the arbitrator, and, in fact, the agreement expressly permits discretionary [\*\*\*16] rule relaxation.

Rubin "was going [\*\*\*19] to make sure everything was 'taken care of . . . [A] little birdie told me Seymour got it covered." Plaintiff sought to subpoena records of Rubin's telephone communications with defendant.

Defendant opposed the application and cross-moved for an order requiring plaintiff to "pay 100 percent of the counsel fees and costs incurred by . . . defendant for having to respond." Rubin also submitted a certification denying plaintiff's allegations of bias, refuting the suggestion he merely accepted defendant's assertions. He explained "[defendant] supplied voluminous credit card information to me for the five years preceding the date of the complaint[.]"

The arbitrator issued a decision on July 1, 2011. He found Silverman "[wa]s not completely objective[.]" given her recent break-up with defendant, whereas Rubin was "selected as a neutral accountant by both parties[.]" had "no apparent dog in the race," and had as many private conversations with plaintiff as with defendant. The arbitrator rejected plaintiff's claims and reserved [\*130] his decision on defendant's fee request. Plaintiff subsequently moved for reconsideration, relying on certifications from plaintiff's accountant and Hoberman. Defendant [\*\*\*20] opposed the request and reasserted his demand for payment of his fees. The arbitrator denied plaintiff's motion for reconsideration.

In a separate submission the arbitrator addressed the allocation of fees. Finding "both parties have the income, ability and financial resources to pay counsel and expert fees and the costs of arbitration[.]" the arbitrator held each party responsible for his and her own fees, as well as "50% of the arbitration fees incurred . . . and 50% of Mr. Rubin's fees . . . as of December 1, 2009." However, as for fees incurred after December 1, 2009, the arbitrator found plaintiff "conducted her . . . litigation in bad faith" and repeatedly asserted unreasonable positions, which warranted an award to defendant in order to protect him from the costs of unnecessary litigation. The arbitrator allocated \$37,000 of Rubin's post-December 1, 2009 fees to plaintiff, and \$9,281.25 to defendant. Further, he awarded defendant \$50,000 for his attorney's work after December 1, 2009, to be paid by plaintiff.

Defendant moved before the Family Part to confirm the March 17, 2011 arbitration award. Plaintiff cross-moved to vacate the award and all underlying agreements [\*\*1201] that were [\*\*\*21] incorporated therein. She further requested to terminate services by the arbitrator and Rubin, to reopen discovery, and to select a new arbitrator and expert to "commence de novo arbitration of all financial issues[.]" The judge granted defendant's motion to confirm the March 17, 2011 award and denied plaintiff's cross-motion in a November 30, 2011 order. A separate motion to confirm the arbitrator's August 11, 2011 fee award was filed and granted, over plaintiff's objection. In a November 30, 2011 order, the judge also declined plaintiff's motion to stay enforcement pending her appeal and denied defendant's motion for an additional fee award.

On appeal, plaintiff requests we reverse the orders by the court confirming the May 25, 2010, March 17, 2011, and August 11, 2011 [\*131] awards by the arbitrator, whom she maintains committed misconduct, displayed partiality, and exceeded the scope of arbitral authority.

II.

Neither party contests the consensual agreement to submit all financial disputes to binding arbitration. The record supports the parties clearly opted out of judicial review of their matrimonial matter in favor of arbitration. The proceeding's emphasis on confidentiality, coupled with [\*\*\*22] defendant's resistance to release of income information, suggest a motive to maintain financial secrecy.

On appeal, plaintiff seeks to vacate the arbitration awards and the orders confirming them, emphasizing procedural defects during proceedings conducted by the arbitrator infected the fundamental fairness of the process and resulted in an unconscionable outcome. Before we examine plaintiff's challenges, we need to consider the arbitral forum choice, governed by the Revised Uniform Arbitration Act (the Act), [N.J.S.A. 2A:23B-1 to -32](#).

[HN3](#) [↑] "In New Jersey, arbitration . . . is a favored means of dispute resolution." [Hojnowski v. Vans Skate Park, 187 N.J. 323, 342, 901 A.2d 381 \(2006\)](#). It is well-settled that New Jersey's strong public policy favors settlement of disputes through arbitration. [Id. at 343, 901 A.2d 381](#); see also [Block v. Plosia, 390 N.J. Super. 543, 551, 916 A.2d 475 \(App.Div.2007\)](#) (stating the Act "continues our state's long-standing policy to favor voluntary arbitration as a

means of dispute resolution"). Increasingly, parties elect "to side step the judicial process" and enter arbitration agreements in a myriad of areas other than labor-management disputes. [Fawzy v. Fawzy, 199 N.J. 456, 477, 973 A.2d 347 \(2009\)](#). See also [Wein v. Morris, 194 N.J. 364, 375-76, 944 A.2d 642 \(2008\)](#) [\*\*\*23] ("Our courts have long noted our public policy that encourages the use of arbitration proceedings as an alternate forum.") (internal quotation marks and citation omitted).

[\*132] [HN4](#) [↑] In *Fawzy*, the Supreme Court reinforced the benefits of using arbitration in family litigation, which the Court first discussed in [Faherty v. Faherty, 97 N.J. 99, 477 A.2d 1257 \(1984\)](#). In *Faherty*, the question considered was the enforceability of an arbitration clause in a separation agreement. [Id. at 105, 477 A.2d 1257](#). The Court concluded:

It is fair and reasonable that parties who have agreed to be bound by arbitration in a formal, written separation agreement should be so bound. Rather than frowning on arbitration of alimony disputes, public policy supports it. We recognize that in many cases arbitration of matrimonial disputes may offer an effective alternative method of dispute resolution.

[\[Faherty, supra, 97 N.J. at 107, 477 A.2d 1257.\]](#)

[\*\*1202] A significant advantage of arbitration, likely the controlling motivation in this matter, is "the opportunity for resolution of sensitive matters in a private and informal forum," rather than presentation of the matter in the public arena of an open courtroom. [Id. at 107-08, 477 A.2d 1257](#). The Court observed:

arbitration conducted in a less [\*\*\*24] formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties' own choosing, is often far less antagonistic and nasty than typical courthouse litigation. In sum, the benefits of arbitration in the family law setting appear to be well established.

[\[Fawzy, supra, 199 N.J. at 472, 973 A.2d 347 \(internal quotation marks and citation omitted\).\]](#)

[HN5](#) [↑] "The object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties." [Hojnowski, supra, 187 N.J. at 343, 901 A.2d 381](#) (quoting [Carpenter v. Bloomer, 54 N.J. Super. 157, 162, 148 A.2d 497 \(App.Div.1959\)](#)).

[HN6](#) [↑] Arbitration is a "creature of contract[.]" [Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25, 905 A.2d 887 \(App.Div.2006\)](#) (citations omitted), *certif. denied*, 189 N.J. 428, 915 A.2d 1051 (2007). Like its federal counterpart, the Federal Arbitration Act (FAA), [9 U.S.C.A. 1-16](#), the Act strives for uniformity. See [N.J.S.A. 2A:23B-29](#) ("In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it."). Accordingly, the Act "recognizes the contractual nature [\*\*\*25] of [\*133] the arbitration remedy and sets forth the details of the arbitration procedure that will apply unless varied or waived by contract, [N.J.S.A. 2A:23B-4](#)." [Fawzy, supra, 199 N.J. at 469, 973 A.2d 347](#). It is understood that "when parties in dissolution proceedings agree to arbitrate their dispute, the general rules governing the conduct of arbitration shall apply, [N.J.S.A. 2A:23B-1 to -32](#)." [Id. at 480, 973 A.2d 347](#). Accordingly, "only those issues may be arbitrated which the parties have agreed shall be." [Id. at 469, 973 A.2d 347](#) (quoting [In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 229, 403 A.2d 448 \(1979\)](#)).

[HN7](#) [↑] The written arbitration agreement may, subject to the restriction of [N.J.S.A. 2A:23B-4\(b\)](#), define the arbitration procedures, including the method for initiation of arbitration proceedings, [N.J.S.A. 2A:23B-9](#); the manner the process is conducted, [N.J.S.A. 2A:23B-15](#); and the issuance of the award, [N.J.S.A. 2A:23B-19](#). The Act authorizes courts to recognize and enforce arbitration agreements. [N.J.S.A. 2A:23B-5, -6](#); [Spaeth v. Srinivasan, 403 N.J. Super. 508, 513, 959 A.2d 290 \(App.Div.2008\)](#). In adopting the Act, the Legislature intended to follow the FAA, "which states that arbitration agreements 'shall be valid[, ] [\*\*\*26] irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" [Id. at 513 n.1, 959 A.2d 290](#) (quoting [9 U.S.C.A. 2](#)).

Further, as discussed in detail below, [HN8](#) once parties agree to proceed in an arbitral forum, the court's role is significantly narrowed. [Fawzy, supra, 199 N.J. at 462, 470, 973 A.2d 347](#). Although, pending the arbitrator's appointment, the court may act provisionally to address "urgent" relief, see [N.J.S.A. 2A:23B-8\(b\)\(2\)](#), "[a]fter an arbitrator is appointed and is authorized and able to act," it is the arbitrator who

may issue orders for provisional remedies, including interim awards, as . . . necessary to protect the effectiveness of the arbitration proceeding and to promote **[\*\*1203]** the fair and expeditious resolution of the controversy, to the same extent and pursuant to the same conditions as if the controversy were the subject of a civil action[.]

[\[N.J.S.A. 2A:23B-8\(b\)\(1\)\]](#).

**[\*134]** The Act permits a less formal process than a court proceeding. As provided by [N.J.S.A. 2A:23B-15\(a\)](#):

[HN9](#) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon **[\*\*\*27]** the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

[HN10](#) Once arbitration commences, the arbitrator may subpoena witnesses or records; permit depositions; permit appropriate discovery to consider, among other things, the "desirability of making the proceeding fair, expeditious, and cost effective"; order compliance with discovery orders or subpoenas the arbitrator issues "and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State"; and issue protective orders. [N.J.S.A. 2A:23B-17a to e](#).

We underscore this point: [HN11](#) when binding arbitration is contracted for by litigants, the judiciary's role to determine the substantive matters subject to arbitration ends. "Arbitration should spell litigation's conclusion, rather than its beginning." [N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 292, 920 A.2d 88 \(2007\)](#). "[I]t is, after all, meant to be a substitute for and not a springboard for litigation." [Fawzy, supra, 199 N.J. at 468, 973 A.2d 347](#) (quoting [Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187, 430 A.2d 214 \(1981\)](#)). **[\*\*\*28]** From the judiciary's perspective, once parties contract for binding arbitration, all that remains is the possible need to: enforce orders or subpoena issued by the arbitrator, which have been ignored, [N.J.S.A. 2A:23B-17\(g\)](#); confirm the arbitration award, [N.J.S.A. 2A:23B-22](#); correct or modify an award, [N.J.S.A. 2A:23B-24](#), and in very limited circumstances, vacate an award [N.J.S.A. 2A:23B-23](#). If not for this limitation on judicial intervention of arbitration awards, "the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined." [Fawzy, supra, 199 N.J. at 470, 973 A.2d 347](#) (citing [Barcon, supra, 86 N.J. at 187, 430 A.2d 214](#)).

**[\*135]** It also is well settled that "there is a strong preference for judicial confirmation of arbitration awards." [Linden Bd. of Educ. v. Linden Educ. Ass'n, 202 N.J. 268, 276, 997 A.2d 185 \(2010\)](#). See also [Martindale v. Sandvik, Inc., 172 N.J. 275, 800 A.2d 872 \(2002\)](#). Consistent with the defined "salutary purposes . . . courts grant arbitration awards considerable deference." [Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201, 61 A.3d 941 \(2013\)](#).

In this matter, plaintiff's requested relief is limited to vacating the arbitration **[\*\*\*29]** award. [HN12](#) "A party seeking to vacate an arbitration award must first obtain trial court review of the award." [Manger v. Manger, 417 N.J. Super. 370, 376, 9 A.3d 1081 \(App.Div.2010\)](#) (citing [Hogoboom v. Hogoboom, 393 N.J. Super. 509, 515, 924 A.2d 602 \(App.Div.2007\)](#)). The court's review is informed by the authority bestowed on the arbitrator by the Act. The Act states a court may vacate an arbitration award *only* upon proof:

[HN13](#) (1) the award was procured by corruption, fraud, or other undue means;

(2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; **[\*\*1204]** or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;



- (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
- (4) an arbitrator exceeded the arbitrator's powers . . . .

[\[N.J.S.A. 2A:23B-23.\]](#)<sup>2</sup>

Further, [HN15](#)<sup>↑</sup> "parties may agree to a broader review than provided for by the default provisions in the . . . Act." [Fawzy, supra, 199 N.J. at 482 n.5, 973 A.2d 347](#). Their agreement must "accurately reflect the circumstances under which a party may challenge the award and the level of review agreed upon." *Ibid*.

**[\*136]** For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, . . . the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that . . . awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that.

*[Tretina v. Fitzpatrick & Assocs., 135 N.J. 349, 358, 640 A.2d 788 (1994) (internal quotation marks and citations omitted).]*

Finally, a party seeking to vacate an arbitration award bears the burden of demonstrating "fraud, corruption, or similar wrongdoing on the part of the arbitrator[.]" *Id. at 357, 640 A.2d 788*. (internal quotation marks and **[\*\*\*31]** citations omitted); see also [Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510, 859 A.2d 742 \(App.Div.2004\)](#) ("[B]ecause of the strong judicial presumption in favor of the validity of an arbitral award, the party seeking to vacate it bears a heavy burden."), *certif. granted, 183 N.J. 218, 871 A.2d 95 (2005), appeal dismissed, 195 N.J. 512, 950 A.2d 901 (2005)*.

Having outlined these statutory parameters, we note, [HN16](#)<sup>↑</sup> "the scope of review of an arbitration award is narrow. Otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined." [Fawzy, supra, 199 N.J. at 470, 973 A.2d 347](#) (citing [Barcon Assocs., supra, 86 N.J. at 187, 430 A.2d 214](#)). "As the decision to vacate an arbitration award is a decision of law, this court reviews the denial of a motion to vacate an arbitration award de novo." [Manger, supra, 417 N.J. Super. at 376, 9 A.3d 1081](#) (citation omitted). See also [Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 \(1995\)](#) (holding no "special deference" is accorded the trial judge's "interpretation of the law and the legal consequences that flow from established facts").

III.

A.

Plaintiff advances several arguments for vacating **[\*\*\*32]** the March 17, 2011 arbitration award. She contends the 2009 agreements were **[\*137]** not the product of arbitration and, therefore, should be set aside. Further, she maintains the arbitrator exceeded his powers by acting as both mediator and **[\*\*1205]** arbitrator, presided over issues not subject to arbitration, and exercised undue means in repeatedly denying plaintiff access to "relevant financial documents."


Defendant counters, stating plaintiff's request to vacate was filed beyond the 120-day window set forth in [N.J.S.A. 2A:23B-23\(b\)](#). We need not address defendant's procedural challenge, in light of the fact that the March 17, 2011 arbitration award was not a final, conclusive determination of all issues concluding the arbitration.

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<sup>2</sup> [HN14](#)<sup>↑</sup> The Court has also instructed an arbitration award may be vacated where it violates "a clear mandate of public policy[.]" [Weiss v. Carpenter, 143 N.J. 420, 443, 672 A.2d 1132 \(1996\)](#). **[\*\*\*30]** However, such intervention is appropriate only where "the public-policy question is not reasonably debatable[.]" *Ibid*.

This case unraveled because the parties agreed to arbitration, then chose to do something else. That said, we analyze what actually occurred resulting in the 2009 agreements and whether our intervention is warranted. Even though the process employed was not an arbitration hearing as envisioned by the Act or as agreed by the parties, we conclude the procedures were not fundamentally unfair, the process was not infirm, and the 2009 agreements need not be vacated.

Regarding the **\*\*\*33** first agreement to distribute the medical practice, the arbitrator did not participate in the settlement discussions; Rubin had the lead role. The parties funneled information to him, he made recommendations, the parties' attorneys and experts asked questions, and a decision to accept, modify or reject the recommendations was individually made. Plaintiff never states she and her original attorney did not discuss these issues, or claims she was deprived of the ability to consider documentation prior to reaching the February 2009 agreement. Rather, her complaint is the documents were not kept by her original attorney and, therefore, were not available to substituted counsel.<sup>3</sup> Plaintiff also complains that when she sought subsequent review of the financial information regarding the business interests she was **[\*138]** denied access. We find the process employed did not violate the Act and plaintiff's challenges are insufficient to vacate the agreement dividing the medical practices.

**HN17**  Although parties contract to arbitrate, settlement negotiations are not **\*\*\*34** foreclosed by the Act. See, e.g., [N.J.S.A. 2A:23B-15\(a\)](#) (authorizing an arbitrator to hold conferences with the parties to the arbitration proceeding before the hearing). Indeed, New Jersey courts have found that the "[s]ettlement of litigation ranks high in [the] public policy" of this State. [Puder v. Buechel, 183 N.J. 428, 437, 874 A.2d 534 \(2005\)](#) (quoting [Nolan ex rel. Nolan v. Lee Ho, 120 N.J. 465, 472, 577 A.2d 143 \(1990\)](#) (internal quotation marks and citation omitted) (alterations in original)). We have held, "so long as the parties acknowledge that the agreement was reached voluntarily and is for them, at least, fair and equitable" it should be enforced. [Lerner v. Laufer, 359 N.J. Super. 201, 217, 819 A.2d 471 \(App.Div.2003\)](#). "Advancing that public policy is imperative . . . where matrimonial proceedings have increasingly overwhelmed the docket." [Puder, supra, 183 N.J. at 430, 874 A.2d 534](#); see also [Davidson v. Davidson, 194 N.J. Super. 547, 550, 477 A.2d 423 \(App.Div.1984\)](#) ("With more divorces being granted now than in history, and with filings on the rise, fair, reasonable, equitable and, to the extent possible, conclusive settlements must be reached, or the inexorable and inordinate passage of time from initiation of suit to final trial **\*\*\*35** will be absolutely devastating[.]").

Plaintiff's suggestion she was uninformed is rejected as this record contains no evidence to show her decision **\*\*1206** dividing the medical practice was not made with full knowledge or was the result of coercion. Plaintiff is a highly educated, successful, professional businesswoman. The parties were married for fourteen years, and, even if some of defendant's enterprises were founded late in the marital relationship, their existence was disclosed and plaintiff was able to gain necessary information regarding these entities. The circumstances here reflect no disparity in bargaining power between plaintiff and defendant.

**[\*139]** Moreover, plaintiff's agreement, guided by the advice of her independently chosen legal counsel and aided by her individual accountant, was made after reflection on alternatives. In fact, the record shows that immediately following plaintiff's initial acceptance of Rubin's recommendation, her accountant and attorney repudiated assent, asserting errors were found in Rubin's calculations. Following further review, plaintiff withdrew her objection and reaffirmed her agreement to be bound, accepting through counsel, the distribution as fair and **\*\*\*36** equitable. The record supports plaintiff's decision was reasoned, voluntary and deliberate, making it a binding contract between the parties.

These same reasons uphold the memorandum of understanding reached on July 8, 2009, along with its amendments dated September 22, 2009, and October 15, 2009. These detailed documents, fully executed by the parties and counsel, were not the product of arbitration, but mediation. Following our review, we find no basis to set them aside.

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<sup>3</sup> The record is not entirely clear, but it appears Rubin reviewed submissions from each side, which he returned after issuing his recommendation.

Certainly, [HN18](#)<sup>(↑)</sup> mediation, although a form of alternate dispute resolution, differs from binding arbitration, which raises the next question posed by plaintiff: can parties who agree to proceed in binding arbitration change the process to mediation? We conclude they can. Even though the parties contracted to pursue "binding arbitration," their change of course to utilize mediation will not invalidate their settlement agreements.

Mediation is governed by the Uniform Mediation Act (UMA), [N.J.S.A. 2A:23C-1 to -13](#), [Rule 1:40-4](#), and [Rule 1:40-5\(b\)](#). Similar to arbitration, mediation provides an alternate, more informal forum than litigation, allowing confidential and candid exchange of information between the parties and the mediator [\*\*\*37] to aid the parties' efforts in reaching an accord on disputes. Mediated agreements, like other contracts, must be knowingly and voluntarily reached. A settlement agreement, reached in mediation, which is incorporated into an executed, signed written agreement [\*140] is enforceable. [Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 250-51, 71 A.3d 888 \(2013\)](#).

The July 8, 2009 memorandum of understanding executed by the parties is direct and expressly states:

This Memorandum between [the parties] shall describe the outline of an Agreement that was reached between the parties on July 8, 2009 after mediation with the assistance of [the arbitrator] and [Rubin].

....

This Memorandum is the result of many months of negotiations and many conferences with [the arbitrator] and Mr. Rubin. The parties are entering into this Memorandum freely and voluntarily after conferring with their attorneys and anyone else with whom they wish to confer. The parties agree that this Memorandum represents a fair compromise of the issues. They acknowledge that by entering into this Memorandum they are waiving their rights to participate in [the] Arbitration hearing and waive the right to have [\*\*\*38] the issues set [\*\*1207] forth in this Memorandum decided by the Arbitrator.

The amendment further provides "the parties agree to the foregoing freely and voluntarily."

Despite her protests, plaintiff offers no evidence to repudiate these pronouncements. Nothing supports the failure of the parties to exchange necessary information. See [R. 1:40-5\(b\)\(3\) HN19](#)<sup>(↑)</sup> ("In mediation of economic aspects of family actions, parties are required to provide accurate and complete information to the mediator and to each other, including but not limited to tax returns, Case Information Statements, and appraisal reports."). Also, the mediation agreement satisfies the prerequisites for enforcement as the terms were incorporated into a written document signed and distributed to all parties. [Willingboro Mall, supra, 215 N.J. at 263, 71 A.3d 888](#). Our review of this record unearths no basis to undo the consensual 2009 agreements.

We also reject plaintiff's claims of legal insufficiency. Although we agree, for example, the child support agreement omitted a baseline determination, that fact may cause future proof problems if modification is sought, but it alone would not void the agreement.

[\*141] Plaintiff points to Hoberman's analysis of her projected [\*\*\*39] 2008 income to suggest the alimony and child support provisions in the 2009 agreements must be vacated. We conclude if plaintiff's projected income were inaccurate, standing alone that fact is insufficient to vacate the July 8, 2009 agreement.

First, [HN20](#)<sup>(↑)</sup> the support award was not simply a guidelines calculation. Necessary information required by [N.J.S.A. 2A:34-23a](#), includes not only plaintiff's income, but also defendant's income, the children's needs, and other funds available, including any income or assets of the children.

Second, the support calculation did not stand alone as the agreement as a whole integrated settlement of both support and various equitable distribution issues. Often these matters are "interrelated" amidst compromise of parties' myriad economic concerns. [Lehr v. Afflitto, 382 N.J. Super. 376, 396, 889 A.2d 462 \(App.Div.2006\)](#). See also [Lynn v. Lynn, 165 N.J. Super. 328, 342, 398 A.2d 141 \(App.Div.\)](#) (noting the necessary interrelationship between property distribution, alimony and child support), *certif. denied*, 81 N.J. 52, 404 A.2d 1152 (1979). [HN21](#)<sup>(↑)</sup> "[T]he termination of a marriage involves an 'economic mosaic' comprised of equitable distribution, alimony and child support and . . . these financial components [\*\*\*40] interface." [Koelble v. Koelble, 261 N.J. Super. 190, 192, 618 A.2d 377 \(App.Div.1992\)](#).



Third, plaintiff's argument does not explain how Hoberman's conclusions affect the final overall result. Hoberman refuted Rubin's inclusion of certain items in the 2008 income projections, but he did not specify plaintiff's actual reported 2008 income or compare it to Rubin's projected computations.

Fourth, even if Rubin's calculations of plaintiff's income were wrong, it is well established that [HN22](#)<sup>↑</sup> significant changes in circumstances warrant review and potential modification of a child support award. [Lepis v. Lepis, 83 N.J. 139, 145, 416 A.2d 45 \(1980\)](#). Therefore, were plaintiff to prove such a change along with the children's needs, the support amount could be altered.

**[\*142]** As a result of our review, we decline to vacate the 2009 agreements, finding unfounded plaintiff's claims that the procedures followed to reach them were defective or her acceptance unreliable. As noted, the parties agreed to mediate and conduct settlement discussions, rather than commence an arbitration hearing. **[\*\*1208]** That procedure is permissible and the agreements are enforceable.

B.

We turn to plaintiff's next challenge asserting the arbitrator's change of role to **[\*\*\*41]** a facilitator of a mediated agreement obviated his ability to thereafter proceed as an arbitrator. Plaintiff argues the arbitrator "committed misconduct and exceeded his powers by acting as both a mediator and an arbitrator." She further explains the arbitrator aided mediation of the disputes, then, when she sought underlying documentation, he "enforced the [agreements] that he had written [as a mediator] as if they were the result of an actual arbitration," converting the result to a binding arbitration award. This is an issue of first impression.

Our review considers the compatibility of the same party assuming the role of mediator and arbitrator. [HN23](#)<sup>↑</sup> Mediation and arbitration both allow for resolution of disputes outside the court process, and the hallmark of a mediator and an arbitrator is neutrality. See [R. 1:40-2\(a\)\(1\)](#) (defining arbitration as "[a] process by which each party and/or its counsel presents its case to a neutral third party, who then renders a specific award"). Nevertheless, we conclude the differences in the roles of these two types of dispute resolution professionals necessitate that a mediator, who may become privy to party confidences in guiding disputants to a **[\*\*\*42]** mediated resolution, cannot thereafter retain the appearance of a neutral factfinder necessary to conduct a binding arbitration proceeding. Consequently, absent the parties' agreement, an arbitrator appointed under the Act may not assume the role of mediator and, thereafter, resume the role of arbitrator.

**[\*143]** [HN24](#)<sup>↑</sup> Mediation is included as a "Facilitative Process[.]" which is defined as "a process by which a mediator facilitates communication between parties in an effort to promote settlement without imposition of the mediator's own judgment regarding the issues in dispute." [R. 1:40-2\(c\)](#). "A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues [and] encouraging parties to accommodate each other[s] interests." [Lehr, supra, 382 N.J. Super. at 394, 889 A.2d 462](#) (internal quotation marks and citations omitted) (alteration in original); see also James R. Coben & Peter N. Thompson, "Disputing Irony: A Systematic Look at Litigation About Mediation," 11 Harv. Negot. L. Rev. 43 ("As a facilitator, a mediator is not tasked with reaching a final decision in a matter, but rather instills trust and confidence of the participants in the mediation process, allowing them **[\*\*\*43]** to resolve their differences." (quoting [V.J.L. v. Red, 2002 WY 25, 39 P.3d 1110, 1113 n.3 \(Wyo. 2002\)](#))).

[HN25](#)<sup>↑</sup> Mediations are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts. Admittedly, mediation encourages confidential disclosures to the mediator, whose training is designed to utilize these confidential positions to aid the parties to evaluate their positions, promote understanding of the other side's position, and reach a consensus. These confidences are "insured only if the participants trust that information conveyed to the mediator will remain in confidence." [Lehr, supra, 382 N.J. Super. at 395, 889 A.2d 462](#). "Mediation communications, which 'would not exist but for the settlement attempt,' are made by parties 'without the expectation that they will later be bound by them.'" [State v. Williams, 184 N.J. 432, 447, 877 A.2d 1258 \(2005\)](#) (quoting Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 *Seton Hall Legis. J.* 2, 13 (1988)). "Successful mediation, with its emphasis on conciliation, depends on confidentiality **[\*\*1209]** perhaps more than any other form of [alternate dispute resolution]." [Williams, supra, 184 N.J. at 447, 877 A.2d 1258](#)

(citation [\*\*\*44] omitted). "Indeed, mediation stands in stark contrast to formal adjudication, [\*144] and [] arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting." *Ibid.*

On the other hand, [HN26](#) [↑] an arbitrator's role is evaluative, requiring the parties to present their evidence for a final determination. See [R. 1:40-2\(b\)\(2\)](#) (defining "Evaluative Process" to include "Neutral Fact Finding: A process by which a neutral, agreed upon by the parties, investigates and analyzes a dispute involving complex or technical issues, and who then makes non-binding findings and recommendations."). Arbitrators essentially weigh evidence, assess credibility, and apply the law when determining whether a party has proven his or her request for relief. See Lela P. Love, *Symposium: The Top Ten Reasons Why Mediators Should Not Evaluate*, [24 Fla. St. U. L. Rev. 937, 938 \(1997\)](#). An arbitrator makes a final decision, which binds the parties. See [N.J.S.A. 2A:23B-1](#) (defining an "arbitrator" as "an individual appointed . . . to render an award . . . in a controversy that is subject to an agreement to arbitrate"). Thus, "arbitrators should conduct the proceedings in an evenhanded [\*\*\*45] manner and treat all parties with equality and fairness at all stages of the proceedings." [Barcon, supra, 86 N.J. at 190, 430 A.2d 214](#) (internal quotation marks and citations omitted).

Toward this end, the Act [HN27](#) [↑] vests arbitrators with broad discretion over discovery and other procedural matters to "conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties . . . before the hearing[.]" [N.J.S.A. 2A:23B-15\(a\)](#). The statute's broad conferral of authority "does not require any particular procedures, mandate discovery, compel the maintenance of a record, command a statement by the arbitrator regarding his findings and conclusions, or an expression of the reasons why he reached the result that he did[.]" unless expressly required under the parties' arbitration [\*145] agreement. [Johnson v. Johnson, 204 N.J. 529, 546, 9 A.3d 1003 \(2010\)](#) (citing [N.J.S.A. 2A:23B-1 to -32](#)).

[HN28](#) [↑] While we recognize the Act envisions a need for flexibility to meet a wide variety of situations presented in arbitration proceedings, we are not persuaded the Act intended an appointed arbitrator [\*\*\*46] may first assume the role of mediator then switch back to conduct final arbitration hearings. As noted, an effective mediator gains each party's confidence and offers advice to steer them toward settlement. Those confidential communications gained in mediation are precluded from being considered in a court contest, [Isaacson v. Isaacson, 348 N.J. Super. 560, 577, 792 A.2d 525 \(App.Div.\), certif. denied, 174 N.J. 364, 807 A.2d 195 \(2002\)](#), and would similarly be precluded from consideration in an arbitration hearing. See also [Willingboro Mall, supra, 215 N.J. at 245, 71 A.3d 888](#) ("Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding.").

In researching this issue, we found limited discussion of the subject. Initially, we are aware [Rule 1:40-2\(d\)](#) identifies as a "Hybrid Process" of complementary dispute resolution "[m]ediation-arbitration," which it defined as "[a] process by which, after an initial mediation, unresolved issues are then arbitrated." The rule does not address whether the same party may perform both functions or whether issues [\*\*1210] attempted to be mediated may then be arbitrated.

In *Isaacson*, we discussed the efficacy of assuming the dual [\*\*\*47] role of custody mediator and guardians ad litem (GAL), examining the applicable court rules governing appointments of custody and parenting time mediators, [R. 1:40-5\(a\)](#) and GALs, [R. 5:8B](#). We noted [Rule 1:40-5\(c\)](#) [HN29](#) [↑] specifies a custody and parenting time mediator may not subsequently act as an evaluator in the proceeding or make any recommendation to the court respecting the issues. [Isaacson, supra, 348 N.J. Super. at 577, 792 A.2d 525](#). We concluded "[a] practical reading of the rules and common sense preclude[d] the [possible] dual role of mediator and GAL." [Id. at \[\\*146\] 575, 792 A.2d 525](#). We find [Isaacson's](#) distinction between an evaluative versus facilitative role helpful.

Canon IV.H of the Code of Ethics for Arbitrators in Commercial Disputes, approved by the American Bar Association and the American Arbitration Association, states "an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle." This guideline is also directed to the evaluator-facilitator dichotomy. Despite the

code's applicability to commercial matters, such a concern certainly exists and may even be heightened in the [\*\*\*48] arbitration of an emotionally charged matrimonial matter.

We uncovered one regulatory provision presumably suggesting an appointed arbitrator may mediate or assist the parties to reach a settlement during compulsory interest arbitration to resolve collective bargaining disputes between police and fire departments and their employees. [N.J.A.C. 19:16-5.7\(c\)](#). However, upon examination of the statutory authority governing the regulation, we find a marked distinction between the two proceedings, as the statute [HN30](#) requires: "Any mediation or factfinding invoked pursuant to . . . this section shall terminate immediately upon the filing of a petition for arbitration." [N.J.S.A. 34:13A-16\(b\)\(2\)](#). Again, the distinction between the roles of the facilitator in a mediation and the factfinder in an arbitration is important.

Based on our review of the distinctly different proceedings of arbitration and mediation, [HN31](#) we conclude the positions of arbitrator and mediator are in conflict. An arbitrator must "maintain 'broad public confidence in the integrity and fairness of the [arbitration] process.'" [Barcon, supra, 86 N.J. Super. at 190, 430 A.2d 214](#) (quoting Holtzmann, *The First Code of Ethics for Arbitrators in Commercial [\*\*\*49] Disputes*, 33 *The Business Lawyer* 309, 312 (1977)). If the same person acts as a mediator, obtains party confidences or offers opinions on the issues in dispute, a conflict arises were he or she to then switch roles to act as an arbitrator, making the final call. We find the need for an arbitrator's [\*147] complete objectivity bears heavily on the integrity of the arbitration process. This concern becomes even more problematic when arbitrating matrimonial disputes between already suspicious adverse parties.

[HN32](#) In the family law context, we could envision parties agreeing in writing to allow one person to perform these roles regarding separate issues; for example, mediation of custody matters and arbitration of financial issues. However, this should be the parties' choice. Absent a specific agreement clearly defining and accepting the complementary dispute resolution professional's roles, dual roles are to be avoided.

It is advisable for parties to exhaust all applicable dispute resolution alternatives, including settlement conferences and mediation before undertaking arbitration. Once these available courses are exhausted and arbitration is chosen, [\*\*1211] the arbitrator should promptly commence hearings [\*\*\*50] and resolve matters expeditiously.

In this matter, the arbitrator disavowed any mediation role, suggesting he merely performed conferencing. The record supports the arbitrator's position regarding the agreement dividing the parties' medical practices. Unfortunately, however, we cannot reach that same conclusion in light of the unequivocal introductory paragraph contained in the July 8, 2009 memorandum of understanding, which is described as "an Agreement that was reached between the parties . . . after mediation with the assistance of [the arbitrator and Rubin]." The agreement's terms place the arbitrator in the role of moving the parties toward compromise in mediation. We will not infer that the written document is inartful or accept the suggestion the arbitrator merely brought to bear his informed judgment in order to reach a fair solution. Rather, we can only conclude the agreement means what it says: it is a product of mediation reached with the assistance of both the arbitrator and Rubin.

Based on our determination, [HN33](#) absent the parties' contract to the contrary, once a neutral assumes the role of mediator, he or she [\*148] may not assume the role of arbitrator. Therefore, any "arbitration [\*\*\*51] awards" based on the arbitrator's finding, entered following the 2009 mediated agreements must be set aside. After guiding mediation, the arbitrator could no longer proceed, and by doing so here, he exceeded his powers. [N.J.S.A. 2A:23B-23\(a\)\(4\)](#).

Applying this holding to the entered arbitration awards, we reach the following conclusions. The November 30, 2011 Family Division order confirming the August 11, 2011 arbitration order adjudicating the award of counsel fees and costs is vacated. Next, examining the March 17, 2011 arbitration award, paragraph (1) adopts Rubin's allocation of credits and disposition of marital assets, which the parties agreed to accept. Although reached during arbitration after the 2009 mediations, the provisions adopt a settlement agreement and were not the product of the arbitrator's determination. Paragraphs (2) through (5) entered the parties' 2009 agreements as final. For the reasons set forth earlier in our opinion upholding the parties' 2009 agreements, these provisions need not be disturbed. Paragraph (7), like paragraph (1), included a post-mediation agreement for a credit due plaintiff, not an arbitration award and

may stand. Paragraphs (6), (8), (10) through (13) [\*\*\*52] are procedural provisions, which also need not be set aside. Only paragraph (9) of the March 17, 2001 arbitration award, addressing the underlying calculation of child support, represents a post-mediation award made by the arbitrator, which must be vacated.

The Family Division's August 19, 2011 order, which confirmed the March 17, 2011 arbitration award is vacated, to the extent the order confirmed paragraph (9) of the arbitration award. However, we need not set aside confirmation provisions incorporating the parties' 2009 agreements into the JOD.

Also, we vacate the provisions in the July 16, and September 23, 2010 Family Part's orders confirming the arbitrator's awards that conflict with the provisions of this opinion. Specifically, the provisions adopting the arbitrator's denial of plaintiff's document requests and confirm the May 25, 2010 arbitration decision, excepting, however, those provisions regarding the 2009 agreements.

[\*149] The matter is remanded to the Family Part for the sole purpose of supervising the parties' selection of a new arbitrator, to conduct arbitration proceedings under the Act to determine unresolved financial [\*\*1212] issues, that are not otherwise covered by their mediated [\*\*\*53] and other settlement agreements.

The final issue for discussion centers on plaintiff's request for financial disclosure following the execution of the 2009 agreements. We are at a loss to understand why this request was met with such resistance, in light of the express terms of the arbitration agreement and the parties' protective order.

The record contains no agreement to limit copying or review of the other side's financial disclosures rendered to Rubin. Rather, the documents governing arbitration gave plaintiff the absolute right to copy all relevant information. Specifically, the appended statement of rights of arbitrating parties included "the right to be provided copies of all documents presented to the [a]rbitrator by their spouse." Further, the protective order allowed the documents to be reviewed by the parties along with their counsel and experts. Allowing review of the documents would not have caused incessant delay, but rather would have allowed substituted counsel the opportunity to become informed.

A concern often arises that post-settlement remorse may motivate a party to retract a valid agreement. However, such tactics can effectively be thwarted through sanctions or an [\*\*\*54] award of attorney's fees for frivolous conduct. See [N.J.S.A. 2A:23B-21 HN34](#) (affording arbitrator's authority to award exemplary relief and reasonable attorney's fees). Further, the request could have been temporally conditioned, and payment for Rubin's time could have been allocated solely to plaintiff.

Defendant relies on our decision in *Manger*, to suggest an arbitrator's discovery decisions must be upheld. [HN35](#) Certain discovery limitations must be made in "the interest of making the hearing 'fair, expeditious, and cost effective[.]'" *Manger, supra*, 417 N.J. Super. at 376, 9 A.3d 1081 (quoting [N.J.S.A. 2A:23B-17\(c\)](#)). In *Manger*, we reviewed defendant's claim of misconduct alleging [\*150] the arbitrator improperly denied submission of expert evaluations of the parties' business. *Id.* at 374, 9 A.3d 1081. We found no basis to disturb the arbitrator's award, upholding "the arbitrator's broad authority to conduct the proceeding[.]" *Id.* at 377, 9 A.3d 1081. However, the facts in *Manger* are distinguishable. The arbitrator in that case had determined to follow pre-arbitration orders that were entered by the Family Part, which included a deadline for submission of expert evaluations. *Id.* at 373, 9 A.3d 1081.


Consistent with her authority to "conduct an arbitration [\*\*\*55] in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding," [N.J.S.A. 2A:23B-15\(a\)](#), the arbitrator could have ignored or revised the orders entered in the trial court. On the other hand, the arbitrator could apply any and all orders previously entered in the trial court and fashion new discovery and case management orders for the arbitration proceeding. Here, the arbitrator exercised her broad authority to follow the latter course.

[[Id.](#) at 376, 9 A.3d 1081.]

More important, "the arbitrator provided an opportunity for each party to identify and exchange the documents on which they intended to rely at the hearing." [Id.](#) at 377, 9 A.3d 1081.



Here, although there was some review of documentation, Rubin and the parties' counsel apparently had not retained the considered information. When plaintiff's substituted counsel sought to gain background for the underlying agreements, the arbitrator denied the request and restrained **[\*\*1213]** Rubin from further discussion of those issues with substituted counsel. As a result of these determinations, substituted counsel faced an untenable and even suspicious situation, precluding her from providing informed advice to her client and prompting **[\*\*\*56]** repeated motions to reopen discovery.


**HN36**  A court may vacate an arbitration award when it is procured by undue means or resulted from an arbitrator exceeding his designated powers. *N.J.S.A. 2A:24-8(a)*. The judicial inquiry must consider more than whether a mere mistake occurred. *Tretina, supra*, 135 N.J. at 356-57, 640 A.2d 788 (quotation marks and citation omitted). Rather, that


formulation requires that the arbitrator[] must have clearly intended to decide according to law, must have clearly mistaken the legal rule, and that mistake must **[\*151]** appear on the face of the award. In addition, the error, to be fatal, must result in a failure of intent or be so gross as to suggest fraud or misconduct.

*[Id. at 357, 640 A.2d 788 (internal quotation marks and citations omitted).]*

Although we agree the arbitrator properly determined discovery would not be reopened, we cannot similarly uphold the order precluding plaintiff from obtaining documents to which she was unquestionably entitled. The contract to arbitrate specifically granted plaintiff this right and nothing reflects she waived that right. Barring substituted counsel from this information represents an egregious remaking of the arbitration contract, which cannot stand. The Family **[\*\*\*57]** Part's order confirming this determination must also be vacated. Once appointed, the new arbitrator shall consider plaintiff's document requests, in light of our opinion.

To the extent plaintiff has presented arguments not specifically addressed in our opinion, we reject them as lacking sufficient merit to warrant discussion. *R. 2:11-3(e)(1)(E)*.

We close with these observations. **HN37**  Arbitration, particularly binding arbitration, must be purposefully chosen, and the parameters must be designated in a contract between the parties. If binding arbitration is selected as the forum for resolution of disputes, a litigant cannot jump back and forth between the court and the arbitral forum. By its very nature, arbitration does not permit such a hybrid system. Further, arbitration "should be a fast and inexpensive way to achieve final resolution of . . . disputes and not merely a way-station on route to the courthouse," *Borough of E. Rutherford, supra*, 213 N.J. at 201, 61 A.3d 941 (internal quotation marks and citations omitted). Attempts to return to the court, except to confirm the final arbitration award, are at odds with this objective.

In the matter at bar, the parties' contract concisely defined matters to **[\*\*\*58]** be addressed in arbitration, yet from commencement, the Family Part maintained involvement such as scheduling case management and entertaining a motion for a protective order, both of which fall directly within the adjudicatory responsibilities of the arbitrator. *N.J.S.A. 2A:23B-17(e)*. Moreover, **[\*152]** the parties held a mistaken belief that court intervention was permitted to check the decisions of the arbitrator. This is untenable. The Act's **HN38**  provisions are unmistakable: once binding arbitration is chosen and the arbitrator(s) named, the court is no longer involved in reviewing or determining the substantive issues. The **[\*\*1214]** court's role is circumscribed to confirm a final arbitration award, correct obvious errors, and consider whether the award should be vacated, *only* when one of the limited bases set forth in *N.J.S.A. 2A:23B-23* has occurred. The piecemeal approach demonstrated here prolonged the final result and eliminated the main benefit of arbitration, "to provide an effective, expedient, and fair resolution of disputes[.]" *Fawzy, supra*, 199 N.J. 470, 973 A.2d 347 (citations omitted).

Finally, had the parties actually followed the path of binding arbitration, the need for a PSA would be obviated because **[\*\*\*59]** an issued arbitration award would be confirmed by court order assuring compliance. No separate agreement memorializing the order is needed. Insistence upon preparation of a PSA appears to result from habit, not necessity.

Lastly, [HN39](#)<sup>[↑]</sup> we do not mean to suggest parties who seek to arbitrate disputes should abandon all hope of amicable resolution. We urge parties to exhaust possible settlement alternatives prior to contracting for arbitration. If arbitration is accepted, parameters for settlement discussions should be set by the arbitrator.

IV.

In summary, the parties' agreements dated February, (incorporated by a Family Part order dated April 1), July 8, September 22, and October 15, 2009 are valid and enforceable. The custody and parenting time consent order reached on February 4, 2010 also is not challenged and remains unchanged. Consequently, the March 8, 2010 JOD as originally filed need not be disturbed because it adopts the 2009 agreements reached and finalized the custody agreement. The JOD further accepts the parties' agreed allocation of debits and credits. The arbitration record suggests this issue was also settled, not resolved by orders following an arbitration **[\*153]** hearing. That resolution, **[\*\*\*60]** occurring after the arbitrator's disqualification, stands on its own as a voluntary agreement.

We vacate the trial court's November 30, 2011 confirmation of the August 11, 2011 arbitration award, allocating attorney's fees and costs as it was rendered following what we have identified arbitrators' unauthorized action. These issues along with any unresolved financial matters, and consideration of release of financial documents shall be addressed by the new arbitrator, once chosen by the parties.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

## [Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.](#)

Supreme Court of New Jersey

February 27, 2013, Argued; August 15, 2013, Decided

A-62 September Term 2011, 069082

### Reporter

215 N.J. 242 \*; 71 A.3d 888 \*\*; 2013 N.J. LEXIS 831 \*\*\*; 2013 WL 4104123

WILLINGBORO MALL, LTD., A NEW JERSEY LIMITED PARTNERSHIP, PLAINTIFF—APPELLANT, v. 240/242 FRANKLIN AVENUE, L.L.C., A NEW YORK LIMITED LIABILITY COMPANY; COLONIAL COURT APARTMENTS, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY; FESTIVAL MARKET AT WILLINGBORO, L.L.C., A NEW JERSEY LIMITED LIABILITY COMPANY; ROY LUDWICK; AND NAMIK MARKET, DEFENDANTS—RESPONDENTS.

**Prior History:** [\*\*\*1] On certification to the Superior Court, Appellate Division, whose opinion is reported at [421 N.J. Super. 445, 24 A.3d 802 \(2011\)](#).

[Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 421 N.J. Super. 445, 24 A.3d 802, 2011 N.J. Super. LEXIS 154 \(App.Div., 2011\)](#)

## Syllabus

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(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interest of brevity, portions of any opinion may not have been summarized.)

***Willingboro Mall, LTD. v. 240/242 Franklin Avenue, L.L.C. (A-62-11) (069082)***

**Argued February 27, 2013 -- Decided August 15, 2013**

**ALBIN, J., writing for a unanimous Court.**

The issues in this appeal are (1) whether [Rule 1:40-4\(i\)](#) requires a settlement agreement reached at mediation to be reduced to writing and signed at the time of mediation, and (2) whether plaintiff waived the privilege that protects from disclosure any communication made during the course of mediation.

In February 2005, Willingboro Mall, LTD. (Willingboro), the owner of the Willingboro Mall, sold the property to 240/242 Franklin Avenue, L.L.C. (Franklin). Willingboro subsequently filed a mortgage foreclosure action on the mall property and the Honorable Ronald E. Bookbinder, J.S.C., directed the parties to [\*\*\*2] participate in non-binding mediation. The mediation was conducted on November 6, 2007, in the offices of Franklin's attorney. Willingboro's manager, Scott Plapinger, and attorney, Michael Z. Zindler, Esq., appeared on behalf of the company. Franklin offered \$100,000 to Willingboro in exchange for settlement of all claims and for a discharge of the mortgage on the mall property. On behalf of Willingboro, Plapinger orally accepted the offer in the presence of the mediator and affirmed that he gave his attorney authority to enter into the settlement. The terms of the settlement, however, were not reduced to writing before the conclusion of the mediation session.

On November 9, 2007, Franklin forwarded to Judge Bookbinder and Willingboro a letter announcing that the case had been "successfully settled" and setting forth the purported terms of the settlement. Franklin's attorney sent a separate letter to Willingboro stating that he held \$100,000 in his attorney trust account to fund the settlement, that Franklin had executed a release, and that the monies would be disbursed when Willingboro filed a stipulation of

dismissal in the foreclosure action and delivered a mortgage discharge on the [\*\*\*3] mall property. Willingboro rejected the settlement terms and refused to sign a release or to discharge the mortgage. Franklin filed a motion to enforce the settlement agreement and attached certifications from its attorney and the mediator that revealed communications made between the parties during the mediation. Willingboro did not move to dismiss the motion, or strike the certifications, based on violations of the mediation-communication privilege. Instead, in opposition to the motion to enforce, Willingboro requested an evidentiary hearing and the taking of discovery, and filed a certification from its manager, Scott Plapinger. The trial court ordered the taking of discovery and scheduled a hearing to determine whether an enforceable agreement had been reached during mediation.

The parties agreed that they were "waiv[ing] any issues of confidentiality with regard to the mediation process" and agreed that the testimony elicited could be used for purposes of the motion to enforce the settlement agreement only and not for purposes of the underlying foreclosure action. Despite the waiver, the mediator declined to testify regarding the mediation in the absence of an order from Judge [\*\*\*4] Bookbinder. Judge Bookbinder pointed out to the parties' attorneys that under [Rule 1:40-4\(d\)](#), "unless the participants in a mediation agree, no mediator may disclose any mediation communication to anyone who was not a participant in the mediation." Willingboro's attorney stated that the parties agreed to the disclosure. The parties then consented to the court order compelling the mediator to testify. The mediator was deposed and divulged mediation communications.

After the close of discovery, the Honorable Michael J. Hogan, P.J.Ch., conducted a four-day evidentiary hearing. On the second day of the hearing, Willingboro reversed course and moved for an order expunging "all confidential communications" disclosed, arguing that mediation communications are privileged under the New Jersey Uniform Mediation Act (Mediation Act) and [Rule 1:40-4](#). Judge Hogan ruled that Willingboro had waived the mediation-communication privilege and held that "a binding settlement agreement was reached as a result of [the] court-directed mediation." The judge found that "[e]ven though the [settlement] terms were not reduced to a formal writing at the mediation session," an agreement had been reached. The court [\*\*\*5] granted Franklin's motion to enforce the settlement as memorialized in its November 9 letter.

The Appellate Division affirmed the trial court's enforcement of the settlement agreement. The panel found that Willingboro "waived the confidentiality normally afforded to" mediation sessions and therefore the trial court properly proceeded to "determine whether the parties had reached a settlement."

The Supreme Court granted Willingboro's petition for certification. *209 N.J. 97, 35 A.3d 680 (2012)*.

**HELD:** Plaintiff expressly waived the mediation-communication privilege and disclosed privileged communications. The oral settlement agreement reached by the parties is upheld. Going forward, however, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable.

1. Public policy favors the settlement of disputes, and the court system encourages mediation as an important means of achieving that end. Mediation is governed by [Rule 1:40 to 1:40-12](#), the Mediation Act, [N.J.S.A. 2A:23C-1 to -13](#), and the rules of evidence, [N.J.R.E. 519](#). The success of mediation as a means of encouraging parties to compromise and settle their disputes depends on confidentiality. Confidentiality [\*\*\*6] promotes candid and unrestrained discussion, a necessary component of any mediation intended to lead to settlement. To this end, court and evidence rules and the Mediation Act confer a privilege on mediation communications, ensuring that participants' words will not be used against them in a later proceeding. (pp. 15-17)

2. [Rule 1:40-4\(c\)](#) provides that a communication made during the course of mediation is privileged. [N.J.S.A. 2A:23C-2](#) broadly defines a "[m]ediation communication" as any "statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." The Mediation Act and the rules of evidence both, in identical language, confer a privilege on mediation communications. The mediation-communication privilege, however, is not absolute. Court and evidence rules and the Mediation Act carve out limited exceptions to the privilege. The first is the signed-writing exception, which allows a settlement agreement reduced to writing and properly adopted by the parties to be admitted into evidence to prove the validity of the agreement. [\*\*\*7] The second exception is waiver. A valid waiver requires not only that a party "have full knowledge of his legal rights," but



also that the party "clearly, unequivocally, and decisively" surrender those rights. [Knorr v. Smeal, 178 N.J. 169, 177, 836 A.2d 794 \(2003\)](#). (pp. 17-21)

3. The signed-writing exception does not apply in this case because, early in the proceedings, Willingboro did not seek to bar enforcement of the settlement based on the lack of a signed written agreement. The Mediation Act and the evidence rules generally prohibit a mediator from making an "oral or written communication" to a court other than to inform the court whether a settlement was reached. Here, the mediator went far beyond merely communicating to the court that the parties had reached a settlement. By validating the contents of Franklin's letter, the mediator breached the privilege. Willingboro did not consent in advance to the disclosure of mediation communications to the court. But despite Franklin's violation of the mediation-communication privilege, Willingboro did not timely move to strike or suppress the disclosures of the mediation communications. Instead, Willingboro disclosed mediation communications and thereby [\*\*\*8] itself breached the mediation-communication privilege, completely opening the door. Although Franklin instituted the enforcement litigation and fired the first shot that breached the privilege, Willingboro returned fire, further shredding the privilege. (pp. 22-28)

4. If the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed before the mediation comes to a close. Going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable. The signed, written agreement requirement will greatly minimize the potential for litigation. In addition, a party seeking the protection of a privilege must timely invoke the privilege. A party that not only expressly waives the mediation-communication privilege, but also discloses privileged communications, cannot later complain that it has lost the benefit of the privilege it has breached. (pp. 28-30)

The judgment of the Appellate Division is **AFFIRMED**.

**Counsel:** *Glenn A. Weiner* argued the cause for appellant (*Klehr Harrison Harvey Branzburg*, attorneys; *Mr. Weiner* and *Michael A. Iaconelli*, of counsel and on the briefs).

*Joseph P. Grimes* [\*\*\*9] argued the cause for respondents (*Grimes & Grimes* attorneys).

**Judges:** JUSTICE ALBIN delivered the opinion of the Court. CHIEF JUSTICE RABNER; JUSTICES LaVECCHIA, HOENS, and PATTERSON; and JUDGE RODRÍGUEZ (temporarily assigned) join in JUSTICE ALBIN's opinion. JUDGE CUFF (temporarily assigned) did not participate.

**Opinion by:** ALBIN

## Opinion

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[\*245] [\*\*890] JUSTICE ALBIN delivered the opinion of the Court.

One of the main purposes of mediation is the expeditious resolution of disputes. Mediation will not always be successful, but it should not spawn more litigation. In this case, the parties engaged in protracted litigation over whether they had reached an oral settlement agreement in mediation. Instead of litigating the dispute that was sent to mediation, the mediation became the dispute.

Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding. A signed written settlement agreement is one exception to the privilege. Another exception is an express waiver of the mediation-communication privilege by the parties.

Here, defendant moved to enforce the oral settlement agreement and, in doing so, submitted certifications by its attorney and the mediator disclosing [\*\*\*10] privileged communications. Instead of seeking to bar the admission of privileged mediation communications, plaintiff, in opposing the motion, litigated the validity of the oral agreement. In

pursuing that course, plaintiff also disclosed mediation communications. In particular, plaintiff expressly waived the privilege on the record when questioning the mediator at a deposition and at an evidentiary hearing.

The Chancery Division found that plaintiff had waived the privilege and upheld the parties' oral agreement at the mediation session. The Appellate Division upheld the oral agreement. We affirm the judgment of the Appellate Division.

To be clear, going forward, parties that intend to enforce a settlement reached at mediation must execute a signed written agreement. Had that simple step been taken, the collateral litigation in this case might have been avoided. In responding to the motion to enforce, plaintiff did not timely interpose the lack of a signed written agreement as a defense. Moreover, if plaintiff intended to defend based on the absence of a written agreement, it was obliged not to litigate the validity of the oral agreement by [\*246] waiving the mediation-communication privilege. [\*\*\*11] This case should also serve as a reminder that a party seeking to benefit from the mediation-communication [\*\*891] privilege must timely assert it.

I.

A.

This case begins with a commercial dispute over the terms of the sale of the Willingboro Mall in Willingboro Township. In February 2005, Willingboro Mall, LTD. (Willingboro), the owner of the Willingboro Mall, sold the property to 240/242 Franklin Avenue, L.L.C. (Franklin). The specific terms of the contract for sale are not germane to this appeal. To secure part of Franklin's obligation, the parties executed a promissory note and mortgage on the property. Willingboro claimed that monies due on August 3, 2005, were not forthcoming and filed a mortgage-foreclosure action on the mall property. Franklin denied that it had defaulted on its contractual obligations and sought dismissal of the complaint. The Honorable Ronald E. Bookbinder, J.S.C., directed the parties to participate in a non-binding mediation for potential resolution of the dispute.

B.

On November 6, 2007, a retired Superior Court judge conducted the mediation over the course of several hours in the offices of Franklin's attorney, Joseph P. Grimes, Esq.<sup>1</sup> Willingboro's manager, Scott [\*\*\*12] Plapinger, and attorney, Michael Z. Zindler, Esq., appeared on behalf of the company. The mediator met privately with each side, conveying offers and counteroffers. At some point, Franklin offered \$100,000 to Willingboro in exchange for settlement of all claims and for a discharge of the mortgage on the mall property. On behalf of Willingboro, Plapinger orally accepted the [\*247] offer in the presence of the mediator, who reviewed with the parties the terms of the proposed settlement. Plapinger also affirmed that he gave his attorney authority to enter into the settlement. The terms of the settlement, however, were not reduced to writing before the conclusion of the mediation session.

Three days later, on November 9, Franklin forwarded to Judge Bookbinder and Willingboro a letter announcing that the case had been "successfully settled." The letter set forth the purported terms of the settlement in eight numbered paragraphs. On November 20, Franklin's attorney sent a separate letter to Willingboro stating that he held \$100,000 in his attorney [\*\*\*13] trust account to fund the settlement, that Franklin had executed a release, and that the monies would be disbursed when Willingboro filed a stipulation of dismissal in the foreclosure action and delivered a mortgage discharge on the mall property.

On November 30, 2007, Willingboro's attorney told Franklin's attorney that Willingboro rejected the settlement terms and refused to sign a release or to discharge the mortgage. In December, Franklin filed a motion to enforce the settlement agreement. In support of the motion, Franklin attached certifications from its attorney and the mediator that revealed communications made between the parties during the mediation. Among other things, the mediator averred in his certification that the parties voluntarily "entered into a binding settlement agreement with full

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<sup>1</sup> This statement of facts was primarily adduced at an evidentiary hearing on a motion to enforce an alleged oral settlement agreement between the parties.

knowledge of its terms, without any mistake or surprise and without any threat or coercion" and that the settlement terms were accurately memorialized in Franklin's letter to the court.

Willingboro did not give its consent to the filing of either certification. However, Willingboro did not move to dismiss the motion, or strike the certifications, based [\*\*892] on violations of the mediation-communication [\*\*\*14] privilege. Instead, in opposition to the motion to enforce, Willingboro requested an evidentiary hearing and the taking of discovery, and filed a certification from its manager, Scott Plapinger.

[\*248] In his certification, Plapinger averred that he had reluctantly agreed to participate in a mediation that his attorney told him would be non-binding. Plapinger also certified to the substance of the parties' discussions during the mediation. He asserted that as a result of his attorney's relentless insistence he went into a room where the mediator summarized the settlement terms agreed upon by the parties. Plapinger stated that the "purported terms of a final and binding settlement" had not been reduced to writing and that if it had, he would not have signed it. According to Plapinger, after the mediation, his attorney told him that the agreement was "binding" and that he had to sign the settlement papers. He refused to do so.

The trial court ordered the taking of discovery and scheduled a hearing to determine whether an enforceable agreement had been reached during mediation.

C.

The parties deposed five witnesses, including the mediator, Willingboro's manager, and Willingboro's attorney. Before [\*\*\*15] deposing the mediator, the parties agreed that they were "waiv[ing] any issues of confidentiality with regard to the mediation process" and agreed that the testimony elicited could be used for purposes of the motion to enforce the settlement agreement only and not for purposes of the underlying foreclosure action. Despite the waiver, the mediator declined to testify regarding the mediation in the absence of an order from Judge Bookbinder.

After a recess, Judge Bookbinder entered the room where the deposition was being taken. Judge Bookbinder pointed out to the parties' attorneys that under [Rule 1:40-4\(d\)](#), "unless the participants in a mediation agree, no mediator may disclose any mediation communication to anyone who was not a participant in the mediation." Willingboro's attorney stated that the parties agreed to the disclosure. The parties then consented to the court order compelling the mediator to testify. The mediator was deposed and divulged mediation communications.

[\*249] D.

After the close of discovery, the Honorable Michael J. Hogan, P.J.Ch., conducted a four-day evidentiary hearing. Franklin called the mediator as its first witness. The mediator gave detailed testimony concerning communications [\*\*\*16] made between the parties during the course of the mediation. The mediator testified that at the conclusion of the mediation, after a settlement had been reached, he asked Plapinger whether he had authorized his attorney to accept the \$100,000 settlement offer, and Plapinger answered, "yes." Moreover, Plapinger -- who was standing next to his attorney -- acknowledged that the settlement ended the case.

On cross-examination by Willingboro's new attorney, Michael Iaconelli, Esq., the mediator balked at disclosing "confidential type information . . . conversations [he] had with Mr. Zindler and [Mr. Plapinger]." Iaconelli responded, "it's our position that the parties have waived confidentiality on that issue." Franklin's attorney agreed that "Judge Bookbinder's order is broad enough to waive confidentiality with regard to the mediation." Finally, to satisfy the mediator's concerns, Iaconelli requested that the court issue "a standing order" requiring answers to questions that "concern discussions between [the mediator] [\*\*893] and Mr. Zindler and [Mr. Plapinger] . . . because we are waiving, as we've already done, based on the agreement of the parties and Judge Bookbinder's order, any confidentiality [\*\*\*17] on that issue." Willingboro's attorney then continued to question the mediator concerning communications made during the mediation.

On the second day of the hearing, Willingboro reversed course and moved for an order expunging "all confidential communications" disclosed, including those in the mediator's testimony and certification and Franklin's attorney's

certification, and barring any further mediation-communication disclosures. Willingboro maintained that mediation communications are privileged under the New Jersey Uniform Mediation Act (Mediation Act or Act) and [Rule 1:40-4](#). Willingboro argued that mediation communications [\*250] could not be presented in support of the motion to enforce the settlement.

Judge Hogan -- after reviewing the record in detail -- ruled that Willingboro had waived the mediation-communication privilege, and the hearing proceeded with the cross-examination of the mediator.

Franklin next called as a witness Michael Zindler, Willingboro's attorney at the mediation. Zindler testified that, on behalf of Willingboro, manager Scott Plapinger agreed to a settlement at the mediation, and that the terms included a payment of \$100,000 by Franklin in exchange for a release [\*\*\*18] and a discharge of the mortgage by Willingboro. He also stated that Franklin's November 9, 2007, letter accurately memorialized the terms of the settlement agreement.

Willingboro called Plapinger to the stand. Plapinger testified that his attorney and the mediator pressured him into agreeing to a settlement that he believed would be non-binding. He acknowledged that the mediator read the terms of the proposed settlement to him and that he "just . . . acquiesced and agreed to everything that was asked of [him]." According to Plapinger, "I said whatever I needed to say to extricate myself from an incredible uncomfortable, high pressure situation." Apparently not given to understatement, he also said, "I would have confessed to the Lindbergh kidnapping and the Kennedy assassination . . . I said yes to all of it."

Bruce Plapinger, Scott's cousin and a member of Willingboro's board of managers, testified to a telephone conversation he had with Scott during the mediation. Bruce asserted that he did not believe -- based on his conversations with Scott -- that the mediation proceeding would lead to a binding result.<sup>2</sup>

## [\*251] II.

Judge Hogan held that "a binding settlement agreement was reached as a result of [the] court-directed mediation." He credited the testimony of the mediator and Willingboro's former attorney, Michael Zindler, and discounted the testimony of Scott Plapinger, who -- Judge Hogan believed -- was suffering from "buyer's remorse." Judge Hogan found that "[e]ven though the [settlement] terms were not reduced to a formal writing at the mediation session," an agreement had been reached, as confirmed by the mediator and Zindler. Judge Hogan noted that Zindler testified that Franklin's November 9 letter had accurately set forth the parties' agreement. Last, the court determined that the validity of the settlement agreement rested on Plapinger's verbal assent to the [\*\*894] agreement in the presence of others, not on any unexpressed mental reservations he may have had. Thus, the court granted Franklin's motion to enforce the settlement as memorialized in its November 9 letter.

## III.

The Appellate Division affirmed the trial court's enforcement of [\*\*\*20] the settlement agreement.<sup>3</sup> [Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 421 N.J. Super. 445, 456, 24 A.3d 802 \(App.Div.2011\)](#). The appellate panel acknowledged that parties assigned to mediation may waive the privilege that protects from disclosure any communication made during the course of the mediation, citing [N.J.S.A. 2A:23C-5](#) and [Rule 1:40-4\(d\)](#). *Id. at 452, 24 A.3d 802*. The panel found that Willingboro "waived the confidentiality normally afforded to" mediation sessions and therefore the trial court properly proceeded to "determine whether the parties had reached a settlement." *Id. at 455, 24 A.3d 802*. Additionally, the panel rejected Willingboro's argument that the mediation rule, [R. 1:40-4\(i\)](#), "require[d] contemporaneous reduction [\*252] of the terms to writing and obtaining signatures on the document at the mediation." *Id. at 453, 24 A.3d 802*. Finally, the panel held that there was substantial credible evidence in the

<sup>2</sup> Also admitted into evidence was a videotaped deposition of Alan Braverman, [\*\*\*19] a business acquaintance of the parties, who testified to an earlier attempt to settle the dispute. The court found his testimony to be "essentially irrelevant."

<sup>3</sup> We do not address other issues raised before the trial court and Appellate Division, which are not germane to this appeal.

record to support the court's findings "that the parties had reached a settlement at the mediation, the terms of the agreement were as set forth in the November 9, 2007 letter prepared by defendants' attorney to Zindler and the court, and that Scott Plapinger's assent to the settlement was not the product [\*\*\*21] of coercion." [Id. at 455-56, 24 A.3d 802.](#)

This Court granted Willingboro's petition for certification. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 209 N.J. 97, 35 A.3d 680 (2012). Willingboro raises two issues in its petition: whether [Rule 1:40-4\(i\)](#) requires a settlement agreement reached at mediation to be reduced to writing and signed at the time of mediation, and whether Willingboro waived the mediation-communication privilege.

IV.

Willingboro urges this Court to hold that, under [Rule 1:40-4\(i\)](#), "a settlement reached at mediation [is not] enforceable" unless it is "reduced to writing at the time of the mediation and signed by the parties." Because the writing memorializing the terms of the settlement was forwarded by Franklin after the mediation and never signed or otherwise assented to by Willingboro, Willingboro argues that both the trial court and Appellate Division erred in enforcing the oral agreement. Moreover, Willingboro disputes the trial court's and Appellate Division's findings that it waived the mediation-communication privilege. Willingboro submits that it did [\*\*\*22] not waive the mediation-communication privilege "by presenting evidence in opposition" to the motion to enforce the oral agreement. Willingboro takes the position that it could not have waived the mediation-communication privilege, which "already had been destroyed by [Franklin's] disclosures" to the court through the mediator's certification. Willingboro posits that its response to Franklin's breach of the mediation-communication privilege was defensive and should not be taken as a waiver of the privilege.

[\*253] In contrast, Franklin maintains that nothing in [Rule 1:40-4\(i\)](#) requires that a [\*\*895] written settlement agreement resulting from mediation "be created or tendered on the actual day of the mediation" or that it be signed by the parties. Franklin argues that the Appellate Division correctly "determined that the three day gap between mediation and memorialization of the settlement was reasonable." Moreover, Franklin relies on the reasoning and holdings of the trial court and Appellate Division that Willingboro waived the mediation-communication privilege. It therefore requests that this Court uphold enforcement of the oral settlement agreement reached at mediation between the parties.

V.

In [\*\*\*23] construing the meaning of a court rule or a statute, our review is de novo, and therefore we owe no deference to the trial court's or Appellate Division's legal conclusions. [Murray v. Plainfield Rescue Squad](#), 210 N.J. 581, 584, 46 A.3d 1262 (2012) (citations omitted); see also [Manalapan Realty, L.P. v. Twp. Comm.](#), 140 N.J. 366, 378, 658 A.2d 1230 (1995) (citations omitted) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). On the other hand, we will defer to a trial court's factual findings, particularly those influenced by the court's opportunity to assess witness testimony firsthand, provided the findings are supported by "sufficient credible evidence in the record." [Brunson v. Affinity Fed. Credit Union](#), 199 N.J. 381, 397, 972 A.2d 1112 (2009) (internal quotation marks and citation omitted); see also [Cesare v. Cesare](#), 154 N.J. 394, 412, 713 A.2d 390 (1998) (citation omitted).

VI.

A.

Public policy favors the settlement of disputes. Settlement spares the parties the risk of an adverse outcome and the time and [\*254] expense -- both monetary and emotional -- of protracted litigation. See [State v. Williams](#), 184 N.J. 432, 441, 877 A.2d 1258 (2005). Settlement also preserves [\*\*\*24] precious and overstretched judicial resources. See [Herrera v. Twp. of S. Orange Vill.](#), 270 N.J. Super. 417, 424, 637 A.2d 526 (App.Div. 1993) ("There is a clear public policy in this state favoring settlement of litigation." (citation omitted)), *certif. denied*, 136 N.J. 28, 641 A.2d 1039 (1994).

Our court system encourages mediation as an important means of settling disputes. See [Williams, supra, 184 N.J. at 446](#) (citations omitted). Indeed, our court rules provide for Complementary Dispute Resolution Programs, which are intended to enhance the "quality and efficacy" of the judicial process. [R. 1:40-1](#). In particular, [Rule 1:40-4\(a\)](#) authorizes, in certain cases, a Superior Court judge to "require the parties to attend a mediation session at any time following the filing of a complaint."

Mediation is governed by our court rules, [R. 1:40 to 1:40-12](#), the Mediation Act, [N.J.S.A. 2A:23C-1 to -13](#), and our rules of evidence, [N.J.R.E. 519](#). The success of mediation as a means of encouraging parties to compromise and settle their disputes depends on confidentiality -- a point recognized in both our jurisprudence and our court rules. See [Williams, supra, 184 N.J. at 446-47, 877 A.2d 1258; R. 1:40-4\(d\)](#).

[Rule 1:40-4\(d\)](#) provides: "Unless the **\*\*\*25** participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone **\*\*896** who was not a participant in the mediation." The rule recognizes that without assurances of confidentiality, "disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken." [Williams, supra, 184 N.J. at 447, 877 A.2d 1258](#) (quoting *Final Report of the Supreme Court Task Force on Dispute Resolution* 23 (1990)). Confidentiality promotes candid and unrestrained discussion, a necessary component of any **\*255** mediation intended to lead to settlement. [Id. at 446-47, 877 A.2d 1258](#) (citations omitted). To this end, our court and evidence rules and the Mediation Act confer a privilege on mediation communications, ensuring that participants' words will not be used against them in a later proceeding.

B.

[Rule 1:40-4\(c\)](#) provides that a communication made during the course of mediation is privileged:

A mediation communication is not subject to discovery or admissible in evidence in any subsequent proceeding except as **\*\*\*26** provided by the New Jersey Uniform Mediation Act, [N.J.S.A. 2A:23C-1 to -13](#). A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence.

Although our court rule does not define "mediation communication," the Mediation Act does. [N.J.S.A. 2A:23C-2](#) broadly defines a "[m]ediation communication" as any "statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."

The Mediation Act and our rules of evidence both, in identical language, confer a privilege on mediation communications. [N.J.S.A. 2A:23C-4\(a\)](#) and [N.J.R.E. 519\(a\)\(a\)](#) provide: "Except as otherwise provided . . . a mediation communication is privileged . . . and shall not be subject to discovery or admissible in evidence in a proceeding unless *waived* or precluded as provided by . . . [\[N.J.S.A. 2A:23C-5\]](#)." (Emphasis added). [N.J.S.A. 2A:23C-4\(b\)](#) and [N.J.R.E. 519\(a\)\(b\)](#) specifically set forth the breadth of the privilege:

b. In a proceeding, the following privileges shall apply:

- (1) a mediation party may refuse **\*\*\*27** to disclose, and may prevent any other person from disclosing, a mediation communication.
- (2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

....

**\*256** Additional support for the broad scope of the privilege is found in the drafters' commentary to the model Uniform Mediation Act. The drafters explained that the mediation-communication privilege allows a participant "to refuse to disclose and to prevent another from disclosing particular communications." Nat'l Conference of Comm'rs on Unif. State Laws, *Uniform Mediation Act* § 4, comment 4 (2003) (emphasis added) [hereinafter *UMA Drafters' Comments*], available at [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf). The drafters



understood that the ability to block another from disclosing mediation communications "is critical to the operation of the privilege" and that the "parties have the greatest blocking power." *Ibid.*

**[\*\*897]** C.

The mediation-communication privilege is not absolute. Our court and evidence rules and the Mediation Act carve out limited exceptions to the privilege, two of which are pertinent to this case. The first **[\*\*\*28]** is the signed-writing exception, which allows a settlement agreement reduced to writing and properly adopted by the parties to be admitted into evidence to prove the validity of the agreement.

[Rule 1:40-4\(i\)](#) specifies the manner in which settlement agreements are to be memorialized "[i]f the mediation results in the parties' total or partial agreement." It provides that the agreement "shall be reduced to writing and a copy thereof furnished to each party." *Ibid.* [Rule 1:40-4\(i\)](#) also provides that "[t]he agreement need not be filed with the court, but if formal proceedings have been stayed pending mediation, the mediator shall report to the court whether agreement has been reached." Although [Rule 1:40-4\(i\)](#) does not state specifically that a written agreement must be signed by the parties, a publication prepared by the Civil Practice Division makes clear that any settlement agreement should be reduced to writing and signed. Civil Practice Div., *Mediator's Tool Box: A Case Management Guide for Presumptive Roster Mediators* 11 (Nov. 2011), available at [http://www.judiciary.state.nj.us/civil/mediators\\_toolbox.pdf](http://www.judiciary.state.nj.us/civil/mediators_toolbox.pdf) **[\*257]** ("Before the parties leave the mediation, the mediator should insist that a short **[\*\*\*29]** form settlement agreement (term sheet) be drafted by one of the attorneys and signed by the parties at the mediation table.").

Although our court rule may be silent about whether a signed agreement is necessary, the Mediation Act and our evidence rules are not. [N.J.S.A. 2A:23C-6\(a\)\(1\)](#) and [N.J.R.E. 519\(c\)\(a\)\(1\)](#) both provide that "an agreement evidenced by a record *signed by all parties to the agreement*" is an exception to the mediation-communication privilege. (Emphasis added). Because a signed agreement is not privileged, it therefore is admissible to prove and enforce a settlement.

Although neither the Mediation Act nor [N.J.R.E. 519](#) specifies what constitutes an "agreement evidenced by a record" and "signed," the *UMA Drafters' Comments* give insight regarding the intended scope of those words. The *UMA Drafters' Comments* report that those words apply not only to "written and executed agreements," but also to "those recorded by tape . . . and ascribed to by the parties on the tape." *UMA Drafters' Comments, supra*, at § 6(a)(1), comment 2. For example, "a participant's notes about an oral agreement would not be a signed agreement." *Ibid.* In contrast, a "signed agreement" would include "a **[\*\*\*30]** handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement." *Ibid.*

D.

The second exception to the mediation-communication privilege relevant to this case is waiver. The privilege may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

- (1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
- (2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

**[\*258]** [[N.J.S.A. 2A:23C-5\(a\)](#); [N.J.R.E. 519\(b\)](#).]

"Waiver is the voluntary and intentional relinquishment of a known **[\*\*898]** right." [Knorr v. Smeal, 178 N.J. 169, 177, 836 A.2d 794 \(2003\)](#) (citation omitted). A valid waiver requires not only that a party "have full knowledge of his legal rights," but also that the party "clearly, unequivocally, and decisively" surrender those rights. *Ibid.* Importantly, [N.J.S.A. 2A:23C-5\(a\)](#) and [N.J.R.E. 519\(b\)](#) mandate that the waiver be express. The *UMA Drafters' Comments* explain that "[t]he rationale for requiring explicit waiver is to safeguard **[\*\*\*31]** against the possibility of inadvertent waiver." *UMA Drafters' Comments, supra*, at § 5(a)-(b), comment 1. Moreover, waivers "conducted on the record" do not present the problem of proving "what was said." *Ibid.*

VII.

A.

We now apply these principles of law to the facts before us. First, had the parties reduced to writing the terms of the agreement and affixed their signatures to the document at the conclusion of the mediation, Franklin would have been able to seek enforcement of the settlement with evidence that fell within an exception to the mediation-communication privilege. [N.J.S.A. 2A:23C-6\(a\)\(1\)](#); [N.J.R.E. 519](#) (noting that "an agreement evidenced by a record signed by all parties to the agreement" is an exception to the mediation-communication privilege). But here, the signed-writing exception does not come into play because, early in the proceedings, Willingboro did not seek to bar enforcement of the settlement based on the lack of a signed written agreement. Moreover, if Willingboro intended to rely on the signed-writing doctrine, then it was obliged to stand by this rule and not litigate the oral agreement by waiving the mediation-communication privilege.

Second, we conclude that **\*\*\*32** the certifications filed by Franklin's attorney and the mediator in support of Franklin's motion to **\*259** enforce the oral agreement disclosed privileged mediation communications. The certifications refer to statements made during the mediation and therefore fall squarely within the definition of a "mediation communication" contained in [N.J.S.A. 2A:23C-2](#).

Moreover, the Mediation Act and our evidence rules generally prohibit a mediator from making an "oral or written communication" to a court other than to inform the court whether a settlement was reached. [N.J.S.A. 2A:23C-7\(a\)-\(b\)](#); [N.J.R.E. 519\(d\)](#). Here, the mediator went far beyond merely communicating to the court that the parties had reached a settlement. The mediator certified to the accuracy of Franklin's November 9 letter, which set forth in eight numbered paragraphs the terms of an oral agreement between the parties. Franklin's letter revealed mediation communications -- not only Willingboro's oral assent to the settlement, but also its specific agreement to individual terms. By validating the contents of Franklin's letter, the mediator breached the privilege.

The terms of the settlement rested on privileged communications between the **\*\*\*33** parties and mediator. However, Willingboro did not consent in advance to the disclosure of mediation communications to the court.

In the absence of a signed settlement agreement or waiver, it is difficult to imagine any scenario in which a party would be able to prove a settlement was reached during the mediation without running afoul of the mediation-communication privilege. The United States Court of Appeals for the Third Circuit reached a similar conclusion under its Local Appellate Rule (LAR) 33.5. [Beazer East, Inc. v. Mead Corp.](#), 412 F.3d 429, 434-36 **\*\*899** (3d Cir.2005) (citing 3d Cir. L.A.R. 33.5 (1995)), *cert. denied*, 546 U.S. 1091, 126 S. Ct. 1040, 163 L. Ed. 2d 857 (2006).

In *Beazer*, the plaintiff attempted to enforce an alleged oral agreement made by the parties during an appellate mediation. [Id. at 434](#). Like the mediation-communication privilege in [N.J.S.A. 2A:23C-4](#) and [N.J.R.E. 519\(a\)](#), LAR 33.5(c) provides that no one participating in the mediation session "may disclose 'statements **\*260** made or information developed during the mediation process.'" [Beazer, supra](#), 412 F.3d at 434-35 (quoting 3d Cir. L.A.R. 33.5(c) (1995)). LAR 33.5(d) "further provides that 'if a settlement is reached, **\*\*\*34** the agreement shall be reduced to writing and shall be binding upon all parties to the agreement.'" [Id. at 435](#) (quoting 3d Cir. L.A.R. 33.5(d) (1995)). The Third Circuit concluded that allowing oral agreements reached at mediation to bind the parties "would seriously undermine the efficacy of the Appellate Mediation Program by compromising the confidentiality of settlement negotiations." [Id. at 434](#). The policy reasons supporting this approach are the encouragement of uninhibited discussion and the avoidance of contested hearings to determine whether the parties reached a settlement. See [id. at 435-36](#) (citation omitted). Ultimately, the plaintiff in *Beazer* could not "prove the existence or terms of the disputed oral settlement without violating this provision's broadly stated [mediation-communication-disclosure] prohibitions." [Id. at 435](#).

Third, without the use of communications made during the mediation, Franklin likely could not have proved the existence of a settlement. Despite Franklin's violation of the mediation-communication privilege in seeking to enforce the oral settlement agreement reached at mediation, Willingboro did not timely move to strike or suppress the disclosures **\*\*\*35** of the mediation communications. Instead, Willingboro proceeded to litigate whether it had,



in fact, entered into a binding, oral settlement agreement. In taking this tack, Willingboro followed Franklin's approach and disclosed mediation communications. Willingboro breached the mediation-communication privilege by appending to its opposition papers Scott Plapinger's certification, which revealed the substance of mediation communications. Additionally, Willingboro then engaged in the discovery process, deposing the mediator and participating in four other depositions that trenched on the mediation-communication privilege.

We reject Willingboro's assertion that its own disclosures of mediation communications were permitted by [N.J.S.A. 2A:23C-5\(b\)](#) [\*261] and [N.J.R.E. 519\(b\)\(b\)](#). That statute and its corollary evidence rule provide: "A person who discloses . . . a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under [\[N.J.S.A. 2A:23C-4\]](#), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure." This language suggests that the disclosure of some privileged communications does not necessarily [\*\*\*36] open the door to disclosure of all privileged communications.

However, in this case, Willingboro expressly waived the mediation-communication privilege in responding to the motion to enforce the oral settlement agreement. In defending against Franklin's violation of the privilege, Willingboro did not have to make further disclosures of mediation communications. It merely had to invoke the protections of the Mediation Act and our evidence rules, which provide that "a mediation party may . . . prevent any other person from disclosing [a mediation communication]." [N.J.S.A. 2A:23C-4\(b\)\(1\)](#); [\*\*900] [N.J.R.E. 519\(a\)\(b\)\(1\)](#). Instead, Willingboro engaged in unrestricted litigation over the validity of the oral agreement, which involved its own wholesale disclosures of mediation communications. Willingboro completely opened the door; it cannot now find shelter in [N.J.S.A. 2A:23C-5\(b\)](#) and [N.J.R.E. 519](#).

B.

The mediation-communication privilege "may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation." [N.J.S.A. 2A:23C-5\(a\)](#); [N.J.R.E. 519\(b\)\(a\)](#). Although Franklin instituted the enforcement litigation and fired the first shot that breached the privilege, [\*\*\*37] Willingboro returned fire, further shredding the privilege. At the mediator's deposition, Willingboro agreed to "waive any issues of confidentiality with regard to the mediation process." When the mediator declined to testify in the absence of a court order, Willingboro gave its unequivocal consent to having Judge Bookbinder direct [\*262] the mediator to respond to questions that touched on communications made during the mediation.

When the mediator testified on the first day of the hearing concerning Franklin's motion to enforce the oral settlement agreement, Willingboro's attorney insisted that the mediator respond to questions that the mediator believed would elicit "confidential type information." Franklin's attorney told the court that "Judge Bookbinder's order is broad enough to waive confidentiality with regard to the mediation." Willingboro's attorney was evidently in total agreement on this issue. Indeed, Willingboro's attorney asked the court to order the mediator to answer questions about mediation discussions between the mediator and Willingboro's representatives, attorney Zindler and company manager Plapinger. Willingboro's attorney also stated that his client had waived the issue [\*\*\*38] of confidentiality.

Only after filing a certification in opposition to enforcement of the oral agreement, participating in five discovery depositions, and one day of an evidentiary hearing -- and after myriad breaches of the mediation-communication privilege -- did Willingboro attempt to invoke the privilege on the second hearing date. However, by then, Willingboro had passed the point of no return. Willingboro had expressly waived the privilege, [N.J.S.A. 2A:23C-5\(a\)](#) and [N.J.R.E. 519\(b\)\(a\)](#) -- it had "clearly, unequivocally, and decisively" surrendered its right to object to the admission of evidence regarding mediation communications at the evidentiary hearing. [Knorr, supra, 178 N.J. at 177, 836 A.2d 794](#) (citing [Country Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd.](#), 190 N.J. Super. 376, 380, 463 A.2d 960 (App.Div.1983)). Willingboro intentionally elected not to invoke the privilege in a timely manner.

VIII.

In summary, if the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation [\*263] comes to a close. In those cases in which the complexity of the settlement terms cannot be drafted by the time the [\*\*\*39] mediation session was

expected to have ended, the mediation session should be continued for a brief but reasonable period of time to allow for the signing of the settlement. We also see no reason why an audio- or video-recorded agreement would not meet the test of "an agreement evidenced by a record signed by all parties to the agreement" under [N.J.S.A. 2A:23C-6\(a\)\(1\)](#) and [N.J.R.E. 519\(c\)\(a\)\(1\)](#). See *UMA Drafters' Comments, supra*, at § 6, comment 2. To be **\*\*\*901** clear, going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable.

The mediation-communication privilege is intended to encourage candid and uninhibited settlement discussions. The rule requiring a signed, written agreement is intended to ensure, to the extent humanly possible, that the parties have voluntarily and knowingly entered into the settlement and to protect the settlement against a later collateral attack. A settlement in mediation should not be the prelude to a new round of litigation over whether the parties reached a settlement. The signed, written agreement requirement -- we expect -- will greatly minimize the potential for litigation.

Last, this case serves **\*\*\*40** as a reminder that a party seeking the protection of a privilege must timely invoke the privilege. A party that not only expressly waives the mediation-communication privilege, but also discloses privileged communications, cannot later complain that it has lost the benefit of the privilege it has breached.

IX.

For the reasons expressed, we affirm the judgment of the Appellate Division, which upheld the Chancery Division's confirmation of the oral settlement agreement in this case.

**\*264** CHIEF JUSTICE RABNER; JUSTICES LaVECCHIA, HOENS, and PATTERSON; and JUDGE RODRÍGUEZ (temporarily assigned) join in JUSTICE ALBIN's opinion. JUDGE CUFF (temporarily assigned) did not participate.

**GLENN A. GRANT**  
Administrative Director of the Courts

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**TO: Assignment Judges  
Trial Court Administrators**

**DIRECTIVE #16-23**

Questions may be directed to  
609-815-2900, ext. 55350.

**FROM: Glenn A. Grant, Administrative Director**

**SUBJ: Family – Parenting Coordinator Program – Guidelines; Forms**

**DATE: September 1, 2023**

This directive promulgates statewide operational guidelines and forms for the Parenting Coordinator Program as approved by the Supreme Court. New Court Rule 5:8D, effective September 1, 2023, establishes the Parenting Coordinator Program, defines the role of the Parenting Coordinator, and establishes the appointment process for rostered and non-rostered Parenting Coordinators.

A Parenting Coordinator is a neutral person appointed by the court to facilitate the timely resolution of day-to-day parenting issues that arise within the context of family life when the parties cannot resolve issues on their own. Using the Order Appointing Parenting Coordinator, the court may appoint a Parenting Coordinator in dissolution (FM) and non-dissolution (FD) matters after the entry of (1) a pendente lite order or a temporary or final custody order, and (2) a parenting plan.

Parenting Coordinators can be selected from the Judiciary's Roster of Statewide Approved Parenting Coordinators ("Roster"), or the court may approve the appointment of a Parenting Coordinator who is not on the Roster if the parties consent. To be placed on the Roster, applicants must meet the qualifications and training requirements set forth in the attached Parenting Coordinator Guidelines. They must also submit the attached Application for Admission to the Roster of Statewide Approved Parenting Coordinators. Once on the Roster, Parenting Coordinators may change or update their profile by submitting a Roster of Statewide Parenting Coordinators Change/Update Form.

The Roster and forms will be posted online at [njcourts.gov](http://njcourts.gov). A training program that meets the requirements set forth in R. 5:8D and the attached Parenting Coordinator Guidelines is being planned.

Attachments:

1. Parenting Coordinator Guidelines (Rule 5:8D)
2. Order Appointing Parenting Coordinator (CN:13005)
3. Application for Admission to the Roster of Statewide Approved Parenting Coordinators (CN:13004)
4. Roster of Statewide Parenting Coordinators Change/Update Form (CN:13006)

cc: Chief Justice Stuart Rabner  
Family Presiding Judges  
Steven D. Bonville, Chief of Staff  
AOC Directors and Assistant Directors  
Clerks of Court  
Special Assistants to the Administrative Director  
Family Division Managers and Assistant Division Managers  
Nancy L. Manuele, Chief, Family Practice

# Attachment 1

## Parenting Coordinator Guidelines

## **Parenting Coordinator Guidelines (Rule 5:8D)**

These Parenting Coordinator Guidelines are issued by the Administrative Director of the Courts pursuant to Rule 5:8D.

### **Guideline 1. Appointment**

The court may appoint a Parenting Coordinator pursuant to Rule 5:8D. Parenting Coordinators do not serve as custody or parenting plan evaluators. In cases where a current temporary or final domestic violence restraining order exists pursuant to the Prevention of Domestic Violence Act (or equivalent law from another jurisdiction), the court may appoint a Parenting Coordinator at the sole election of the victim. The victim has the option to terminate the Parenting Coordinator process without the filing of a formal motion. Otherwise, termination of the Parenting Coordinator process shall be addressed pursuant to paragraph K of Guideline 5. Each party shall be permitted to briefly interview potential Parenting Coordinator candidates before the court makes the appointment.

### **Guideline 2. Authority of the Court and the Parenting Coordinator**

#### **A. Authority of the Court**

The appointment of a Parenting Coordinator shall not affect the court's jurisdiction in any aspect of the case, including custody, parenting time or support, and its management and control of the case.

B. Authority of the Parenting Coordinator

1. The Order of Appointment shall:

- a. authorize the Parenting Coordinator to facilitate discussion between the parties,
- b. authorize the Parenting Coordinator to make recommendations to the parties in the event the parties cannot reach an agreement, and
- c. indicate that the Parenting Coordinator's recommendations will be binding upon the parties unless a party objects and then files a timely motion or Order to Show Cause.

2. The Parenting Coordinator shall not have authority to make recommendations regarding financial issues or to modify legal and/or physical custody. The Parenting Coordinator may make recommendations to facilitate parenting time, including but not limited to the following:

- a. Time, place, and manner of pick-up and drop-off of child,
- b. Childcare arrangements,
- c. Minor or temporary alterations in parenting schedules for weeknight, weekend, holidays, vacation, and special events that will not substantially alter the parenting plan,
- d. Dates for summer vacation,

- e. The parents' schedules and conditions of phone or other contact (e.g., text and email) with the child while in the other parent's custody,
- f. Selection and scheduling of activities and resolving conflicts between parties concerning the child's participation in recreation, enrichment, and extracurricular activities/programs,
- g. Referrals to other professionals to improve family functioning, including recommendations for custody or other focused evaluations,
- h. A child's travel and passport arrangements,
- i. Equipment and personal possessions of the child, including movement of these items between households for the child's use,
- j. Clarification of provisions in parenting plans to address inadvertent gaps that may lead to conflict between the parties including defining specific hours for pickup/drop-off and transportation during holidays,
- k. Information exchanges including school, health, social activities, and communication about the child between the parties,
- l. Consistency in child disciplinary matters,
- m. Non-permanent significant changes in a child's appearance including haircuts, hair color changes, dress code, and manicures,



n. Unless limited by a domestic violence restraining order, how the parties may communicate with each other, with the child, and in the child's presence, and

o. All other issues agreed upon by the parties and the Parenting Coordinator to help effectuate resolution of custody and parenting time issues.

Guideline 3. Qualifications of Parenting Coordinators on the Statewide Roster of Approved Parenting Coordinators

A. Process

The Administrative Director of the Courts, or the Director's designee, shall be responsible for reviewing and acting on all Parenting Coordinator applications. Applicants must complete an application form posted on the Judiciary's website ([www.njcourts.gov](http://www.njcourts.gov)). Applicants who meet the professional and training requirements set forth in this Directive shall be added to the Roster of Statewide Approved Parenting Coordinators. The roster shall be maintained by the Administrative Director of the Courts and shall be posted on the Judiciary's website.

Parenting Coordinators on the Statewide Roster must annually submit to the Administrative Director of the Courts proof that they continue to be licensed and in good standing in their respective professions.

## B. Professional Qualifications

### 1. Retired Superior Court Judges and Currently Licensed

Attorneys. Retired Superior Court judges and currently licensed attorneys must be licensed to practice law and be in good standing with the State of New Jersey Board of Admissions to the Bar.

### 2. Mental Health Professionals. Mental health professionals must

be licensed and be in good standing in the fields of psychology, psychiatry, or social work in the State of New Jersey with the appropriate State Board or Agency.

### 3. Alternative or Complementary Dispute Resolution

Professionals. Professionals in alternative or complementary dispute resolution occupations must be in good standing in their field.

## C. Training Requirements

### 1. General. All Parenting Coordinators shall have completed a

minimum of forty (40) hours of training pursuant to the requirements of subparagraph (C)(3) of Guideline 3.

### 2. Continuing Training. All Parenting Coordinators shall annually

attend four (4) hours of continuing education and shall file with the Administrative Office of the Courts, as appropriate, an annual certification of compliance. To meet the requirement, this continuing education shall include instruction in ethical issues associated with Parenting Coordination practice and should cover at least one of

the following: case management skills; Parenting Coordination; and resolution concepts and skills.

3. Parenting Coordination Course Content. The forty (40) hours of classroom instruction for Parenting Coordinators shall include basic mediation skills as well as at least sixteen (16) hours of specialized Parenting Coordination training, which should cover: family and child development; psychological issues in separation and divorce; family dynamics; New Jersey family law; high-conflict family dynamics; parenting coordination process; techniques; domestic violence; the impact of divorce on children at varying developmental levels; diversity, inclusion, and cultural competency; and community resources.

4. Domestic Violence Training. Where there is a domestic violence restraining order, the parenting coordinator must also have completed additional training on domestic violence components, including: power and control; progression of abuse; the cycle of violence; and issues related to the victim and to the perpetrator.

#### Guideline 4. Exemptions for Non-Roster Parenting Coordinators

The court may approve the appointment of an individual to serve as a Parenting Coordinator who is not on the Roster of Statewide Approved Parenting Coordinators only with the consent of the parties. Non-Roster Parenting Coordinators shall not be appointed in matters where there is a domestic violence

restraining order. Parenting Coordinators who are not on the roster must follow these Guidelines and are only exempted from certain provisions if stated below or by court order:

A. Qualifications and Training Requirements. Parenting Coordinators appointed by consent of the parties are exempt from the qualification requirements set forth in paragraph (B) of Guideline 3 and the training requirements set forth in paragraph (C) of Guideline 3.

B. Conflicts of Interest and Impartiality. Depending upon the relationship (e.g., relative, trusted friend) of the non-roster Parenting Coordinator to the parties, the Parenting Coordinator may be exempt from Guideline 6 regarding conflicts of interest. However, all Parenting Coordinators must be impartial.

C. Reporting of Suspected Domestic Violence or Child Abuse. Although non-roster Parenting Coordinators shall not be appointed where there is a domestic violence restraining order, the Parenting Coordinator shall contact the court to address any safety concerns relating to a party or child. Additionally, domestic violence records and names and addresses of victims or alleged victims of domestic violence or sexual offenses are confidential. The Parenting Coordinator shall not disclose such information. (See Court Rule. 1:38-3(d)(9) and -3(d)(10)).

In New Jersey, any person having reasonable cause to believe that a child has been subjected to abuse should immediately call 1-877 NJ ABUSE (1-877-652-2873). If the child is in immediate danger, the Parenting Coordinator should also call 911.

Guideline 5. Procedures

A. The Order of Appointment shall specify the authority of the Parenting Coordinator and indicate the issues on which the Parenting Coordinator may make recommendations.

B. On each issue submitted to the Parenting Coordinator, each party will have an opportunity to be heard.

C. Parenting Coordinators shall not have any communication with the court unless mutually agreed to by the parties or unless required by statute, court rule, or the appointment order. Absent mutual agreement, either party may file an application to permit the Parenting Coordinator to communicate with the court. Such communication must be on notice to the parties.

D. A term limit for the appointment of a Parenting Coordinator shall be set forth in the order, as fixed by the court or agreed to by the parties, which term shall commence upon the parties' retention of the Parenting Coordinator. The term of appointment may be extended by the court on good cause shown or by agreement of the parties.

E. A Parenting Coordinator shall document in writing all agreements made by the parties and all recommendations by the Parenting Coordinator, which shall be communicated simultaneously to both parties. In time sensitive circumstances, recommendations may be made orally and must be communicated to both parties, followed by written confirmation simultaneously communicated to both parties.

F. The Parenting Coordinator shall hold an initial meeting with the parties, either jointly or separately, at the discretion of the Parenting Coordinator, and in compliance with limitations set forth in any domestic violence restraining order. The Parenting Coordinator shall define and describe for the parties in the retainer agreement, the role, limitations, and fees of the Parenting Coordinator, which shall be consistent with the Order of Appointment.

G. Complaint Procedure. Except as provided by other applicable law, a party having a complaint about a Parenting Coordinator shall submit a written letter to the Parenting Coordinator detailing the complaint, with a copy: to the other party (or where there is a domestic violence restraining order, the Parenting Coordinator shall serve the copy on the other party; or to both attorneys (if any), and to the attorney for the child (if any)). The Parenting Coordinator shall within ten (10) days of receipt of a written complaint provide a written response to both parties and the attorneys, subject to the other provisions herein. Thereafter, the

Parenting Coordinator at their discretion may schedule a meeting or conference call with the attorneys or with the attorneys and the parties or self-represented litigants in an effort to resolve the complaint. In situations where the complaint is not resolved by this process, the dissatisfied party may file a motion with the court.

H. Compensation of Parenting Coordinator. Parenting Coordinators shall be compensated in accordance with their stated fees and for expenses incurred, which shall be clearly set forth in the Order of Appointment, as well as in the Retainer Agreement and/or in the information and materials provided to the parties at the initial conference. The parties shall pay the apportioned percentage either as agreed upon or determined by the court and set forth in the Order of Appointment.

I. Pay Disputes. Parenting Coordinators that have not been timely paid in accordance with the Order of Appointment may bring an action to compel payment. Such action shall be made in the county in which the Order of Appointment originated and shall be commenced with the filing of a complaint in the Law Division. Nothing in these Guidelines prevents either party or the court from allocating, modifying, or enforcing the parties' respective obligations to pay the Parenting Coordinator pursuant to the Order of Appointment in the Family Part matter.

J. Parenting Coordinator Retainer Agreement/Fees. The Parenting Coordinator's retainer agreement shall set forth the fees, costs and retainer associated with the appointment. The retainer agreement must include the following information:

1. A description of the services and disbursements for which the parties will be responsible and how they will be billed, the Parenting Coordinator's hourly billing rate, the amount of retainer required, and how the retainer will be applied and replenished,
2. The method by which the fee will be computed,
3. The billing frequency, which shall be no less frequently than every ninety (90) days, provided services were rendered in that period, and
4. The payment due date.

K. Termination of Parenting Coordinator's Appointment.

1. The court or the Parenting Coordinator may terminate the appointment in the following instances:
  - a. the services of the Parenting Coordinator do not meet the needs of the family,
  - b. the child has reached the age of majority,
  - c. the parties stipulate to termination, or



d. the Parenting Coordinator's fees are not being paid or are not being paid at a time specified by the Order of Appointment.

2. Either party may file a motion to terminate the Parenting Coordinator's appointment if the Parenting Coordinator exceeded their mandate, acted in a manner inconsistent with the approved procedures or violated professional conduct, provided the approved complaint procedure has been utilized. If the Parenting Coordinator seeks to withdraw, the request shall be granted absent extraordinary circumstances.

Guideline 6. Conflicts of Interest and Impartiality

A. Parenting Coordinators shall be subject to the professional standards of their respective professions.

B. Parenting Coordinators shall be impartial and shall not discriminate based on race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or disability. Parenting Coordinators shall withdraw from a case if they determine that they cannot act in an impartial manner. Parenting Coordinators have a primary duty to be impartial and to advise all parties of any circumstances that create the appearance of possible bias, prejudice, or inability to remain impartial.

C. Parenting Coordinators shall neither give nor accept a gift, favor, loan, or other item of value from any party having an interest in the Parenting

Coordination process, subject to potential reasonable exemptions for non-roster Parenting Coordinators.

D. Parenting Coordinators shall not serve in a manner that presents a conflict of interest. A conflict of interest arises when any relationship between the Parenting Coordinator and either or both parties, or the subject matter of the dispute compromises the Parenting Coordinator's impartiality. Parenting Coordinators shall disclose potential conflicts of interest as soon as practical after the Parenting Coordinator becomes aware of the interest or relationship giving rise to the potential conflict.

E. Parenting Coordinators shall not create a conflict of interest by providing any service to interested parties that is not directly related to the Parenting Coordination process.

F. A conflict of interest shall include, but is not limited to the following:

1. The Parenting Coordinator has a personal bias or prejudice concerning a party or a party's lawyer,
2. The Parenting Coordinator has personal knowledge of the parties, the child or of disputed evidentiary facts concerning the proceeding, or
3. The Parenting Coordinator, or a partner or associate in the Parenting Coordinator's firm, served as lawyer, therapist, consultant, coach or in

any other mental health role or other representative capacity for the parties or child.

G. Parenting Coordinators disqualified by the terms of these Guidelines may not avoid disqualification by disclosing the conflict of interest and securing the parties' consent to a waiver of the conflict.

H. Parenting Coordinators shall attend to all matters in a timely manner.

I. Parenting Coordinators shall not serve in dual sequential roles in a matter including as attorney, guardian ad litem, mediator, arbitrator, custody evaluator, therapist, coach, consultant, or other mental health role for either party or a child in the matter. Parenting Coordinators should attempt to facilitate resolution of issues by agreement of the parties and shall not act in a formal mediator role or as a therapist, evaluator, or legal advisor. A Parenting Coordinator's attempt to resolve an issue does not disqualify them from making a recommendation on an issue that remains unresolved.

#### Guideline 7. Confidentiality/Manner of Communications

A. All communications by the parties or their attorneys with the Parenting Coordinator shall not be confidential. All communications by third parties with the Parenting Coordinator shall not be confidential, unless the communication is made from a third party who has a privileged relationship with a

party or a child, in which case the issue of whether the communication remains privileged/confidential shall be explicitly addressed by the parties and the Parenting Coordinator and adjudicated by the court if unresolved. A Parenting Coordinator shall expressly advise the parties regarding the terms of this paragraph.

B. The Parenting Coordinator may communicate with a party, their attorney, or any mutually agreed upon third party on an *ex parte* (meaning one-on-one, private communication, not in the presence of the other party) basis to the extent necessary to obtain information relevant to the Parenting Coordinator's role. The fact of such communication shall be made known to the parties as determined by the Parenting Coordinator. The Parenting Coordinator may meet with the child upon the expressed written consent of all parents/legal guardians if the Parenting Coordinator believes that this will aid in issuing appropriate recommendations.

C. The parties shall have the right to initiate or receive one-on-one communication with the Parenting Coordinator. Any such one-on-one communications shall be made known to the other party, as soon thereafter as possible, in writing in a manner consistent with the Parenting Coordinator's protocols. Any party or their attorney may communicate in writing with the Parenting Coordinator. Copies of such communications will be provided to the other party unless the Parenting Coordinator determines otherwise. In those

instances, the Parenting Coordinator will determine how they will convey the communication with the other parent consistent with the protocols established by the Parenting Coordinator. Copies of any documents, tape recordings or other electronic material that one party gives to the Parenting Coordinator must also be given to the other party unless the Parenting Coordinator determines otherwise. In those instances, the Parenting Coordinator will determine how the materials will be conveyed to the other party. If a crisis arises that will affect a child, the Parenting Coordinator may make a recommendation on an emergent basis, either in person or by way of an emergency conference call or by electronic means, to all parties. In cases where there is a domestic violence restraining order between the parties, communication shall be consistent with the limitations of such order.

## Attachment 2

Order Appointing Parenting Coordinator -  
CN 13005

Superior Court of New Jersey  
Chancery Division - Family Part  
County of \_\_\_\_\_  
Docket Number: \_\_\_\_\_

\_\_\_\_\_  
Plaintiff,

v.

\_\_\_\_\_  
Defendant,

**Civil Action  
Order Appointing  
Parenting Coordinator**

**This matter** having been opened to the Court to appoint a Parenting Coordinator to assist in implementing the parties' (select one):

- court ordered custody and parenting plan, or
- agreed upon custody and parenting plan.

The appointment is made (select one)

- upon consent of the parties, or
- pursuant to a court hearing, and

The Court having considered the (select one)

- testimony and evidence presented, or
- certifications submitted by the parties and the argument of counsel,

**And,**

The Court having made (select one)

- oral findings of good cause, or
- written findings of good cause;

**It is on this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, Ordered that**

1. Appointment: (full name) \_\_\_\_\_, located at \_\_\_\_\_, New Jersey (phone: \_\_\_\_\_), is hereby appointed Parenting Coordinator for a term of (date/event) \_\_\_\_\_.

The Parenting Coordinator was selected:

- from the Statewide Roster of Approved Parenting Coordinators (**I446**) or

- not selected from the Statewide Roster of Approved Parenting Coordinators and instead appointed with the consent of the parties (I447).

2. Fees and Retainer: The Parenting Coordinator will be compensated at the hourly rate of \$\_\_\_\_\_ consistent with their retainer agreement. A joint retainer of \$\_\_\_\_\_ will be paid to the Parenting Coordinator and the parties shall sign the Parenting Coordinator's retainer agreement, a copy of which is annexed to this Order as Schedule A, within \_\_\_ days of this Order. The parties will share the Parenting Coordinator's fees as follows: Plaintiff \_\_\_% and Defendant \_\_\_% subject to a reallocation by application to the court. The court may seek input from the Parenting Coordinator in the event of a request for reallocation of fees and costs.
3. Role of Parenting Coordinator: The Parenting Coordinator shall assist in implementing the parties' parenting plan by facilitating the resolution of day-to-day parenting issues in a timely manner when the parties cannot resolve these issues themselves, including facilitating communication and agreement whenever possible, assisting the parties to learn strategies to avoid conflict regarding their child, reduce misunderstanding, clarify priorities, explore possibilities for compromise, develop methods of communication to promote cooperation in parenting, and making recommendations to the parties to achieve these goals. The Parenting Coordinator does not function as an attorney, guardian ad litem, counselor, therapist, mediator, arbitrator, custody evaluator, coach, consultant or mental health provider for the parties, child, or family.
4. No Confidentiality: Communications by the parties or their attorneys with the Parenting Coordinator are evidential, and shall not be deemed confidential. All communications from third parties to Parenting Coordinators shall not be deemed confidential, unless the communication is made from a third party who has a privileged relationship with a party/child, in which case the issue of whether the communication remains privileged or confidential shall be explicitly addressed by the parties and the Parenting Coordinator and adjudicated by the court if unresolved. Additionally, the parties acknowledge that consistent with this Order, the Parenting Coordinator shall abide by the terms of R. 1:38-3(d)(9) and -3(d)(10) and maintain confidentiality of the parties' identifying information, contact information, records and reports of any kind.
5. Recommendations: The Parenting Coordinator shall facilitate discussion between the parties and make recommendations to the parties in the event the parties cannot reach an agreement, which shall become binding unless a party objects by filing a timely motion or order to show cause. In cases where there exists a current temporary or final restraining order between the parties, communication shall be consistent with the limitations of such order.



6. Sources of Information: Each party is ordered to provide the Parenting Coordinator with all requested information including signed releases to enable the Parenting Coordinator to communicate with collateral contacts. The Parenting Coordinator is authorized to have contact with any professional or other individual the Parenting Coordinator deems necessary to perform the duties as Parenting Coordinator including the child, therapists, physicians, childcare providers, teachers, and family members. In the event that either a collateral contact possesses privileged information, or the information sought is privileged pursuant to a statute, the party has the right to oppose signing the release and shall advise the Parenting Coordinator and the other party of their objections. If the issue remains unresolved, either party may file a motion and the court shall determine whether the release is to be signed and whether and to what extent the privileged information shall remain confidential.
7. Scope: The Parenting Coordinator shall not have authority to make recommendations regarding financial issues or modify legal and physical custody. The Parenting Coordinator may make recommendations to facilitate parenting time on matters, including:
  - a) Time, place and manner of pick-up and drop-off of child;
  - b) Childcare arrangements;
  - c) Minor or temporary alteration in parenting schedules for weeknight, weekend, holidays, vacation, and special events that will not substantially alter the parenting plan;
  - d) Dates for summer vacation;
  - e) The parents' schedules and conditions of phone or other contact (e.g., text and email) with the child while in the other parent's custody;
  - f) Selection and scheduling of activities, and resolving conflicts between the parties concerning the child's participation in recreation, enrichment, and extracurricular activities;
  - g) Referrals to other professionals to improve family functioning, including recommendation for custody or other focused evaluations;
  - h) Child's travel and passport arrangements;
  - i) Equipment and personal possessions of the child, including movement of these items between households for a child's use;
  - j) Clarification of provisions in parenting plans to address inadvertent gaps that may lead to conflict between the parties, including defining specific hours for pickup/drop-off and transportation during holidays;
  - k) Information exchanges, including school, health, social activities, and communication about the child between the parties;
  - l) Consistency in child disciplinary matters;
  - m) Non-permanent significant changes in a child's appearance, including haircuts, hair color changes, dress code, manicures;

- n) Unless limited by a domestic violence restraining order, how the parties communicate with each other, with the child, and in the child's presence; and
  - o) All other issues agreed upon by the parties and the Parenting Coordinator to help effectuate resolution of custody and parenting issues.
8. Protocol: The Parenting Coordinator shall determine the protocol of all communications, interviews, and sessions, including who shall or may attend the meetings. At their discretion, the Parenting Coordinator may conduct meetings with the parties, the child, and others related to the case jointly or separately, which meetings may occur by telephone, video conference or in person. All parties will have an opportunity to be heard on each issue submitted to the Parenting Coordinator. The Parenting Coordinator shall provide an agenda to the parties in the event the Parenting Coordinator initiates the request for a meeting. In no event may a party tape or record any Parenting Coordination sessions. In cases in which there is domestic violence restraining order between the parties, communication shall be consistent with the limitations of such order. The Parenting Coordinator shall document in writing all agreements made by the parties and all recommendations by the Parenting Coordinator, which shall be communicated simultaneously to both parties. In time sensitive circumstance, recommendations may be made orally and must be communicated to both parties, followed by written confirmation simultaneously communicated to both parties.
9. Communication with the Parenting Coordinator: The parties have the right to initiate or receive oral ex parte (meaning private, not in the presence of the other party) communication with the Parenting Coordinator at the Parenting Coordinator's discretion, and the fact of such communication shall be made known to the other party contemporaneously with its occurring (or as soon thereafter as possible) in writing in a manner consistent with the Parenting Coordinator's protocols. Any party or their attorney may communicate in writing with the Parenting Coordinator and copies of such communications will be provided to the other party, unless the Parenting Coordinator determines otherwise, in which event the Parenting Coordinator will determine the means by which they will convey the communication to the other parent consistent with the protocols established by the Parenting Coordinator. Copies of any documents, tape recordings, or other electronic material that one party gives to the Parenting Coordinator must also be given to the other party unless the Parenting Coordinator determines otherwise, in which event the Parenting Coordinator will determine the means by which the contents will be conveyed to the other party. If a crisis situation arises that will affect a child, the Parenting Coordinator may make a recommendation on an emergent basis with all parties present either in person or via emergency conference call, or by e-mail to all

parties. In cases in which there is domestic violence restraining order between the parties, communication shall be consistent with the limitation of such order.

10. Testimony: The Parenting Coordinator shall testify only pursuant to an order issued by a judge in this matter. The Parenting Coordinator shall be paid for all court appearances, depositions, conferences, or other appearances at which the Parenting Coordinator participates in connection with these proceedings including travel time at the Parenting Coordinator's hourly rate of \$\_\_\_\_\_ and payment of the estimated amount required shall be paid no later than 48 hours prior to testifying or appearing,
11. Termination: The court or the Parenting Coordinator may terminate the Parenting Coordinator's appointment in the following instances: the services of the Parenting Coordinator do not meet the needs of the family; the child has reached the age of majority; the parties stipulate to the termination; the Parenting Coordinator's fees are not being paid; entry of a court order; or upon expiration of the term as set forth in paragraph 16 of this order. Either party may file a motion to terminate the Parenting Coordinator's appointment whenever the Parenting Coordinator has exceeded their mandate, acted in a manner inconsistent with the approved procedures, or violated professional conduct, provided the approved complaint procedure has been utilized. If the Parenting Coordinator seeks to withdraw, the request shall be granted absent extraordinary circumstances.
12. Complaint: Except as provided by other applicable law, a party having a complaint about the Parenting Coordinator shall submit a written letter to the Parenting Coordinator detailing their complaint, with a copy to the other party (or where there is a domestic violence restraining order the Parenting Coordinator shall serve the copy on the other party) to both attorneys (if any) and to the attorney for the child (if any). The Parenting Coordinator shall within ten (10) days provide a written response to both parties and their attorneys, subject to the other provisions herein. Thereafter, the Parenting Coordinator at their discretion may schedule a meeting or conference call with the attorneys and the parties to resolve the complaint. If the complaint is not resolved by this process, the dissatisfied party may file a motion with the court to decide the dispute.
13. Report to the Court: Parenting Coordinators shall not have any communication with the court, unless mutually agreed to by the parties or unless otherwise required or permitted under the terms of this Order. Absent mutual agreement, either party may file a motion to permit the Parenting Coordinator to communicate with the court and such communication will be on notice to the parties.
14. In cases where there currently exists a temporary or final restraining order pursuant to the New Jersey Prevention of Domestic Violence Act, it is further ordered:

- a) The victim shall be advised of the right to decline appointment of a Parenting Coordinator and that the victim has the option to terminate the Parenting Coordinator process without the filing of a formal motion. Otherwise, termination of the Parenting Coordinator process shall be addressed pursuant to paragraph 11 of this order.
- b) The Parenting Coordinator shall address any safety concerns with the court in writing.
- c) The Parenting Coordinator shall abide by the terms of Rule 1:38-3(d)(9) and -3(d)(10) and maintain confidentiality of the parties' identifying information, contact information, records, and reports of any kind.
- d) The Parenting Coordinator shall include measures addressing the safety of the parties and any participants and shall establish protocols for meetings and communications consistent with the domestic violence restraining order.

15. The Parenting Coordinator remains subject to the child abuse reporting requirements pursuant to N.J.S.A. 9:6-8.10.

16. The Parenting Coordinator's appointment shall expire on \_\_\_\_\_, unless otherwise extended upon a showing of good cause or by agreement of the parties.

17. Other Terms:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_.

A copy of this order and guidelines shall be served on the parties and the Parenting Coordinator within \_\_\_\_ days.

\_\_\_\_\_  
 Date

s/ \_\_\_\_\_  
 J.S.C.

## Attachment 3

Application for Admission to the Roster of  
Statewide Approved Parenting Coordinators

CN 13004



## New Jersey Judiciary

# Qualifications for Admission to the New Jersey Judiciary Roster of Statewide Approved Parenting Coordinators

The Administrative Director of the Courts, or the Director's designee, is responsible for reviewing and acting on Parenting Coordinator applications. Applicants must complete the attached application. Those who meet the professional and training requirements set forth below will be added to the Roster of Statewide Approved Parenting Coordinators.

Parenting Coordinators on the Statewide Roster must annually submit to the Administrative Office of the Courts proof that they continue to be licensed and in good standing in their respective professions and proof of continuing training.

## Required Professional Experience and Education

### Professional Qualifications

1. *Retired Superior Court Judges and Currently Licensed Attorneys.*  
Retired Superior Court judges and currently licensed attorneys must be licensed to practice law and be in good standing with the State of New Jersey Board of Admissions to the Bar.
2. *Mental Health Professionals.*  
Mental health professionals must be licensed and be in good standing in the fields of psychology, psychiatry, or social work in the State of New Jersey with the appropriate State Board or Agency.
3. *Alternative or Complementary Dispute Resolution Professionals.*  
Professionals in alternative or complementary dispute resolution occupations must be in good standing in their field.

### Training Requirements

1. *General.*  
All Parenting Coordinators shall have completed a minimum of forty (40) hours of training pursuant to the requirements of paragraph 3 below.
2. *Continuing Training.*  
All Parenting Coordinators shall annually attend four (4) hours of continuing education and shall file with the Administrative Office of the Courts, as appropriate, an annual certification of compliance. To meet the requirement, this continuing education shall include instruction in ethical issues associated with Parenting Coordination practice and should cover at least one of the following: case management skills; Parenting Coordination; and resolution concepts and skills.

3. *Parenting Coordinator Course Content.*

The forty (40) hours of classroom instruction for Parenting Coordinators shall include basic mediation skills as well as at least sixteen (16) hours of specialized parenting coordination training, which should cover: family and child development; psychological issues in separation and divorce; family dynamics; New Jersey family law; high-conflict family dynamics; parenting coordination process; techniques, domestic violence; the impact of divorce on children at varying developmental levels; diversity, inclusion, and cultural competency; and community resources.

4. *Domestic Violence Training.*

Where there is a domestic violence restraining order, the Parenting Coordinator must also have completed additional training on domestic violence components, including: power and control; progression of abuse; the cycle of violence; and issues related to the victim and to the perpetrator.



New Jersey Judiciary  
**Application for Admission to the Roster of Statewide  
Approved Parenting Coordinators**

Last Name			First Name			Middle Name		
Firm / Business Name								
Firm / Business Address: Street								
City						State		Zip Code
Telephone Number			Fax Number			Email		
Have you ever been disciplined in your profession? (If yes, attach explanation.) <input type="checkbox"/> Yes <input type="checkbox"/> No					Do you have malpractice insurance? <input type="checkbox"/> Yes <input type="checkbox"/> No		Hourly Fee \$	
<b>Currently Licensed Attorneys and Retired Superior Court Judges</b>								
Degrees Attained (post high school)			Year		Name of Institution(s)			
Year Admitted to the New Jersey Bar			Attorney ID		Are you a retired Superior Court Judge? <input type="checkbox"/> Yes <input type="checkbox"/> No			
<b>Mental Health Professionals</b>								
Degrees Attained (post high school)			Year(s) Received		Name of Institution(s)			
New Jersey Professional License(s)			Date(s) Received		License Number(s)			
<b>Alternative or Complementary Dispute Resolution Professionals</b>								
Degrees Attained (post high school)			Year(s) Received		Name of Institution(s)			
Areas of Practice								



**Parenting Coordinator Training** (Attach additional page if necessary.)

Provider(s)	Course Title	Date(s)	Hours
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

I certify that the foregoing statements made by me are true and that I am in good standing in my profession.

\_\_\_\_\_  
Date

s/  
\_\_\_\_\_  
Signature

**Please attach the following:**

1. Resume or Curriculum Vitae
2. **Copies of official training certificates of completion that meet the mandatory training requirements.**
3. Descriptive paragraph (maximum of 50 words) about your parenting coordinator services and other relevant professional experience that will appear on the statewide roster if your application is approved.

**Send the items described above, and this completed form to the *Parenting Coordinator Program* by email, mail, or fax.**

**Email:** [AOCFamily.mbx@njcourts.gov](mailto:AOCFamily.mbx@njcourts.gov)

**Mail:** Family Practice Division  
Administrative Office of the Courts  
PO Box 983  
Trenton, NJ 08625

**Fax Number:** (609) 376-3021

## Attachment 4

# Roster of Statewide Parenting Coordinators Change/Update Form

CN 13006



**New Jersey Judiciary  
Family Practice Division  
Roster of Statewide Parenting Coordinators  
Change/Update Form**

Name		Request Date	
Attorney ID		Telephone Number	
<input type="checkbox"/> <b>Remove me from the Roster.</b>			
<input type="checkbox"/> <b>Update the following information on the Roster.</b>			
Address: Street			
City		State	Zip Code
Telephone Number		Fax Number	
Email Address		Website	
Counties where your name currently appears on the Roster:			
Counties where you want your name added on the Roster:			
Hourly Fee \$			

Email or fax your completed form to: Parenting Coordinator Program,  
[AOCFamily.mbx@njcourts.gov](mailto:AOCFamily.mbx@njcourts.gov) or (609) 376-3021.

## [N.J. Court Rules, R. 5:8B](#)

Current with all changes received through February 18, 2024

***NJ - New Jersey State & Federal Court Rules > Rules Governing the Courts of the State of New Jersey > PART V. Rules Governing Practice in the Chancery Division, Family Part > CHAPTER II. Specific Civil Actions***

### **Rule 5:8B. Appointment of Guardian Ad Litem.**

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**(a)** Appointment. In all cases in which custody or parenting time/visitation is an issue, a guardian ad litem may be appointed by court order to represent the best interests of the child or children if the circumstances warrant such an appointment. The services rendered by a guardian ad litem shall be to the court on behalf of the child. A guardian ad litem may be appointed by the court on its own motion or on application of either or both of the parents. The guardian ad litem shall file a written report with the court setting forth findings and recommendations and the basis thereof, and shall be available to testify and shall be subject to cross-examination thereon. In addition to the preparation of a written report and the obligation to testify and be cross-examined thereon, the duties of a guardian may include, but need not be limited to, the following:

1. Interviewing the children and parties.
2. Interviewing other persons possessing relevant information.
3. Obtaining relevant documentary evidence.
4. Conferring with counsel for the parties.
5. Conferring with the court, on notice to counsel.
6. Obtaining the assistance of independent experts, on leave of court.
7. Obtaining the assistance of a lawyer for the child ([Rule 5:8A](#)) on leave of court.
8. Such other matters as the guardian ad litem may request, on leave of court.

**(b)** Objection or Refusal of Appointment. A proposed guardian ad litem shall have the right to consent or to decline to serve as such, notice of such decision to be in writing to the court with copies to counsel. The parties shall have the right to object to the person appointed as guardian ad litem on good cause shown.

**(c)** Term. The term of the guardian ad litem shall be coextensive with the application pending before the court and shall end on the entry of a judgment of divorce, dissolution of a civil union or termination of a domestic partnership or an order terminating the application for which the appointment was made, unless continued by the court. The guardian ad litem shall have no obligation to file a notice of appeal from a judgment or order nor to participate in an appeal filed by a party.

**(d)** Fee. The hourly rate to be charged by the guardian ad litem shall be fixed in the initial appointing order and the guardian ad litem shall submit informational monthly statements to the parties. The court shall have the power and discretion to fix a retainer in the appointing order and to allocate final payment of the guardian ad litem fee between the parties. The guardian ad litem shall submit a certification of services at the conclusion of the matter, on notice to the parties, who will thereafter be afforded the right to respond prior to the court fixing the final fee.

### **History**

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Adopted November 6, 1989, to be effective January 2, 1990; paragraph (a); amended July 5, 2000 to be effective September 5, 2000; paragraph (c); amended July 21, 2011 to be effective September 1, 2011.

Annotations

## Notes

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### Amendment Notes

2011 amendment, in (c), inserted “dissolution of a civil union or termination of a domestic partnership” in the first sentence, and made capitalization changes.

## Commentary

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### Official Comment

The purpose of [Rules 5:8A](#) and 5:8B is to eliminate the confusion between the role of a court-appointed counsel for a child and that of a court-appointed guardian ad litem (GAL). The Supreme Court’s Family Division Practice Committee in its 1987-1988 Annual Report distinguishes the roles.

A court-appointed counsel’s services are to the child. Counsel acts as an independent legal advocate for the best interests of the child and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed.

A court-appointed guardian ad litem’s services are to the court on behalf of the child. The GAL acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The GAL submits a written report to the court and is available to testify. If the purpose of the appointment is for independent investigation and fact finding, then a GAL would be appointed. The GAL can be an attorney, a social worker, a mental health professional or other appropriate person. If the primary function of the GAL is to act in the capacity of an expert, then the court should ordinarily appoint a GAL from the appropriate area of expertise. Attorneys acting on behalf of children in abuse or neglect cases and in termination of parental rights cases should act as counsel for the child pursuant to [Rule 5:8A](#) rather than in the capacity of a GAL pursuant to [Rule 5:8B](#). *See, Matter of M.R., 135 N.J. 155, 174, 638 A.2d 1274, 1283 (1994)*.

These rules are not intended to expand the circumstances when such appointments are to be made; neither are these appointments to be made routinely.

## Notes to Decisions

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**Estate, Gift & Trust Law: Trusts: Supplemental Needs Trusts**

**Family Law: Child Custody: Guardians Ad Litem**

**Estate, Gift & Trust Law: Trusts: Supplemental Needs Trusts**

When a disabled child is the subject of a proposed special needs trust, it is within the trial court’s discretion to appoint a guardian ad litem. [J.B. v. W.B., 215 N.J. 305, 73 A.3d 405, 2013 N.J. LEXIS 834 \(N.J. 2013\)](#).

## Family Law: Child Custody: Guardians Ad Litem

When a disabled child is the subject of a proposed special needs trust, it is within the trial court's discretion to appoint a guardian ad litem. [J.B. v. W.B., 215 N.J. 305, 73 A.3d 405, 2013 N.J. LEXIS 834 \(N.J. 2013\)](#).

## Research References & Practice Aids

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### Expert Annotations

[LexisNexis NJ Court Rules Anno. P 5:8B-0.02](#) Expert Annotations to [Rule 5:8B](#)

### Treatises

[New Jersey Family Law § 13-19](#), Guardian ad Litem

### NJ ICLE

[NJ Family Law Practice § 1.8D \(1\)](#) (INDEPENDENT COUNSEL; APPOINTMENT OF GUARDIANS AD LITEM)

[NJ Family Law Practice § 1.8D \(1\)\(b\)](#) (GUARDIANS AD LITEM)

[NJ Family Law Practice § 4.8B](#) (GRANDPARENT TIME WITH GRANDCHILDREN)

[NJ Family Law Practice § 4.9F](#) ([R. 5:8A](#) - APPOINTMENT OF COUNSEL FOR CHILD AND 5:8B - APPOINTMENT OF GUARDIAN AD LITEM)

[NJ Family Law Practice § 8.3B \(2\)](#) (MISCELLANEOUS SOURCES)

New Jersey State & Federal Court Rules

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End of Document

Alternative Dispute Resolution Panel: “Effective Use of ADR in a High Conflict Case – Early Intervention”




I.	Introduction: (Jeffrey Fiorello)	5 minutes
	A. Speakers – go down the line and introduce themselves.	
	B. Set the Context for the Seminar (Jeffrey Fiorello)	
II.	Mediation: (Derek / Robin)	10 minutes
III.	Arbitration: (Andrea)	5 minutes
IV.	Financial: (Judy / Megan)	10 minutes
V.	Mental Health: (Shireen)	5 minutes
VI.	Parenting Coordinators (Amanda)	5 minutes
VII.	GAL (Candice)	5 minutes
VIII.	Questions / Final Thoughts / Conclusion (All)	5 minutes

TOTAL: 50 minutes



## R. 5.1-1

The rules in Part V shall govern family actions. All family actions shall also be governed by the rules in Part I insofar as applicable. Civil family actions shall also be governed by the rules in Part IV insofar as applicable and except as otherwise provided by the rules in Part V. Criminal and quasi-criminal family actions shall also be governed by the rules in Part III insofar as applicable except as otherwise provided by the rules in Part V. Juvenile delinquency actions shall be governed by the rules in Part III insofar as applicable and except as otherwise provided by the rules in Part V.

<b>1:9-Subpoenas</b>	
<b>1:9-1-For attendance of witnesses; forms; issuance; notice in lieu of subpoena</b>	
<p>A subpoena may be issued by the clerk of the court or by an attorney or party in the name of the clerk or as provided by R. 7:7-8 (subpoenas in certain cases in the municipal court). It shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. If the witness is to testify in a criminal action for the State or an indigent defendant, or has been subpoenaed by a Law Guardian in an action brought by the Division of Child Protection and Permanency pursuant to Title 9 or Title 30 of the New Jersey Statutes, the subpoena shall so note, and shall contain an order to appear without the prepayment of any witness fee. The testimony of a party who could be subpoenaed may be compelled by a notice in lieu of subpoena served upon the party's attorney demanding that the attorney produce the client at trial. If the party is a corporation or other organization, the testimony of any person deposable on its behalf, under R. 4:14-2, may be compelled by like notice. The notice shall be served in accordance with R. 1:5-2 at least 5 days before trial. The sanctions of R. 1:2-4 shall apply to a failure to respond to a notice in lieu of a subpoena.</p> <p><i>Note: Source—R.R. 3:5-10(a)(b), 4:46-1, 6:3-7(a), 7:4-3 (second paragraph), 8:4-9(a)(b); caption and text amended November 27, 1974 to be effective April 1, 1975; amended July 13, 1994 to be effective September 1, 1994; amended January 5, 1998 to be effective February 1, 1998; amended July 28, 2017 to be effective September 1, 2017.</i></p>	
<b>1:9-2-For Production of Documentary Evidence and Electronically Stored Information; Notice in Lieu of Subpoena</b>	
<p>A subpoena or, in a civil action, a notice in lieu of subpoena as authorized by R. 1:9-1 may require production of books, papers, documents, electronically stored information, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed. The court may direct that the objects designated in the subpoena or notice be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys and, in matrimonial actions and juvenile proceedings, by a probation officer or other person designated by the court. Except for pretrial production directed by the court pursuant to this rule, subpoenas for pretrial production shall comply with the requirements of R. 4:14-7(c).</p> <p><i>Note: Source—R.R. 3:5-10(c), 4:46-2, 6:3-7(b), 7:4-3 (second paragraph), 8:4-9(c); amended November 27, 1974 to be effective April 1, 1975; amended</i></p>	



### 1:9-3-Service



A subpoena may be served by any person 18 or more years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named together with tender of the fee allowed by law, except that if the person is a witness in a criminal action for the State or an indigent defendant, the fee shall be paid before leaving the court at the conclusion of the trial by the sheriff or, in the municipal court, by the clerk thereof. A subpoena which seeks only the production of documents or records may be served by registered, certified or ordinary mail and, if served in that manner, shall be enforceable only upon receipt of a signed acknowledgment and waiver of personal service.

*Note: Source—R.R. 3:5-10(b) (last sentence), 3:5-10(d), 4:46-3, 5:2-2, 6:3-7(c), 7:4-6(a) (last sentence), 8:4-9(d); amended July 13, 1994 to be effective September 1, 1994; amended August 1, 2016 to be effective September 1, 2016.*

### 1:9-4-Place of service



A subpoena requiring the attendance of a witness at a hearing in any court may be served at any place within the State of New Jersey.

*Note: Source—R.R. 3:5-10(c), 6:3-7(d), 7:4-6(b), 8:4-9(e).*

### 1:9-5-Failure to appear



Failure without adequate excuse to obey a subpoena served upon any person may be deemed a contempt of the court from which the subpoena issued.

*Note: Source—R.R. 3:5-10(f), 6:3-7(e), 8:4-9(f); amended July 13, 1994 to be effective September 1, 1994.*



Caution

As of: March 12, 2025 12:33 PM Z

## Tevis v. Tevis

Supreme Court of New Jersey

November 13, 1978, Argued ; April 5, 1979, Decided

A-40/41

### Reporter

79 N.J. 422 \*; 400 A.2d 1189 \*\*; 1979 N.J. LEXIS 1204 \*\*\*

JANINA TEVIS, PLAINTIFF-RESPONDENT AND CROSS-APPELLANT, v. MICHAEL TEVIS, JR., DEFENDANT-APPELLANT AND CROSS-RESPONDENT

**Prior History:** [\*\*\*1] On certification to the Superior Court, Appellate Division, whose opinion is reported at [155 N.J. Super. 273 \(1978\)](#).

### Core Terms

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immunity, interspousal, statute of limitations, cause of action, accrued, marital, injuries, damages, two year, divorce, doctrine of immunity, circumstances, parties, equitable, reasons, redress, limitations period, discovery rule, limitations, instituted, diligence, inflicted, beating, lawsuit, rights

### Case Summary

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#### Procedural Posture

Defendant ex-husband challenged the order of the Superior Court, Appellate Division (New Jersey), which held that neither the bar of the statute of limitations, nor that of interspousal immunity prevented plaintiff ex-wife from filing suit against defendant for injuries arising from an intentional tort, over two years after the alleged occurrence. Plaintiff cross-appealed the lower court's reversal of a punitive damages award.

#### Overview

Weeks after plaintiff wife divorced defendant husband, plaintiff instituted a suit for damages for injuries she received as a result of a beating by defendant during their marriage. Defendant moved for summary judgment dismissal of plaintiff's **claims**, alleging that they were barred by the two year statute of limitations, N.J. Stat. Ann. § 2A: 14-2, and by the doctrine of interspousal immunity. The trial court denied defendant's motion, found in favor of plaintiff, and awarded compensatory

and punitive damages. Defendant challenged the trial court's judgment, and the lower court affirmed the trial court judgment, except as to the award of punitive damages. Defendant petitioned the court and the court reversed the lower court's judgment. The court stated that plaintiff's action was barred by the statute of limitations under §2A: 14-2 and that marital immunity could not be asserted by plaintiff to toll the statute of limitations. Likewise, the court held that neither the discovery rule, nor any other equitable considerations tolled the statute of limitations. The court remanded the matter for the trial court to enter summary judgment in favor of defendant.

#### Outcome

The court reversed the lower court's judgment and held that plaintiff ex-wife's suit against defendant ex-husband for injuries resulting from an assault and battery were time-barred by the statute of limitations. The court remanded the matter for the trial court to enter summary judgment in favor of defendant.

### LexisNexis® Headnotes

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Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Torts > Intentional Torts > Assault & Battery > General Overview

Torts > ... > Defenses > Specific Immunities > Interspousal Immunity

**[HN1](#)** Statute of Limitations, Time Limitations

[N.J. Stat. Ann. § 2A:14-2](#), provides that every action at law for an injury to the person caused by the wrongful act of any person within this state shall be commenced within 2 years after the cause of any such action shall have accrued.

Torts > Procedural Matters > Statute of Limitations > General Overview

**[HN2](#)** Procedural Matters, Statute of Limitations

A cause of action in tort accrues at the time when a right first arises to institute and maintain an action against a wrongdoer.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Discovery

Torts > Procedural Matters > Statute of Limitations > General Overview

**[HN3](#)** Tolling of Statute of Limitations, Discovery Rule

Under the discovery rule, the statute of limitations is deemed not to begin to run until the injured party knows, or by the exercise of reasonable diligence should have learned, that he may have a basis for an actionable **claim**.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > County, Municipal & State Liability

Torts > Procedural Matters > Discovery

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

**[HN4](#)** Governmental & Nonprofit Liability, County, Municipal & State Liability

When a party is either unaware that he has sustained an injury or, although aware that an injury has occurred, he does not know that it is, or may be, attributable to the fault of another, the cause of action does not accrue until the discovery of the injury or facts suggesting the fault of another person.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Defenses > Specific Immunities > Interspousal Immunity

Torts > Procedural Matters > Discovery

**[HN5](#)** Tolling of Statute of Limitations, Discovery Rule

The discovery rule has been, and is, pertinent only in those circumstances in which a plaintiff is not, and reasonably could not be, aware of the underlying factual basis for a cause of action.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Statutory Construction

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

**[HN6](#)** Statute of Limitations, Statutory Construction

In each case involving the application of the statute of limitations the equitable **claims** of opposing parties must be identified, evaluated and weighed.

Torts > Procedural Matters > Statute of Limitations > General Overview

**[HN7](#)** Procedural Matters, Statute of Limitations



In the final analysis, the court must be governed by an objective assessment of the equities, not by an understandable sympathy for plaintiff's plight and a pardonable repugnance toward defendant's conduct.

**Counsel:** *Mr. Ira D. Dorian* argued the cause for appellant (*Mr. Matthew Grayson*, attorney).

*Mr. Alan Wasserman* argued the cause for cross-appellant (*Messrs. Wilentz, Goldman and Spitzer*, attorneys; *Mr. Frederick J. Dennehy*, on the brief).

**Judges:** *For reversal and remandment* -- Justices Mountain, Sullivan, Clifford and Handler. *For affirmance* -- Chief Justice Hughes and Justice Pashman. The opinion of the court was delivered by Handler, J. Sullivan, J. (concurring in result). Pashman, J., dissenting. Hughes, C.J., dissenting.

**Opinion by:** HANDLER

## Opinion

[\*424] [\*\*1191] Plaintiff Janina Tevis instituted a suit for damages for injuries received as a result of a physical beating administered by her husband, Michael Tevis. This occurred in the early morning of May 14, 1973. The suit was commenced on July 7, 1975. Defendant brought a motion for summary judgment to dismiss the complaint, claiming that the action was barred by the two-year statute of limitations, N.J.S.A. 2A:14-2. That motion was denied. The trial court also ruled [\*\*\*2] that the action was not barred by the doctrine of interspousal immunity since the parties were divorced at the time of the action. The matter proceeded to trial and a jury returned a verdict awarding plaintiff \$ 25,000 in compensatory and \$ 10,000 in punitive damages.

In a reported decision, Tevis v. Tevis, 155 N.J. Super. 273 (1978), the Appellate Division affirmed as to compensatory damages, holding that neither the bar of the statute of limitations nor that of interspousal immunity applied in this case. The court, however, reversed the judgment as to punitive damages on the ground that the trial court improperly prevented defendant from submitting proof of provocation in mitigation of those damages. The defendant petitioned this Court for certification on the statute of limitations and interspousal immunity issues and the plaintiff cross-petitioned on the issue of mitigation of punitive

damages. This Court certified both petitions. 77 N.J. 483 (1978). We reverse the judgment below on the ground that the action is time-barred and remand the matter to the trial court for the entry of summary judgment in favor of defendant.

[\*425] According to the trial testimony [\*\*\*3] of Mrs. Tevis and two of her children, she had returned home in the early morning on May 14, 1973 after having spent the evening out. Shortly after entering the house her husband began to beat her. Plaintiff suffered substantial injuries which were corroborated by the testimony of her treating physician and by photographs of her face and body taken shortly after the event. Defendant denied having struck his wife and claimed she had injured herself when she slipped and fell while trying to kick him during the course of an argument. He also asserted by way of a proffer of proof that the argument erupted when he returned home that night and he became provoked upon seeing his wife with another man in a car parked in front of the house.

Following this incident, plaintiff sought the advice of an attorney. She instituted a criminal complaint against her husband in the local municipal court which was later dismissed. On May 22, 1975 the parties were divorced. On July 7, 1975, some six weeks after the divorce and over two years after the assault and battery, plaintiff brought this tort action against the defendant for personal injuries.

The statute of limitations relevant to this [\*\*\*4] kind of action, HN1 [↑] N.J.S.A. 2A:14-2, provides that:

Every action at law for an injury to the person caused by the wrongful act \* \* \* of any person within this state shall be commenced within 2 years after the cause of any such action shall have accrued.

The trial court held that, because the bar of interspousal immunity prevented the successful maintenance of a suit by a wife against her husband during marriage for injuries arising from an intentional tort, plaintiff's cause of action did not accrue until that bar was lifted by the parties' divorce. Since the lawsuit was instituted well within two years of the divorce, the statute of limitations was deemed not to bar the action. The Appellate Division, while agreeing with the result reached by the trial court, disagreed with its reasoning. [\*426] The appellate court stated that, while the interspousal immunity doctrine would have actually barred the instant suit if it had been brought earlier in time, that disability was removed by this Court's decision in Small v.



[Rockfeld, 66 N.J. 231 \(1974\)](#). The court characterized that case as **[\*\*1192]** effectively extending the abolition of the doctrine to interspousal **[\*\*\*5]** torts based on gross negligence and intentional injury. [155 N.J. Super. at 277](#). The Appellate Division concluded that the present action thus became maintainable, and therefore accrued, on the date *Small v. Rockfeld* was decided, namely, December 17, 1974, and, since the statute of limitations began to run from that time, the lawsuit was timely filed within two years of that date.

I

The thinking of the Appellate Division with respect to the application of the doctrine of interspousal immunity to intentional or egregious torts raises its own conceptual difficulties. Since we have determined that this action is barred by the statute of limitations, there would be no need to dwell on the Appellate Division's analysis of the interspousal immunity doctrine in this case except that its perception of the doctrine has contributed to a result which is incorrect.

The subject of interspousal tort immunity has been treated comprehensively and exhaustively in the recent decision of [Merenoff v. Merenoff, 76 N.J. 535 \(1978\)](#). We there traced with some care the evolution of the doctrine. [Id. 539-547](#). Our decision definitively abrogated the doctrine of immunity with respect **[\*\*\*6]** to interspousal torts with certain limited exceptions. [Id. at 557](#). It is clear from the facts of those companion cases and from the statement of our holding that the abolition of the doctrine pertained to tortious conduct generally encompassing not only conventional negligence but also intentional acts, as well as other forms of excessive behavior such as gross negligence, recklessness, wantonness, and the like. The only kind of marital conduct excepted **[\*427]** from the abolition was that involving marital or nuptial privileges, consensual acts and simple, common domestic negligence, to be defined and developed on a case-by-case approach. [Id. at 557, 558-559](#). The inclusion of intentional and aggravated torts within the abolition of interspousal immunity in *Merenoff* is underscored by our approving reference to the decision of the Appellate Division in this very case for the proposition that it "refus[ed] to apply interspousal immunity to a claim based upon an intentional tort committed by a husband against his wife." [Id. at 546](#).

The Appellate Division believed that the case of *Small v. Rockfeld*, decided three years before *Merenoff*, sounded the death **[\*\*\*7]** knell of the interspousal immunity

doctrine for intentional torts. Yet, arguably *Small v. Rockfeld* need not have treated the issue of interspousal immunity. Although the defendant in that action asserted the defense of both the interspousal and interfamilial doctrines, the action was brought under the Wrongful Death Act ( [N.J.S.A. 2A:31-1 et seq.](#)) for the pecuniary loss sustained by the decedent's infant daughter. There was no claim on behalf of the deceased wife which would invoke the marital immunity bar. In any event the marital relationship between the parties had been dissolved by the death of the wife, a situation earlier recognized as not raising the interspousal bar. [Long v. Landy, 35 N.J. 44 \(1961\)](#). Moreover, the Court in *Small v. Rockfeld* expressed the view that it was not its decision so much as the important case of [Immer v. Risko, 56 N.J. 482](#), decided four years before in 1970, which effectively interred the doctrine. [Small v. Rockfeld, supra, 66 N.J. at 241](#). Indeed, the *coup de grace* of the interspousal immunity doctrine for intentional torts might be thought to have been actually dealt by the Appellate Division in **[\*\*\*8]** this case, a possibility which occurred to us in [Merenoff, supra, 76 N.J. at 546](#).

The only point of this schoolmen's discussion is to highlight the uncertainty of using the demise of the doctrine of interspousal immunity as a tool for applying the statute of limitations. The nebulous state of the **[\*\*1193]** law of marital immunity **[\*428]** permits it to cater to anyone's predilections so far as invoking the statute of limitations. Moreover, this approach would permit the assertion of marital tort claims long after the commission of the tort itself and would encourage the resurrection of old marital grievances, a disfavored policy consistently rejected by our courts. Cf. [Merenoff v. Merenoff, supra at 560](#); [Darrow v. Hanover Twp., 58 N.J. 410 \(1971\)](#).

The immunity doctrine is also unsatisfactory if marshalled in this case as a theoretical construct, as part of the legal definition of the tort and a determinant of when the tort itself may be said to have occurred. The Appellate Division characterized the interspousal immunity doctrine as "so elemental to the maintainability of the action that its existence will defeat the action even if not properly pleaded". **[\*\*\*9]** [155 N.J. Super. at 279](#). For this reason, it believed that as long as the doctrine was viable, plaintiff's cause of action could not arise.

In reaching this conclusion, the lower court focused upon the consequences of the failure to plead or otherwise assert immunity as an affirmative defense to a timely-filed tort action, citing [Faul v. Dennis, 118 N.J.](#)



Super. 338, 343-344 (Law Div. 1972). But compare Holmes v. Russ, 113 N.J. Super. 445 (Law Div. 1971). Cf. O'Connor v. Abraham Altus, 67 N.J. 106, 116 (1975); Rappeport v. Flitcroft, 90 N.J. Super. 578 (App. Div. 1966). We are not dealing here, however, with that kind of problem. The present question is whether the statute of limitations should serve to bar this action, not whether marital immunity, though not pleaded, would have served as a bar had the action been brought within time. More to the point, interspousal immunity, when asserted as a bar to bringing an action, has not been treated invariably by our courts as a substantive element inhering in the cause of action. Despite certain *dicta* in Kennedy v. Camp, 14 N.J. 390, 396 (1954) that " \* \* \* a wife cannot sue her husband [\*\*\*10] for beating her during coverture, even after divorce", later decisions recognized the right to bring an interspousal cause of action in tort even though the tort was committed while [\*429] the parties were married. E.g., Small v. Rockfeld, supra; Long v. Landy, supra; Sanchez v. Olivarez, 94 N.J. Super. 61 (Law Div. 1967); cf. Eule v. Eule Motor Sales, 34 N.J. 537 (1961), cited and discussed in Merenoff v. Merenoff, supra, 76 N.J. at 544-545. And, following Immer v. Risko, it should have been just as obvious that the continuing marriage of the parties *per se* would not prevent the bringing of a lawsuit for personal injuries based on tort.

We have recognized in principle that immunities serve primarily to bar or curtail recovery -- to absolve from liability, *W. Prosser, Law of Torts* 970 (4th ed. 1971) -- rather than to define liability or describe what constitutes wrongful conduct. Merenoff v. Merenoff, supra at 547. It was appreciated by this Court quite some time ago that "[t]he negligent infliction of injury by a husband upon his wife is a wrongful act" and that "[i]t does not lose this quality merely because the wife is prohibited [\*\*\*11] by the common law doctrine from enforcing liability for her damage". Long v. Landy, supra, 35 N.J. at 50. It may be that there are contexts in which it is plausible to conclude that an immunity is a constituent element of a cause of action; nevertheless, strong considerations, grounded in a public policy which favors the redress of wrongfully inflicted injuries, dictate that immunity, when used as a shield to defeat recovery, be established affirmatively. Cf. Ellison v. Housing Authority of South Amboy, 162 N.J. Super. 347, 351 (App. Div. 1978) (construing provisions of the New Jersey Tort **Claims** Act, N.J.S.A. 59:1-1 et seq.).

Aside from the characterization of marital immunity as either a substantive [\*\*\*1194] element of a cause of action or an affirmative defense to a cause of action, the

doctrine should not be viewed as a catalyst which renders wrongful acts innocuous. Cf. Merenoff v. Merenoff, supra; Long v. Landy, supra. Additionally, it is well to note that historically interspousal tort immunity was a common law tenet with the inherent mutability of the common law. As a common law principle, it has always been vulnerable to challenge and [\*\*\*12] peculiarly [\*430] subject to judicial modification in light of changing social conditions and ascendant notions of public policy. E.g., Merenoff v. Merenoff, supra, 76 N.J. at 548-549, citing State v. Culver, 23 N.J. 495, 505, cert. den. 354 U.S. 925, 77 S. Ct. 1387, 1 L. Ed. 2d 1441 (1957).

We are satisfied that these reasons countermand the use of marital immunity to toll the operation of the statute of limitations upon a cause of action. *51 Am. Jur. 2d Limitation of Actions* § 191 at 758-759. It is our conclusion that the assumed existence of the doctrine of interspousal immunity at the time plaintiff was wrongfully injured by her husband did not, in this case, prevent her cause of action from then and there accruing.

II

The question may be raised as to whether plaintiff's cause of action having accrued at the time she suffered injuries at the hands of her husband, the running of the statute of limitations should be tolled for other reasons. The general statute of limitations governing a tort action such as plaintiff's, N.J.S.A. 2A:14-2, is predicated on certain assumed objectives. These policies would appear to be met [\*\*\*13] by the application of the statute as a bar to plaintiff's suit in this case.

Primarily, statutes of limitations are statutes of repose. See, e.g., Fox v. Passaic General Hospital, 71 N.J. 122 (1976); Lopez v. Swyer, 62 N.J. 267 (1973); Fernandi v. Strully, 35 N.J. 434 (1961). They reflect a public policy and underlying legislative judgment that **claims** for redress resulting from the injurious acts of others shall be settled relatively soon, within a legislatively-specified period of time, notwithstanding the vagaries of human conduct and the uncertainties of human affairs. See Rothman v. Silber, 90 N.J. Super. 22 (App. Div.), cert. den. 46 N.J. 538 (1966). Limitations statutes are designed to induce the assertion of **claims** within a reasonable time so that the charged party has a fair opportunity to defend. These statutes spur diligence [\*431] in the vindication of legal **claims** in order to avoid the unfairness and injustice which stem from litigation based on distant circumstances and faded memories. Kaczmarek v. New Jersey Turnpike



Authority, 77 N.J. 329 (1978); Rosenau v. City of New Brunswick and Gamon Meter Co., 51 N.J. [\*\*\*14] 130 (1968).

With respect to tort actions, the Legislature has not defined in the statute of limitations when a cause of action "shall have accrued" ( N.J.S.A. 2A:14-2). The accrual of a cause of action in the tort field has been a matter for judicial determination. Rosenau v. City of New Brunswick and Gamon Meter Co., supra; Fernandi v. Strully, supra; compare Lawrence v. Bauer Publishing & Printing, Ltd., 78 N.J. 371 (1979) (an action for libel arises upon "publication", N.J.S.A. 2A:14-3). We have long held that HN2 a cause of action in tort accrues at the time when a right first arises to institute and maintain an action against a wrongdoer. *E.g.*, Tortorello v. Reinfeld, 6 N.J. 58 (1950); Fredericks v. Dover, 125 N.J.L. 288 (E. & A. 1940). The right to maintain an action is not a prediction of success; it does not import the notion that the claimant will prevail on the merits or overcome all legal disabilities or affirmative defenses. It means simply the right to commence the action and to remain in court for purposes of having the claim adjudicated, as well as the opportunity to counter any legal or [\*\*1195] factual defenses which are raised. [\*\*\*15] When this right attaches, the cause of action accrues. This is usually at the time of the commission of the wrong and the suffering of injury. Rosenau v. City of New Brunswick and Gamon Meter Co., supra; Diamond v. N.J. Bell Telephone Co., 51 N.J. 594 (1968); Tortorello v. Reinfeld, supra, 6 N.J. at 65.

In certain circumstances, the court has attempted to mitigate the sometimes harsh results arising from the inflexible application of this standard by invoking the "discovery" rule. HN3 Under this rule, the statute of limitations is deemed not to begin to run until the injured party knows, or [\*432] by the exercise of reasonable diligence should have learned, that he may have a basis for an actionable claim. *E.g.*, Burd v. New Jersey Telephone Company, 76 N.J. 284 (1978); Lopez v. Swyer, supra; Alfone v. Sarno, 139 N.J. Super. 518 (App. Div. 1976). Thus, HN4 when a party is either unaware that he has sustained an injury or, although aware that an injury has occurred, he does not know that it is, or may be, attributable to the fault of another, the cause of action does not accrue until the discovery of the injury or facts suggesting the fault of another [\*\*\*16] person. See Lopez v. Swyer, supra. It is a rule most frequently summoned in medical malpractice cases, see *e.g.*, Fox v. Passaic General Hospital, supra; Moran v. Napolitano, 71 N.J. 133 (1976); Fernandi v. Strully, supra; Alfone v. Sarno,

supra, although it has found some other applications in the tort field, *e.g.*, Diamond v. N.J. Bell Telephone Co., supra (improper installation of an underground conduit); New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419 (1968) (error in land survey).

This rule is of no aid to plaintiff in the present case. She knew of her injuries and was simultaneously aware of their cause in the person of her husband at the moment of the assault and battery. That she might not then have prevailed in a lawsuit if the interspousal immunity bar were raised and asserted, even if true, does not mean that her cause of action did not then arise. HN5 The discovery rule has been, and is, pertinent only in those circumstances in which a plaintiff was not, and reasonably could not be, aware of the underlying factual basis for a cause of action. Burd v. New Jersey Telephone Company, supra, 76 N.J. at 291-292; Rankin v. Sowinski [\*\*\*17], 119 N.J. Super. 393 (App. Div. 1972); Holmes v. Russ, supra. That is not this case. Plaintiff's cause of action accrued when she was battered and the running of the statute of limitations from that point in time was not postponed by the undiscoverability of any latent facts crucial to the existence of the cause of action.

[\*433] III

The question remains as to whether other equitable considerations may relieve plaintiff of the onus of the statute of limitations. " \* \* \* HN6 [I]n each case [involving the application of the statute of limitations] the equitable claims of opposing parties must be identified, evaluated and weighed." Lopez v. Swyer, supra, 62 N.J. at 274. We have noted that, in appropriate situations, it would be remiss of the court to apply strictly and uncritically a statutory period of limitations without conscientious consideration of the circumstances of the individual case. Kaczmarek v. New Jersey Turnpike Authority, supra.

HN7 We must in the final analysis be governed by an objective assessment of the equities, not by an understandable sympathy for plaintiff's plight and a pardonable repugnance toward defendant's conduct. Plaintiff apparently [\*\*\*18] suffered substantial injuries but she was not incapacitated or prevented by her physical or mental trauma from pursuing her legal rights. Kyle v. Green Acres at Verona, Inc., 44 N.J. 100 (1965); accord, White v. Violent Crimes Compensation Board, 76 N.J. 368 (1978). Indeed, she was fit enough to confer with an attorney and to bring a criminal proceeding against defendant [\*\*1196] following the incident.



Even though defendant's conduct was grotesque and inexcusable, there is no **claim** that he defrauded plaintiff or that she relied upon any misleading or deceitful misrepresentation of his in forstalling civil redress. Cf. [Bowler v. Fidelity & Casualty Co. of N.Y.](#), 53 N.J. 313, 327-329 (1969); [State v. United States Steel Corp.](#), 22 N.J. 341 (1956); [Rothman v. Silber](#), *supra*, 90 N.J. Super. at 33-34.

In actuality, plaintiff initiated a divorce action against defendant. Although wrongful marital conduct would obviously be germane in those proceedings for any number of reasons, it has not been shown that plaintiff ever brought forth her damage **claims** for the tortious injuries she suffered. A wife's civil **claims** for monetary compensation against [\*\*\*19] her [\*434] husband, and his contingent liability therefor, would seem a relevant circumstance affecting the parties' financial status in the context of a matrimonial controversy. Cf. [Martindell v. Martindell](#), 21 N.J. 341 (1956); [Schiff v. Schiff](#), 116 N.J. Super. 546 (App. Div. 1971), cert. den. 60 N.J. 139 (1972); also, [Mey v. Mey](#), 79 N.J. 121 (1979); [Painter v. Painter](#), 65 N.J. 196 (1974); [Rothman v. Rothman](#), 65 N.J. 219 (1974). Hence, in assessing the equities in this present case from the perspective of the statute of limitations, it is not unfair to conclude that, during the pendency of the matrimonial litigation, plaintiff had given some thought to the possibility of asserting a **claim** against her husband as evidenced by the fact that such a **claim** was brought within weeks after the grant of the divorce. Since the circumstances of the marital tort and its potential for money damages were relevant in the matrimonial proceedings, the **claim** should not have been held in abeyance; it should, under the "single controversy" doctrine, have been presented in conjunction with that action as part of the overall dispute between the parties [\*\*\*20] in order to lay at rest all their legal differences in one proceeding and avoid the prolongation and fractionalization of litigation. Cf. [Falcone v. Middlesex County Med. Soc.](#), 47 N.J. 92 (1966); [Applestein v. United Board & Carton Corp.](#), 35 N.J. 343, 356 (1961); [Ajajian v. Schlanger](#), 14 N.J. 483, cert. den. 348 U.S. 835, 75 S. Ct. 58, 99 L. Ed. 659 (1954); also, [McFadden v. Turner](#), 159 N.J. Super. 360, 368-372 (App. Div. 1978); [Wm. Blanchard Co. v. Beach Concrete Co., Inc.](#), 150 N.J. Super. 277, 292-294 (App. Div.), cert. den. 75 N.J. 528 (1977); [Leisure Technology v. Klingbeil](#), 137 N.J. Super. 353, 357 (App. Div. 1975).

In the instant case, plaintiff neither filed a timely lawsuit nor was she prevented from so doing. She was mindful of her rights, as well as her wrongs, but neglected to

pursue them when there was an opportunity to do so within the time allowed by law. For these reasons, we conclude that plaintiff's action was barred by the statute of limitations. This obviates [\*435] consideration of the issue of provocation in connection with the **claim** for punitive damages.

The decision of the Appellate [\*\*\*21] Division is reversed and the case remanded for entry of judgment in favor of defendant.

**Concur by:** SULLIVAN

## Concur

---

SULLIVAN, J. (concurring in result). I concur in the result reached by the majority but not for the reasons expressed in its opinion. This is not a statute of limitations case. On May 14, 1973, when Mrs. **Tevis** was assaulted by Mr. **Tevis**, the doctrine of interspousal immunity was in effect in this State and she did not have a [\*\*\*1197] cause of action for damages against her husband. Our subsequent abrogation of this doctrine did not affect interspousal torts committed prior thereto. Cf. [Merenoff v. Merenoff](#), 76 N.J. 535, 560 (1978). The Appellate Division erred in holding to the contrary.

**Dissent by:** PASHMAN; HUGHES

## Dissent

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PASHMAN, J., dissenting. The majority today rules that a woman who was severely beaten by her former husband will not be compensated for the injuries which she suffered. In its view, her **claim** for relief was filed six weeks later than a literal reading of [N.J.S.A. 2A:14-2](#) would allow. In so holding, the majority both ignores the purposes underlying personal injury statutes of limitations and departs from this Court's heretofore "equitable" [\*\*\*22] approach in dealing with questions concerning the timeliness of suits.

I cannot subscribe to this result. Ms. **Tevis** did not institute suit immediately after the beating was inflicted because such an endeavor would have amounted to a wholly useless act. Her **claim** would have been dismissed pursuant to the archaic and now discredited doctrine of interspousal immunity. She did, however, file suit well within two years of our abrogation of the interspousal bar in [Small v. Rockfeld](#), 66 N.J. 231



(1974). Indeed, her suit was commenced a mere two years and six weeks from the date of injury. Given this circumstance, defendant does not -- nor can he reasonably -- contend [\*436] that he was prejudiced by the delay. Nor were the triers of fact compelled to render a decision based upon "stale" evidence. I would therefore hold that Ms. Tevis' cause of action did not "accrue" within the meaning of N.J.S.A. 2A:14-2 until we rendered our decision in Small v. Rockfeld, supra. Consequently, that cause of action is not time-barred.

I

N.J.S.A. 2A:14-2 -- the statute of limitations applicable to personal injury suits -- provides that an action for damages must be commenced [\*\*\*23] within two years after "the cause of \* \* \* action shall have accrued." Thus, the main question here is when did Ms. Tevis' claim in fact "accrue." The majority, relying upon technical pleading concepts relating to the distinction between an "element of a *prima facie* case" and an "immunity to suit," concludes that the date of accrual was May 14, 1973 -- the day upon which the beating was inflicted. Consequently, a literal application of N.J.S.A. 2A:14-2 leads them to dismiss the present suit, inasmuch as it was filed six weeks after May 14, 1975.

Such a mechanical construction of N.J.S.A. 2A:14-2 is both unwarranted and unwise. Due to the absence of any legislative specification as to the precise moment when a claim "accrues," this Court has long held that we are under a duty to fashion rules which best serve the interests of justice. See, e.g., Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 121 (1973); Fernandi v. Strully, 35 N.J. 434, 449 (1961). In carrying out this duty, technical legal concepts and *per se* rules are to be eschewed. Rather, we must scrutinize all of the facts and circumstances of a particular case in order to determine [\*\*\*24] whether barring suit will in fact serve the goals underlying the limitations period. See, e.g., Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329, 338 (1978); White v. Violent Crimes Compensation Bd., 76 N.J. 368, 379-387 (1978).

[\*437] The primary purpose of personal injury statutes of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend. See, e.g., Kaczmarek, supra, 77 N.J. at 337; Union City Housing Auth. v. Commonwealth Trust Co., 25 N.J. 330, 335 (1957). Another goal furthered by such statutes is that of stimulating litigants to pursue their causes of action diligently. See, e.g., Kaczmarek, supra, 77 N.J. at 337;

[\*\*1198] Farrell, supra, 62 N.J. at 115. Finally, limitations periods serve to weed out stale, frivolous and vexatious claims. See, e.g., Kaczmarek, supra, 77 N.J. at 337-338.

In situations where these goals will not be furthered by barring suit, we have not hesitated in departing from a strict and uncritical application of the statutory period. Thus, for example, this Court has developed the "discovery [\*\*\*25] rule" in order to ameliorate the sometimes harsh results that might ensue were causes of action always deemed to accrue at the moment an allegedly wrongful act is committed. Under that rule,

\* \* \* in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.

[Lopez v. Swyer, 62 N.J. 267, 272 (1973)]

See, e.g., Burd v. New Jersey Telephone Co., 76 N.J. 284, 291 (1978); Moran v. Napolitano, 71 N.J. 133 (1976); Fox v. Passaic General Hospital, 71 N.J. 122 (1976); Fernandi v. Strully, 35 N.J. 434 (1961).

The rationale underlying the discovery rule is not difficult to fathom. A plaintiff who is unaware of the commission of a tort or the defendant's responsibility therefor cannot be said to have slept on his rights until he discovers the facts which equate in law with a cause of action. Moreover, the defendant in such a situation cannot rightly complain that suit was not immediately instituted, inasmuch as his concealment of the [\*438] wrong [\*\*\*26] or his responsibility therefor directly caused the delay. Hence, suit is allowed because dismissal would not further the underlying goals of the statute of limitations. See, e.g., Moran, supra; Fox, supra; Lopez, supra; Fernandi, supra.

A similar rationale lies at the root of the doctrine of "equitable estoppel." Under that doctrine, a defendant is precluded from invoking the statute of limitations as an affirmative defense if his wrongful conduct or representations have caused a plaintiff's claim to be subject to the statute's bar. In the main, our courts have applied the doctrine in situations in which: (1) a defendant has lulled a plaintiff into a false sense of security by representing that a claim will be amicably settled without the necessity for litigation, see, e.g., Friedman v. Friendly Ice Cream Co., 133 N.J. Super. 333 (App. Div. 1975); Howard v. West Jersey and



Seashore R.R. Co., 102 N.J. Eq. 517 (Ch. Div. 1928), aff'd o.b., 104 N.J. Eq. 201 (E & A 1929); or (2) a defendant has failed to disclose information which he had a statutory duty to disclose, and such non-disclosure prevented a plaintiff from realizing that he possessed an actionable [\*\*\*27] **claim**, see, e.g., State v. United States Steel Corp., 22 N.J. 341, 355-360 (1956); Noel v. Tefteau, 116 N.J. Eq. 446 (Ch. Div. 1934). Mindful, however, of the equitable underpinnings of the doctrine, we have not hesitated to estop a defendant in any case in which his wrongful conduct has prevented the timely filing of a complaint. See, e.g., Barres v. Holt, Rinehart & Winston, Inc., 74 N.J. 461 (1977), aff'ing o.b., 141 N.J. Super. 563 (App. Div. 1976), aff'ing o.b., 131 N.J. Super. 371 (Law Div. 1974); Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 111 (1965); Patrick v. Groves, 115 N.J. Eq. 208, 210 (E & A 1934). As in the case of the "discovery rule," suit is not barred because dismissal will not further the goals underlying the limitations period.

Contrary to the assertions of the majority, this Court has never intimated that statutes of limitations must be literally applied in every case whose factual pattern does not [\*439] fall within the contours of the discovery rule or the doctrine of equitable estoppel. In fact, we have continuously emphasized that "it would be derelict \* \* \* to apply strictly and uncritically [\*\*\*28] a statutory period of limitations [in any situation] without [\*\*1199] considering conscientiously the circumstances of the individual case and assessing the Legislature's objective in prescribing the time-limitation as related to the particular **claim**." Kaczmarek, supra, 77 N.J. at 338; see, e.g., White, supra, 76 N.J. at 379; Ward v. McLellan, 117 N.J. Eq. 475 (E & A 1935).

An examination of the facts of this particular case shows clearly that dismissal will not further the purposes underlying the two year limitations period prescribed by N.J.S.A. 2A:14-2. Rather, such an examination leads to the conclusion that Ms. Tevis' cause of action should be deemed to have accrued on December 17, 1974 -- the date on which this Court decided Small v. Rockfeld, 66 N.J. 231 (1974).

II

Ms. Tevis' injuries were inflicted on May 14, 1973. She did not immediately file suit against her husband for the simple and quite understandable reason that any such suit would have been dismissed pursuant to the doctrine of interspousal immunity. On December 17, 1974, however, this Court handed down its decision in Small

v. Rockfeld, supra, thereby sounding [\*\*\*29] the death knell of this archaic common law immunity. Upon becoming aware of our decision, Ms. Tevis filed suit. This suit was commenced well within two years of the Small decision. Her course of conduct therefore demonstrates that she was not remiss in diligently asserting her rights. She instituted a **claim** for redress as soon as she had a right to receive such redress.

The proofs adduced at trial show unmistakably that Ms. Tevis' **claim** for relief was neither frivolous nor vexatious. Nor were the triers of fact compelled to render a decision predicated upon "stale" evidence, inasmuch as suit was commenced [\*440] a mere six weeks after the limitations period would ordinarily have expired.

Finally, in view of the limited time period between injury and suit, defendant cannot reasonably complain that his defense has been prejudiced by delay. Indeed, defendant has not alleged during any stage of the present proceedings that delay has in fact hindered his ability to respond to Ms. Tevis' complaint.

Thus, dismissal of this particular suit will not further *any* of the goals underlying N.J.S.A. 2A:14-2. Indeed, dismissal will not serve any salutary purpose whatsoever. [\*\*\*30] <sup>1</sup> Instead, such a disposition of the present suit will merely act to undermine the basic policy upon which our tort law is predicated.

At the very root of our system of civil laws is the notion that justice should be achieved and wrongs redressed. This impulse applies with special force in the tort area where " \* \* \* over the centuries the common law \* \* \* has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." Carey v. Phiphus, 435 U.S. 247, 257, 98 S. Ct. [\*\*\*31] 1042, 1049, 55 L. Ed. 2d 252, 261 (1978); see, e.g., Merenoff v. Merenoff, 76 N.J. 535, 547 (1978); Anderson v. Somberg, 67 N.J. 291 (1975), cert. den. 423 U.S. 929, 98 S. Ct. 279, 46 L. Ed. 2d 258 (1975); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960).

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<sup>1</sup>The majority **claims** to be concerned with protecting the courts from a flood of old and stale **claims**. Its fear in that regard is unfounded. Two years have already elapsed since Small v. Rockfeld was decided. Thus, only **claims** already pending would be cognizable. Second, the application of equitable principles to each particular case will ensure that only those cases will be heard where the evidence is fresh and prejudice is lacking.

The majority today simply ignores this principle. Instead, it chooses to give effect to a common law immunity which originated in 16th century England and is predicated upon [\*441] the legal fiction of spousal unity. See, e.g., *Merenoff, supra*, 76 N.J. at 539; *Small v. Rockfeld, supra*, [\*\*1200] 66 N.J. at 238; *Immer v. Risko*, 56 N.J. 482, 484-485 (1970).

This is not a case in which an immunity prospectively abolished by this Court actually did further some rational goal at the time that the events in controversy transpired. The concept of juridical unity of husband and wife was outmoded when Ms. *Tevis* was beaten, it was outmoded when she filed suit, and it remains outmoded today. Indeed, any goals that might once have been served by the fictitious concept were effectively dissipated by the enactment of the "Married Women's Acts" in the mid-nineteenth [\*\*\*32] century. See *N.J.S.A. 37:2-1 et seq.* This is the precise reason that we abolished the immunity. See *Merenoff, supra*, 76 N.J. at 540; *Small v. Rockfeld, supra*, 66 N.J. at 238; *Immer v. Risko, supra*, 56 N.J. at 485.

Nevertheless, the majority today chooses to exalt this functionally useless immunity at the expense of the principle of fair compensation which is deeply embedded in our tort law. It does so by mechanically applying the literal language of a statute of limitations none of whose purposes will be served by barring this particular dispute. The majority in effect rules that, in this case, principles of equity should play no part in the judicial process.

I dissent.

HUGHES, C.J., dissenting: I would affirm the judgment below substantially for the reasons expressed in the opinion of the Appellate Division, reported at *155 N.J. Super. 273*.

# Attorney Ethics Random Audit Compliance Program

By Francesca O’Cathain

## The Three Stated Goals of the Audit:

1. Education
2. Deterrence
3. Detection of Misappropriation

## How Do They Pick Your Firm?

- Random computer-generated selection
- Approximately 5,400 law firms in New Jersey

## How Much Time Do You Have?

- 10 day notice. Usually one auditor for a regular sized firm. An attorney is expected to be present.

## What to Expect?

1. An initial interview about the firm’s book-keeping procedures.
2. Auditor reviews the trust and business accounts.
3. Auditor verifies that all trust account funds are safeguarded.

## What Happens After?

- Closing letter if everything is compliant
- If there are deficiencies:
  - o Minor: Letter that requires corrective action and the attorney has 45 days to demonstrate compliance.
  - o Major: Referral to the OAE

## **Requirements of R 1:21-6 – The Record Keeping Requirement**

Every law firm will have at least two bank accounts. Separate accounts are required for the following:

- Trust Account i.e. funds entrusted to the attorney's care to be deposited. Examples include settlement funds from a personal injury case or money held in a matrimonial case.
- IOLTA Trust Account i.e. interest earned on the trust account funds
- Business Account i.e. for professional services to be deposited
- Fiduciary Account e.g. maintained when the lawyer is an executor, guardian, trustee, receiver etc.

### **Trust Account**

#### **Basics:**

- All accounts/slips/checks designated "Attorney Trust Account"
- Only New Jersey attorneys can be signatories

#### **The Bank:**

- Must be with a bank approved by the Supreme Court
- Bank agrees to report to the OAE if that account has insufficient funds

#### **Legal Fee from Trust Account:**

- If the money in the trust account includes the legal fee owed to the lawyer, the lawyer can withdraw that money unless the client disputes the fee. In that case, it must remain in the trust account until the dispute is resolved.
- Retainers do not need to be kept in a trust account unless there is an explicit understanding with the client to keep them there.
- Do not electronically transfer your legal fee from the trust account

#### **No Commingling:**

- The attorney can put a minimal amount of money in the trust account to pay service charges. \$250 is the suggested amount. This is not considered commingling. Be sure to maintain a trust ledger for these funds.

#### **Monthly Reconciliations:**



- The balances in the Trust Ledger Book must be reconciled every month with the balances in the Trust Receipts Journal and Trust Disbursements Journal. Must be able to show compliance with this.

#### Electronic Transfers:

- No electronic transfers from this account to your business account – even if it is your legal fee
- Trust Account electronic transfers must be made on signed written instructions from an attorney to the bank
- The bank must provide the attorney with a document that confirms an electronic transfer

#### Trust Account Book-Keeping:

- Basic Trust Accounting System Consists of the Following:
  - o Trust Account Checkbook
  - o Trust Receipts Journal – records all deposits/credits to the trust account
  - o Trust Disbursement Journal – records all withdrawals/debits from the trust account
  - o Trust Ledger Book
    - The Trust Ledger Book must have a single page for each separate client
    - Must have a running balance of funds held for each client

The Receipts/Disbursements Journals are known as the basic books. The Ledger Books are known as the secondary books. After entries are first made in the Journals, they are then made in the Ledger Books.

- Three Way Monthly Reconciliation
  - o Step 1: Obtain “Book Balance”
    - Add up the Total Receipts Journal for the month
    - Add up the Total Disbursements Journal for the month
    - Put those totals in the “Control Sheet”
    - Get the “Book Balance” by putting in last month’s balance
    - Put these numbers in the “Reconciliation Sheet”
  - o Step 2: Obtain “Reconciled Bank Balance”
    - Put in last month’s ending balance

- Add deposits in transit
  - Subtract outstanding checks
  - The totals should be the same as the “Book Balance”
- Step 3: Obtain “Client Trust Ledger”
  - Get all open balances from the Client Trust Ledger
  - Total should be the same as Step 1 and Step 2
- Maintain current status and retain the following for 7 years
  - All deposits/withdrawals
  - Ledger books
  - Retainers and Compensation agreements
  - Statements to clients re disbursements of funds on their behalf
  - Bills to clients
  - Payments to non-employees for services
  - Originals of checkbooks
  - Proof of monthly reconciliations.
  - Any part of the clients’ file needed to understand financial transactions

Mistakes that Can Become Problems:

- All funds in the Trust account must be identifiable. An overage makes no sense and needs to be investigated. A shortage indicates a real problem and needs to be investigated because that is a potential sign of misappropriation.
- Do not open separate trust accounts for each client. With all trust money in one trust account, the client ledger card becomes very important because it will avoid the mistake of using one client’s money for another client.

Left Over Money in the Trust Account

- Designated as unidentifiable and unclaimed if there for more than 2 years
- If can’t locate after another year of diligent search, paid to the Clerk of the Superior Court with an Affidavit of Diligent Search

Other:

- There is a duty to pay promptly i.e. don’t leave money sitting in the trust account
- No ATM for this account

- Withdrawals cannot be made to “cash”
- Maintain records for 7 years

### **IOLTA – Interest on Lawyer’s Trust Account**

- An attorney cannot receive interest on trust accounts.
- Account designated “IOLTA Attorney Trust Account”
- Any bank approved by the Supreme Court to hold a trust account must offer an IOLTA account
- An attorney can open a separate interest bearing account for an individual so long as it complies with the Rules. This is rarely done because it is not necessary and not worth the potential pitfalls.

### **Business Account**

- All accounts/slips/checks designated “Attorney Business Account”, “Attorney Professional Account”, or “Attorney Office Account”
- Signatory does not have to be an attorney but probably should be e.g. can be a non-attorney office manager
- Does not have to be Supreme Court approved bank but needs to have a New Jersey branch
- Can have more than 1 business account
- Remember to never put client funds in this account
- Legal fees received must go into this account
- Payroll and business expenses can be paid from this account
- Can accumulate interest that the attorney can retain
- No Monthly Reconciliation Required
- Must maintain the following:
  - o Receipts Journal
  - o Disbursements Journal
  - o Checkbook with Running Balance
  - o Imaged Checks – No More than Two Per Page Front and Back



- Deposit Slips

## **Non-Compliance**

- Violation of
  - R.P.C. 1.15(d) and/or R.P.C. 8.1(b)

## **Conclusion:**

- Show them the money
  - Your money
  - The client's money
  - And the IOLTA money



New Jersey Courts

Independence • Integrity • Fairness • Quality Service

# Legal Ethics & Artificial Intelligence: Guidance for New Jersey Lawyers

July 24, 2024

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# Panelists

- Johanna Barba Jones, Esq., Director of the Office of Attorney Ethics
- Laks Kattalai, CIO, NJ Judiciary
- Jessica Lewis Kelly, Esq., Special Assistant to the Administrative Director
- Ryan J. Moriarty, Esq., Assistant Ethics Counsel, Office of Attorney Ethics

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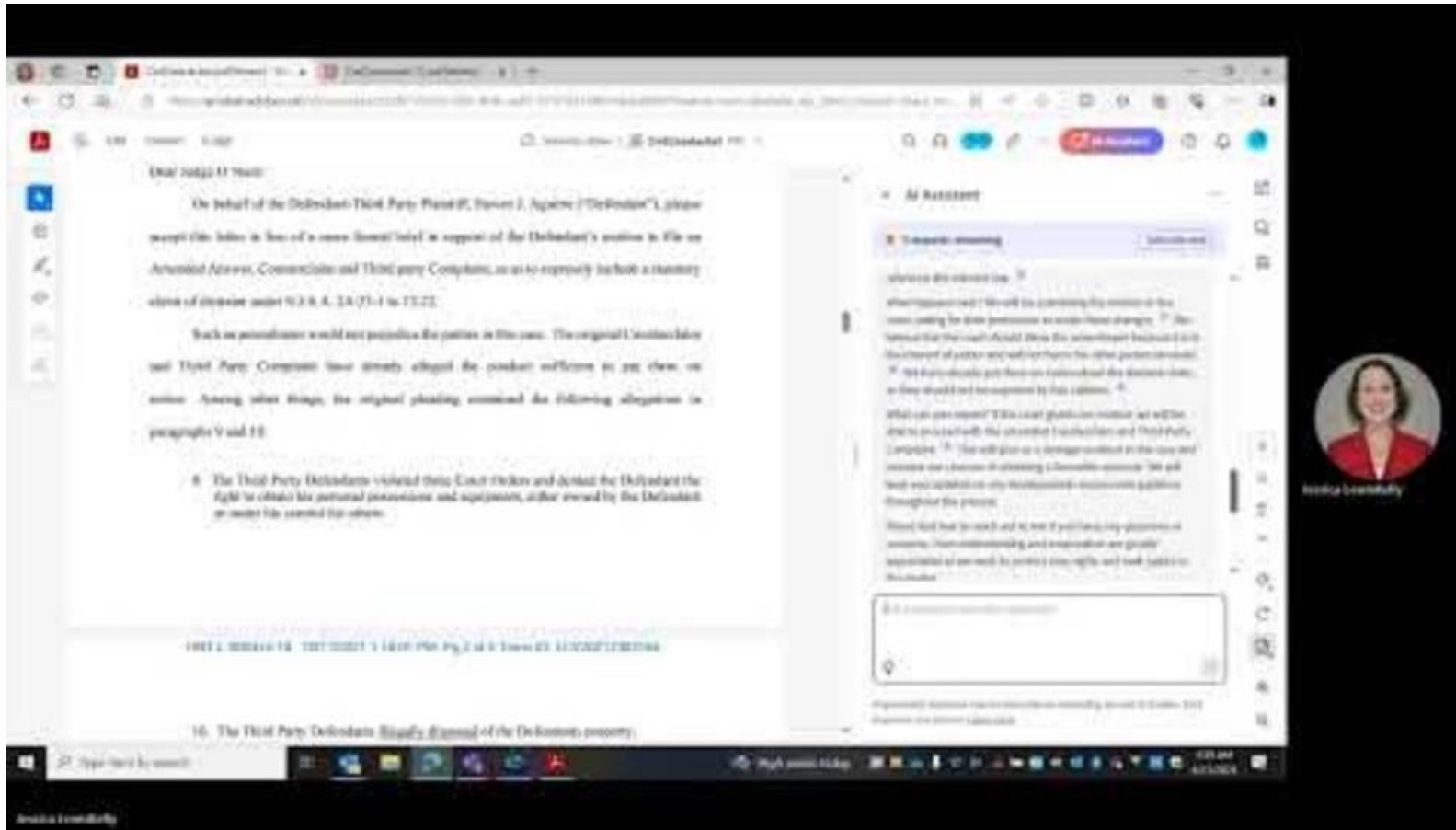
# Overview

- AI Terms & Concepts
- Uses of AI in the Law
- NJ Supreme Court Guidance on AI Use by Lawyers
- AI Ethics: Examples & Discussion



# Use of GAI by Attorneys

This [video](#) shows how the Adobe AI assistant can review public (non-confidential) pleadings in eCourts, draft an email to the client, then translate the email into Spanish.



Dear Judge O'Neill:

On behalf of the Defendant-Third Party Plaintiff, Steven J. Aguirre ("Defendant"), please accept this letter in lieu of a more formal brief in support of the Defendant's motion to file an Amended Answer, Counterclaim and Third party Complaint, so as to expressly include a statutory claim of distraint under N.J.S.A. 2A:33-1 to 33-23.

Such an amendment would not prejudice the parties in this case. The original Counterclaim and Third Party Complaint have already alleged the conduct sufficient to put them on notice. Among other things, the original pleading contained the following allegations in paragraphs 9 and 10:

9. The Third Party Defendants violated three Court Orders and denied the Defendant the right to obtain his personal possessions and equipment, either owned by the Defendant or under his control for others.

HNT-L-000414-18 10/11/2021 1:18:01 PM Pg 2 of 5 Trans ID: LCV20212363164

**AI Assistant**

Unlock full access to AI Assistant [Subscribe now](#)

Reframe this email to be from the lawyer to the client, explaining the motion and what is being requested. Write at a 7th grade level.

Subject: Important Update: Motion for Leave to File an Amended Answer, Counterclaim, and Third Party Complaint <sup>1</sup>

Dear [Client's Name],

I hope this email finds you well. I wanted to provide you with an important update regarding your case against Investor's Holding Fund, LLC. <sup>2</sup> We are preparing to file a motion on your behalf, seeking permission from the court to amend your Answer, Counterclaim, and Third Party Complaint. <sup>3</sup>

What does this mean? Well, an amendment is like making changes or additions to your original response to the lawsuit. <sup>4</sup> In this case, we want to include a new claim called "distrain" under a specific New Jersey law. This claim relates to the unlawful taking or disposal of your personal property by the Plaintiff and Third Party

Ask a question about this document

AI-generated responses may be inaccurate or misleading. Be sure to double-check responses and sources. [Learn more](#)

Dear Judge O'Neill:

On behalf of the Defendant-Third Party Plaintiff, Steven J. Aguirre ("Defendant"), please accept this letter in lieu of a more formal brief in support of the Defendant's motion to file an Amended Answer, Counterclaim and Third party Complaint, so as to expressly include a statutory claim of distraint under N.J.S.A. 2A:33-1 to 33-23.

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- 9. The Third Party Defendants violated three Court Orders and denied the Defendant the right to obtain his personal possessions and equipment, either owned by the Defendant or under his control for others.

AI Assistant

3 requests remaining [Subscribe now](#)

Translate the above email into Spanish. Include a statement at the beginning that the translation is being done with technology to save time so it might not be perfect.

Subject: Actualización Importante: Solicitud de Permiso para Presentar una Respuesta Enmendada, Contrademanda y Demanda de Terceros

Estimado/a [Nombre del Cliente],

Espero que este correo electrónico le encuentre bien. Quería brindarle una actualización importante sobre su caso contra Investor's Holding Fund, LLC. Nos estamos preparando para presentar una solicitud en su nombre, buscando permiso del tribunal para enmendar su Respuesta, Contrademanda y Demanda de Terceros.

Quiero mencionar que esta traducción se está realizando con tecnología para ahorrar tiempo, por lo que puede que no sea



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# Use of GAI by Attorneys

This [video](#) shows how ChatGPT4o voice mode can be used to practice an oral Q&A (with the example being the Rules Hearing before the New Jersey Supreme Court).





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# Artificial Intelligence (AI) & Generative Artificial Intelligence (GAI) Terms & Concepts

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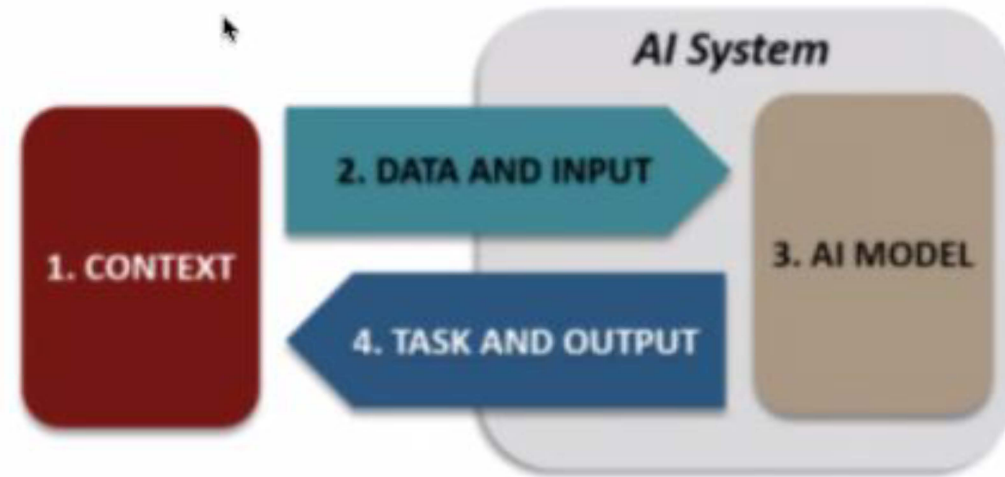
# Terms & Concepts

- **Artificial Intelligence** includes an array of technologies that perform functions based on simple, rule-based systems to complex, self-learning algorithms. Examples include recommendations of products or services based on prior use history (e.g., Netflix or Amazon).
- **Generative AI** (Gen AI or GAI) refers to Large Language Models (LLM) that generate text, images, and other content based on review of prior information in the dataset.

## — Components of AI Systems & Stages of the AI Lifecycle

An **AI system** is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that [can] influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.

- OECD, 2023



Plan & design

Collect & process data

Build & use model

Verify & validate

Deploy

Operate and monitor

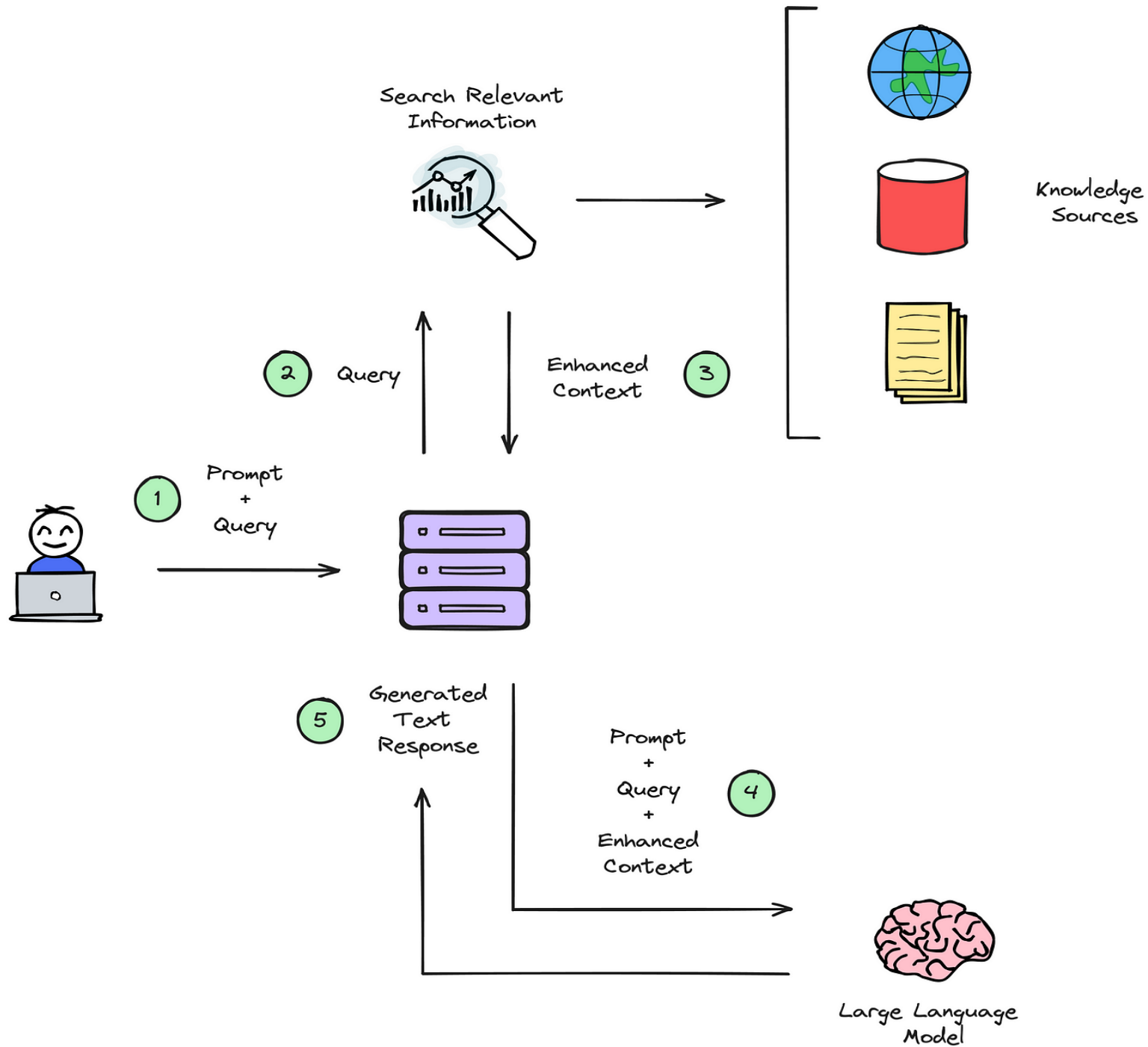
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# Terms & Concepts

- **Hallucinations (or confabulations)** refer to instances in which an AI model generates content that is incorrect or nonsensical due to limitations in the model's understanding, biases in the dataset, or errors in the processing pipeline.
- **Retrieval Augmented Generation (RAG)** involves forcing the AI to develop answers based on real datasets as opposed to open, contradictory datasets. This method can prevent hallucinations.

# Retrieval Augmented Generation



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# Terms & Concepts

- **Transparency:** the openness of an AI system, meaning the extent to which its design, data, and decision-making operations are made known to stakeholders
- **Explainability:** the ability of an AI system to provide understandable reasons for its decisions/outputs

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# Terms & Concepts

- **Interpretability:** the capacity to discern the data points and logic that led to an AI system's decision (e.g., high interpretability means that the internal mechanisms of an AI system can be meaningfully analyzed and related to its outputs)
- Transparency + Explainability + Interpretability → more trustworthy AI



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# Uses of AI in the Law

# GAI Benefits



- Enhanced efficiency and productivity
- Improved risk assessment and decision-making
- Cost savings and resource optimization
- Task automation and workflow improvement

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# GAI Risks

- Data privacy and security
- Ethical considerations and biases
- Inaccuracies and reliability concerns
- Intellectual property issues
- Job displacement/evolution and industry adjustments
- Dependency and loss of critical thinking
- Overall regulation and enforcement

# Current Uses of GAI for Legal Tasks

- **Document review / litigation support**
  - eDiscovery, deposition summarization, review and analysis
- **Contract review**
  - Summary of key terms, conflicting clauses, policy compliance





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# Current Uses of GAI for Legal Tasks

- **Drafting**
  - First responses, motions, contracts
- **Knowledge Management**
  - Templates and form databases
  - Resource organization and retrieval
- **Research**
  - Non-hallucinating legal resources: CaseText, Reuters

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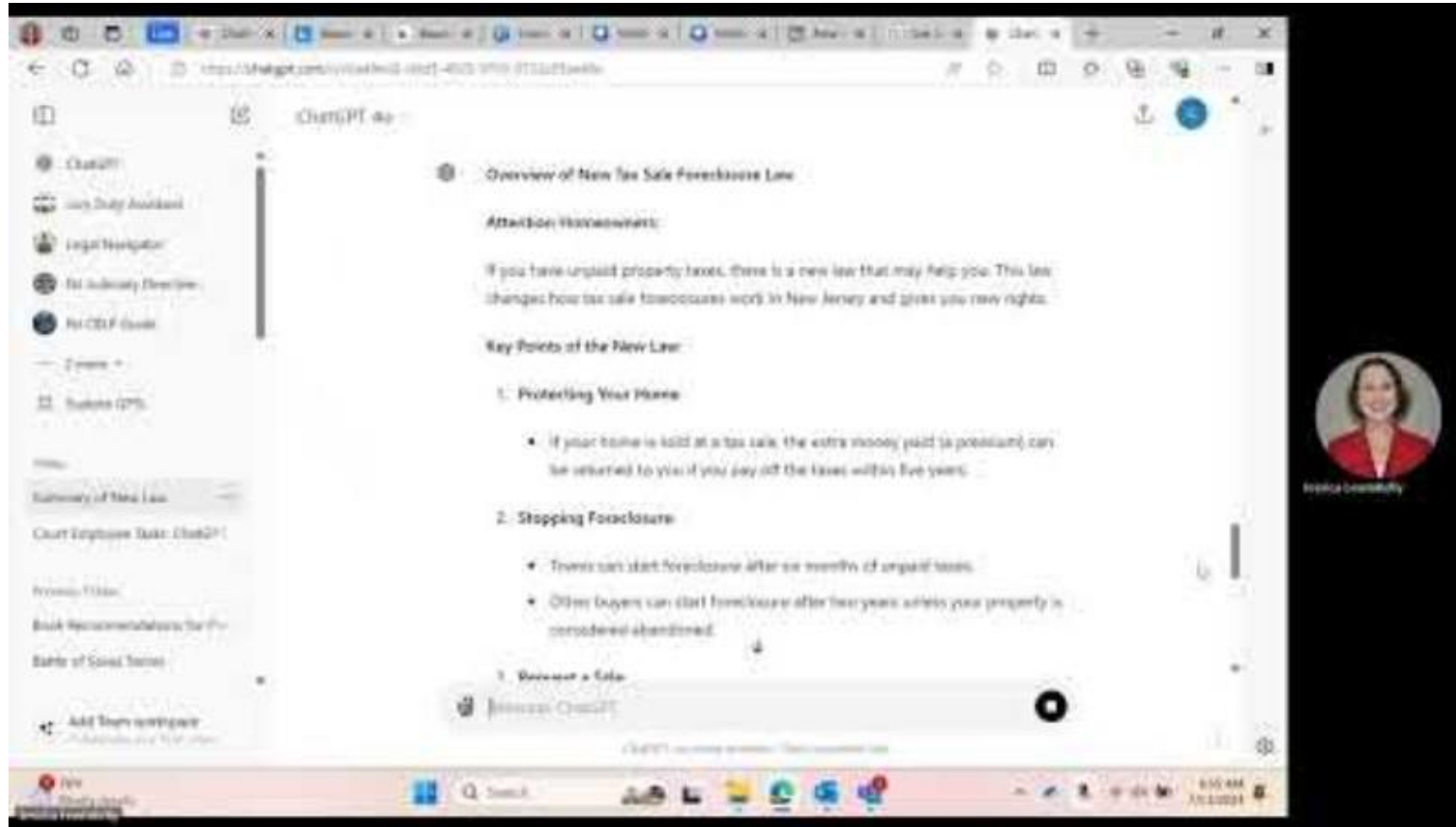
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# Current Uses of GAI for Legal Tasks

- **Training**
  - Preparation of slides, illustrations, and examples
- **Non-Legal Presentations**
  - Intra-office communications, speeches
- **Office Management**
  - Scheduling, etc.

# Use of GAI by Attorneys

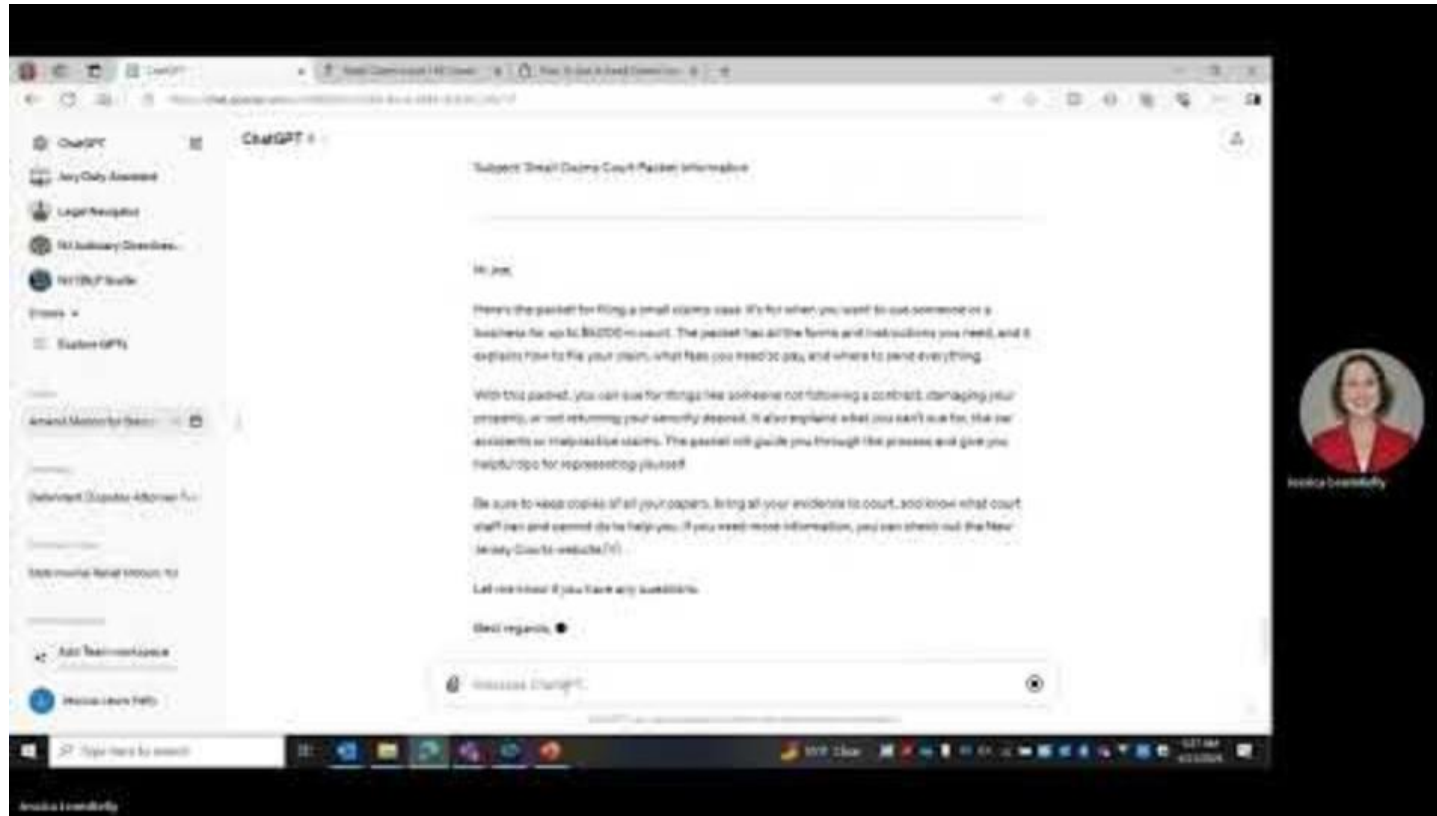
In this [video](#), AI summarizes the provisions of the new tax sale foreclosure law, first in detail and then in simple terms for members of the public who might be affected by the law.





# Use of GAI by Legal Staff

In this [video](#), ChatGPT4 summarizes a Judiciary self-help packet and drafts an explanatory email to a self-represented court user, with information for the ombudsman.



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# NJ Supreme Court Guidelines for Lawyers

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# Supreme Court Action – January 2024

- [Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers](#)
- Issued January 25, 2024, effective immediately
- Detailed overview of ethical considerations
- No immediate amendments to any RPCs
- Questions and comments, including as to specific AI use cases: [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov)

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# Supreme Court Action – January 2024

- **Accuracy and truthfulness**, RPCs 3.1, 4.1(a)(1), and 8.4(c)
- Lawyers must check their case citations (of course)
  - And must ensure that an AI-suggested argument has merit and is not frivolous

# Supreme Court Action – January 2024

- **Honesty, candor, and communication**
  - RPC 3.3 (candor to the tribunal)
  - RPCs 1.2(d), 1.4(d), 3.4(b)

AI is not an excuse for false representations and does not enable misleading manipulation of evidence by a lawyer or client



# Supreme Court Action – January 2024

- **Confidentiality**
  - RPC 1.6. Lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosure...
  - A lawyer is responsible to ensure the security of an AI system before entering any non-public client information





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# Supreme Court Action – January 2024

- **Prevention of Misconduct, Including Discrimination**
  - Again, lawyers remain responsible to ensure accuracy of communications with clients and the court, RPCs 8.4(c), (d), and (g)
- **Oversight, RPCs 5.1, 5.2, 5.3**
  - Ethical responsibilities extend to lawyers and nonlawyer staff, including as to use of AI



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# Supreme Court Action – January 2024

- These preliminary guidelines are intended to assist lawyers in complying with the **existing RPCs, which remain unchanged by the availability and use of AI.**

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# AI Ethics

## Examples & Discussion

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# Hypothetical – AI for Client Intake

- A prospective client contacts you to discuss representation in a DWI matter. You don't do a lot of municipal work but are aware that there were some recent changes in this area.
  - Could you use GAI to get a quick update on DWI law in New Jersey?

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# Hypothetical – AI for Client Intake

- Sure. You're just gathering information.



## ChatGPT

Searched 6 sites

In New Jersey, recent changes to DWI (Driving While Intoxicated) law have introduced significant amendments, particularly regarding the handling of plea bargains and the implementation of ignition interlock devices. As of early 2024, the New Jersey Supreme Court has allowed plea bargaining in DWI cases, overturning a longstanding rule that prohibited such negotiations in these matters. This change aims to provide more flexibility in the judicial process and potentially lead to quicker resolutions in DWI cases ([The Bianchi Law Group](#)) ([Monmouth Defense Blog](#)).

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# Hypothetical – AI for Client Q&A

- After an initial meeting, the client retains you. It's a first offense, BAC 0.19. The client asks what options are likely.
  - Could you use GAI to get an initial answer?

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# Hypothetical – AI for Client Q&A

- Yes, as long as you protect confidentiality and check your work.

JL You

My client has no prior DWIs. The blood alcohol (BAC) was 0.19. Is my client eligible for a plea?

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# Hypothetical – AI for Client Q&A



## ChatGPT

Yes, your client is eligible for a plea bargain. Recent changes in New Jersey DWI law now allow plea bargaining for DWI cases, even for those with higher blood alcohol concentrations (BAC), like your client's BAC of 0.19. This is a significant shift from previous regulations where plea bargaining in DWI cases was generally prohibited ([The Bianchi Law Group](#)) ([Monmouth Defense Blog](#)).

However, given the high BAC level, it's important to prepare for stringent conditions that might be part of any plea agreement. This could include a longer period for which an ignition interlock device must be installed and possibly other penalties. It's crucial to discuss these potential outcomes with your client and negotiate the best possible terms within the new legal framework.





**You**

provide a hyperlink to New Jersey Supreme Court information on DWI plea bargaining. search only njcourts.gov



**ChatGPT**

Searched 3 sites

The New Jersey Supreme Court has recently authorized plea bargaining in DWI cases, allowing for more flexibility in handling these charges, even for cases with higher BAC levels such as your client's 0.19. This change is significant as it deviates from the previous stringent rules that prohibited plea deals in DWI cases. Now, attorneys can negotiate plea agreements that might involve reduced penalties or alternative sentencing options under certain circumstances. This is detailed in the court's guidelines and recent amendments to N.J.S.A. 39:4-50, reflecting a shift in policy to allow for judicial discretion in plea bargaining within the DWI context.

For specific guidelines and details directly from the New Jersey Courts on plea bargaining in DWI cases, you can refer to the official notice [here](#).

JL

Write an email to a client in a NJ municipal court matter. The client is charge with DWI. BAC 0.19. Looking for a plea bargain. Explain at a 6th grade level the likely options and penalties.

Dear [Client's name],

I am writing to update you on the options for resolving your DWI charge in municipal court. Because New Jersey law prohibits plea bargaining of DWI charges, our options are limited. However, I want to explain the likely outcomes and penalties you are facing.

For a first DWI offense with a BAC of 0.19, the mandatory penalties would include:

- Up to 30 days in jail
- License suspension of 7-12 months

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# NJ Courts Use of AI

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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI

## Statement of Principles

### **Independence**

- AI systems will be designed and deployed in a manner that respects and maintains the independence of the Judiciary...
  - AI will never be used to replace the autonomy of judges...

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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI

## Integrity

- AI technologies will be rigorously assessed
  - The Judiciary ... will engage in ongoing oversight to ensure that AI technologies are Transparent, Explainable, Accurate, Reliable, and Secure.

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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI



## Fairness

- AI will be used to support equity for all parties to the case, to maximize access to the courts, and to reduce unnecessary delays in case disposition...



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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI

## Quality Service

- Expanded Judiciary use of AI aims to improve effectiveness and consistency in court services...
  - AI technologies will be used in ways that maintain confidentiality and that safeguard the security of Judiciary systems and the data contained in those systems.



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# Resources & Next Steps

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# AI Resources for NJ Attorneys

Notice to the Bar, “Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence By New Jersey Lawyers”

(January 24, 2024) (viewable at:

<https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf?cb=aac0e368>).

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# AI Resources for NJ Attorneys

New Jersey State Bar Association, Task Force on Artificial Intelligence (AI) and the Law: Report, Requests, Recommendations, and Findings (May 2024) (viewable at: <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>)

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# Specific Questions or Suggestions

Legal questions about prospective use of artificial intelligence?

Call the Attorney Ethics Hotline @ (609) 815-2924.

Suggestions for issues to be considered by the NJ Supreme Court Committee on AI?

Email [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov)

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# Takeaway #1

Use of generative AI for legal work remains limited – but attorney feedback suggests it will expand.

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# Takeaway #2

Now is a great time to become familiar with the basics of generative AI, even if you opt not to use it for legal work.

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# Takeaway #3

The Judiciary welcomes questions and suggestions about AI training and resources.



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# Questions & Discussion



# **Task Force on Artificial Intelligence (AI) and the Law: Report, Requests, Recommendations, and Findings**

**May 2024**

## **Co-Chairs**

**Steven J. Eisenstein  
Rebecca L. Rakoski  
Dr. Robert Spangler**

## **Task Force Members:**

Hon. Ronald J. Hedges (Ret.)  
Seth Abrams  
John Allen  
Christopher J. Asakiewicz  
Raymond M. Brown  
Narline Casimir  
Kelly Castor  
Vincent I. Ferrer  
Trina L. Glass  
Harry Halikias  
Robert B. Hille  
Philip W. Lamparello  
Naju R. Lathia  
Scott R. Malyk  
Jay McManigal  
Timothy F. McGoughran  
Michael Paglione  
Karen P. Randall  
Ravi Sattiraju  
Jennifer N. Sellitti  
Brandon Lee Wolff  
Stephanie J. Wilson  
John T. Wolak  
Brett Yore

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# **NJSBA Task Force on Artificial Intelligence and the Law: Official Report, Recommendations, and Findings**

## **Executive Summary:**

This report includes the collaborative efforts and conclusions of the New Jersey State Bar Association's 27-member Task Force on Artificial Intelligence and the Law. As such, it addresses fundamental considerations and provides practical, actionable guidance for attorneys and legal professionals to use AI while maximizing its benefits safely and ethically. Critical areas explored include understanding AI's benefits, recognizing potential risks, selecting appropriate AI tools, ensuring data protection and effectively training staff.

This report is designed to serve as a practical resource. The conclusions and recommendations herein emphasize the importance of prioritizing AI education, establishing baseline procedures and guidelines, and collaborating with data privacy, cybersecurity, and AI professionals as needed. Given the complexity of the topic and the resources necessary for attorneys to safely use AI, interim measures such as adopting temporary guidelines are recommended until a comprehensive AI policy can be developed and implemented. These priorities and recommendations are essential to ensure the responsible integration of AI in legal practice and adherence to ethical and legal standards.

Finally, this report highlights several important social justice concerns related to the use of AI, including the importance of transparency in AI software algorithms, bias mitigation, and equitable access to AI tools. The Task Force concluded that legal AI tools should be reviewed for fairness and accessibility, particularly tools designed for individuals from marginalized or vulnerable communities. Understanding the risks and benefits of AI as related to social justice is crucial to maintaining a just and inclusive legal system that benefits all members of society.

## **Introduction and Background**

The NJSBA Task Force on AI and the Law is comprised of 27 attorneys and industry experts. It was established in late 2023 with the objectives of examining the impact of AI on the legal profession and providing practical guidance to attorneys and legal professionals. The Task Force, co-chaired by Steven Eisenstein, Rebecca Rakoski and Dr. Robert Spangler, aimed to provide attorneys and legal professionals with the tools, education, guidance and resources needed to safely and ethically navigate and benefit from the growing use of AI in the legal field.

The Task Force was organized into four workgroups, each dedicated to addressing specific facets of AI's interaction with the legal domain. These workgroups (Artificial Intelligence and Social Justice Concerns, Artificial Intelligence Products and Services, Education and CLE Programming, Ethics and Regulatory Issues) were asked to deliver findings and/or recommendations tailored to the needs of New Jersey's legal community.

Each workgroup operated independently, conducting thorough research, analysis and deliberation. Workgroup findings were reported back to the entire Task Force in group meetings. This report represents the culmination of these efforts.

### **Focus of the Report**

A central tenet of this Task Force was to avoid duplicating the existing efforts of other state and regional AI task forces and committees. Instead, it sought to build on the insights and expertise of these groups by contributing practical information and recommendations tailored to the specific needs of New Jersey's legal community.

Similarly, in crafting this report, the Task Force acknowledged the dynamic nature of the field and the continuous evolution of AI technologies. As such, the recommendations presented here are designed to remain relevant and to be adapted in line with future developments. This report is intended to serve as the initial installment in a series of statements, guidance documents, videos and educational resources that will be updated as needed and focused on the intersection of AI and the law.

## **Summary of Requests, Findings, and Recommendations**

The following primary requests, findings and recommendations underscore the importance of education, ethical considerations and responsible implementation of AI tools in the legal profession.

### **Requests for the NJSBA Board of Trustees:**

1. The NJSBA should continue to provide diverse educational opportunities for attorneys on AI selection and use, as well as the impact of AI on the practice of law.
2. The NJSBA should establish a permanent group dedicated to AI, the evolving technological landscape and its application to the legal profession.

### **Recommendation for further discussion:**

1. It is recommended to propose that the New Jersey MCLE Board require attorneys to earn one CLE credit every two years in technology-related legal subjects. Specifically, given the ethics and social justice issues inherent in using AI in the practice of law, the Task Force recommends that one of the five required ethics credits for CLE compliance be technology related.

### **Findings:**

1. Legal professionals must understand that education, knowledge and guidance are necessary to operate AI tools safely and ethically in a legal setting.
2. When assessing AI tools and services, it is crucial to categorize them according to their intended users and recipients. Tools designed for the public, as opposed to legal professionals, should not be used for tasks considered "the practice of law."
3. When evaluating AI tools and services, it is essential to identify and document how data, especially client data, is transmitted, used and stored by the AI to ensure its confidentiality. This information should guide the assessment of whether a particular AI tool is suitable for its intended use.
4. All law firms should adopt an organizational AI policy with a risk assessment framework (sample template provided in Appendix 2).
5. The Rules Governing the Courts of New Jersey, the New Jersey Rules of Evidence and the Rules of Professional Conduct are sufficiently flexible to address considerations relating to AI.

## **Additional Findings and Recommendations:**

This report acknowledges the ever-evolving nature of AI and offers initial guidance, rather than definitive policies. Subsequent tools and recommendations will be provided as the technology progresses, with a continued emphasis on practicality. The following additional findings and recommendations support this mission:

### **Additional recommendations for further discussion:**

1. The Task Force recommends the creation of a monthly or bi-monthly AI email newsletter distributed by the NJSBA. This newsletter would feature curated articles, case studies, instructional videos and updates on AI-related topics relevant to the legal profession. Additionally, it could include highlights from recent court decisions involving AI, interviews with experts in the field and announcements about upcoming AI-related events and conferences.
2. The Task Force proposes the establishment of an AI hub on the NJSBA website. This hub would provide access to various resources, including educational videos, toolkits, best practice guides and FAQs.
3. The Task Force recommends the publication of a comprehensive compendium of AI-related legislation, rules and other legal materials. Compiled by Hon. Ronald J. Hedges (Ret.) and published by the NJSBA, this compendium would serve as a valuable resource for legal professionals seeking to navigate the complex legal landscape surrounding AI. Updated regularly, the compendium would be available as both an e-book and a PDF on the NJSBA website, providing legal professionals with easy access to the latest information on AI-related legal frameworks. A draft of this compendium has been submitted to the Task Force for review and consideration.

### **Additional findings:**

1. The practice of law is poised for substantial transformation due to AI. While the full extent of this transformation remains to be seen, attorneys must keep abreast of and adapt to evolving technological landscapes and embrace opportunities for innovation and specialization in emerging AI-related legal domains.
2. The bench, bar and public must be able to easily determine when AI or generative AI is used in a legal matter. It is equally important to understand how to use AI correctly in light of applicable laws and rules. The Task Force will continue to monitor this and will provide subsequent recommendations.
3. When developing or implementing AI systems, collaboration with data privacy experts, cybersecurity professionals and/or AI professionals is highly recommended to ensure responsible integration and adherence to ethical and legal standards.
4. As technology evolves, and with cloud computing and AI becoming increasingly integral to legal practice, lawyers may lose additional control over data privacy and security. Consequently, some of the responsibility for protecting sensitive information may need to shift from law firms to their technology providers, potentially enhancing data protection as these providers are often better equipped to manage sophisticated privacy and cybersecurity challenges.
5. Although considerable advances have occurred that improve access to technology for all demographic and socio-economic groups, ongoing focus is required to ensure that all



individuals have access to the technology and tools – including AI – that will allow them to understand and pursue available legal rights and remedies.

6. Guidelines and rules for the use of AI by both pro se litigants and attorneys should prioritize and ensure general awareness and appreciation of the limitations and risks of the use of AI and promote equitable access to AI tools and technologies.
7. Partnerships and collaborative networks should be established with a broad spectrum of legal entities, advocacy groups, social justice organizations and policymakers to promote fair, unbiased and ethical deployment of AI as a resource to be available and applied in appropriate civil and criminal matters. Such collective endeavors would enhance AI development and application in legal matters with a particular sensitivity toward justice, equality and ethical considerations.
8. A structured and reliable framework for ongoing dialogue, review and scrutiny of AI use by courts, legal service organizations and the bar must be established and maintained to ensure appropriate access and implementation of AI for all demographics – in particular underserved, marginalized and at-risk communities. This entails tracking the evolution of AI and actively assessing the direct and ancillary effects on various demographic groups. Continuous monitoring and evaluation will enable the legal profession to proactively address potential disparities and strategies to mitigate any adverse impacts.

## Understanding Artificial Intelligence: The Basics

Attorneys must comprehensively understand the risks, benefits and core principles of AI.

AI refers to technology that enables machines to mimic human intelligence (National Institute of Standards and Technology, 2024). AI plays a crucial role in enhancing user experiences and streamlining tasks in various applications, such as:

1. Video conferencing tools that use AI algorithms for background noise cancellation (Li & Liu, 2012) and automatic transcription.
2. Virtual assistants from companies like Apple, Google, Amazon, and Microsoft that use AI to understand and respond to spoken or written user commands.
3. AI-powered tools like Suggested Replies in Outlook and Outlook Mobile that use machine learning to suggest responses based on the context of the email.\* (Kannan et al., 2016).

*\*While not the case for all AI tools, Suggested Replies in Outlook and Outlook Mobile can help users save time and effort while maintaining privacy.*

It is critical to acknowledge that not all AI is created equal. Generative AI, for instance, goes beyond basic data processing and interaction by generating new content – including text, images, videos and more – from a potentially vast array of sources (Lv, 2023). Generative AI tools increase efficiency in the practice of law, but may also pose significant risks, including our ability to distinguish between real and fabricated data and data privacy and ethical issues. Accordingly, verifying accuracy and understanding sources provided by AI is critical. Furthermore, attorneys must familiarize themselves with the concept of "hallucinations" in AI. Hallucinations arise when AI systems produce outputs that appear plausible but lack factual basis, often presenting the content with an air of authority, complicating their detection. (MIT Sloan Teaching & Learning Technologies, 2024). These inaccuracies can have significant practical and ethical implications, especially in legal contexts where accuracy and reliability are paramount. Therefore, attorneys must exercise caution when relying on AI-generated content and diligently verify its validity to ensure sound decision-making and uphold the integrity of the legal process.

## **Ethics and Regulatory Issues Work Group: Impact on the Practice of Law**

### **Work Group Members:**

Hon. Ronald J. Hedges (Ret.)\*, Seth Abrams, Christopher J. Asakiewicz, Trina L. Glass, Robert B. Hille\*, Michael Paglione

*Note: \* Indicates Co-Chair*

The Ethics and Regulatory Issues Work Group of the Task Force studied AI and its potential implications for the law and the legal system. After a series of meetings and comprehensive research, the following conclusions were drawn:

- The current state of the law, including the Rules Governing the Courts of New Jersey, the NJRE and the RPCs, are sufficiently flexible to address considerations relating to AI.
- As with any technology, AI use in legal matters should be scrutinized for compliance with relevant laws and regulations.
- The increasing use of AI and generative AI technologies by attorneys and legal professionals could significantly disrupt the industry's traditional hourly billing model. Significant use of these technologies may conflict with current billing practices in light of ABA Model Rule 1.5(a)(1) (American Bar Association, 2024).

### **Focus of Our Examination**

The work group's examination began with a thorough exploration of the nature of AI, investigating its potential as a legal tool and considering both its responsible use and potential misuse by legal professionals and the public. The work group next assessed how such use or abuse could affect the legal profession, legal practice and the integrity of the law. Additionally, the work group examined the potential impact on the administration of justice and evaluated whether existing legal frameworks required revision to effectively address emerging and future concerns presented by AI.

The examination focused on the following key areas:

1. **Preservation of Legal Obligations:** A significant consideration centered on the responsible use of AI tools while upholding confidentiality obligations, privilege protections and intellectual property rights, as maintaining these legal safeguards ensures the integrity of legal proceedings and protects the rights of all parties involved.
2. **Identification of AI Usage:** Another critical consideration involved the potential need to clearly identify instances where AI, particularly generative AI, is employed. This extends to understanding the nature of AI-generated output – including how it was produced – and metadata analysis, which is integral to the court's gatekeeping function and ensures transparency in the legal process.
3. **Ensuring Integrity and Reliability:** There was a clear consensus on the importance of ensuring the integrity and reliability of AI-generated products. This encompasses accountability measures to prevent misuse, detection of fabricated evidence (such as deep fakes) and adherence to established evidentiary standards outlined in the New Jersey

Rules of Evidence (NJRE), particularly concerning the definition of original evidence (see NJRE 1002 and 1003).

### **Examples of Law Examined by the Working Group**

The examination included a review of the relevant RPCs and an analysis of *Baxt v. Liloia*, 155 N.J. 190 (NJ 1998). The following RPCs can establish a standard in legal malpractice cases.

1. 1.0(a), (c), (f), (i), (j), (k), (o), (p)
2. 1.4
3. 1.6 and comment (Note proficiency requirement in (f))
4. 1.16(d)
5. 3.1 (fake authorities from AI)
6. 3.3 (see 3.1)
7. 3.4 (see 3.1)
8. 4.1 (see 3.1)
9. 4.4(b) and *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (NJ 2010)
10. 5.1, 5.2 and 5.3

Of particular significance are the following RPCs to consider when dealing with any technology: RPC 1.0(p) (defining metadata), RPC 1.6 (pertaining to client confidentiality duties and the obligation to stay abreast of technological advancements, in conjunction with RPC 1.0(i), (j), and (k) defining reasonableness), RPC 4.4(b) (addressing confidentiality duties to third parties) and RPC 5.3 (establishing liability for vendor breaches). These RPCs encompass various technological obligations and considerations.

Additionally, depending on the circumstances, NJRE 101(a)(3), 101(b)(3), 801(e), 901, 1001, 1004 and 1006 may also be implicated, along with NJ Court Rules 4:10, 4:25-7 and -8, and 3:13.

## **The Emergence of AI and its Practical Impact on the Practice of Law**

This Task Force has observed a significant increase in the past 12 months in the availability of AI and GAI tools designed for both consumers and the legal profession. Before using these tools, it is imperative that legal practitioners:

1. Thoroughly scrutinize the claims made by AI providers regarding the capabilities and security of their tools.
2. Remain cognizant of the critical areas where AI is likely to have the most significant initial impact on legal practice.
3. Differentiate between AI tools designed for the public and those designed for the practice of law.

The Task Force has also identified several key areas where we believe AI may to emerge and substantially influence the practice of law in the near future:

- 1. Document drafting:** Generative AI-powered tools may streamline the document drafting process by automating repetitive tasks like contract generation and legal document preparation, giving lawyers more time to focus on complex strategy, research and client relationships.
- 2. Research:** AI may facilitate faster and more comprehensive legal research by analyzing vast amounts of case law, statutes and other legal documents. Moreover, AI-driven data analytics tools may uncover insights and trends that would elude manual review, potentially enhancing the quality and depth of legal analysis.
- 3. Correspondence:** AI-powered communication tools, such as email drafting for non-legal matters and/or automation platforms, may enable attorneys to manage client communications more efficiently. These tools are designed to provide timely responses, schedule appointments and draft and summarize routine correspondence, freeing up valuable time for higher-value tasks.
- 4. General case preparation:** AI and Generative AI technologies may eventually offer valuable support in case preparation, from predictive analytics for case outcomes to organizing and summarizing voluminous evidence. By automating tasks like evidence management and deposition analysis, attorneys can focus on developing persuasive legal strategies and advocating for their clients more effectively.
- 5. Misuse of AI to fabricate evidence and data:** The potential misuse of AI to fabricate documents, data and other materials raises significant concerns, particularly regarding the authenticity of evidence. This issue extends to conspiracy theorists and others, highlighting the importance of adhering to evidence rules such as Rules 803, 14, 15, and 18. Lawyers must play a crucial role to safeguard against the proliferation of counterfeit evidence and falsified documents. Lawyers should also consider disclaimers and representations to protect against the inadvertent violation of the Rules of Professional Conduct.

**6. AI as a discovery tool:** AI may streamline legal discovery by significantly enhancing efficiency. It may enable the rapid analysis of extensive datasets encompassing various forms of data such as documents, video, audio, photos and more. Through advanced algorithms and machine learning, AI may streamline the review of diverse data types, potentially saving substantial time and resources for legal teams. Ultimately, the use of AI-driven discovery may facilitate thorough and effective preparation for litigation or regulatory compliance.

**7. AI trial preparation tools:**

AI trial preparation tools, including those for jury selection, promise to transform legal strategies. Using advanced algorithms and machine learning, these tools will analyze data to aid in developing comprehensive trial strategies. By efficiently assessing potential jurors' backgrounds and biases, AI may optimize jury selection for favorable outcomes, enhancing legal representation and decision-making during litigation. However, it is essential to consider the impact of any bias in AI tools when creating and using them.

**8. AI integration with case management software:**

Integrating case management software with AI and generative AI capabilities might turn these programs into virtual assistants, potentially streamlining tasks like document generation and workflow optimization. Simplifying document management and enhancing workflow efficiency could help legal practitioners navigate their caseloads more effectively. Additionally, AI and generative AI features empower users to extract valuable insights from extensive datasets, facilitating informed decision-making and expediting case resolution. This innovative synergy might ensure superior client service delivery, heightened productivity and reduced errors in legal operations.

**9. AI integration with practice management software:** Much like previous examples, integrating AI with practice management software could streamline scheduling, billing and routine administrative tasks while providing actionable insights. Empowering legal professionals with data-driven analysis would also likely enhance decision-making and client service delivery.

**10. AI trial presentation tools:** While futuristic, the use of AI at trial may assist in presenting evidence to judges and juries in an informative and effective manner. It could significantly enhance the courtroom presentation of evidence, resulting in greater jury involvement and understanding of the issues presented.

**Substituted Judgment**

Significant concern arises when attorneys rely on AI to replace their professional judgment. For instance, while AI can be employed to efficiently analyze extensive surveillance footage and extract key moments, attorneys maintain an ethical duty to personally review the footage. The legal community must grapple with the critical question of distinguishing between processes that enhance human performance and those that supplant it.

Similarly, another crucial issue is determining whether the ethical rules apply solely to the final product submitted to the court or extend to the numerous intermediate steps leading to that final product.

**Rise of New Areas of Practice**

The widespread availability of AI and AGI is a transformative event that will potentially reshape the legal landscape, much like the internet revolutionized communication and commerce. As AI becomes increasingly sophisticated and ubiquitous, new legal practice areas will emerge to address critical issues such as bias, transparency, accountability and fairness in AI decision-making. Lawyers specializing in these fields will be instrumental in guiding the responsible deployment of AI technologies and ensuring compliance with evolving legal and regulatory frameworks.

Furthermore, as AI increasingly permeates various aspects of society, legal frameworks must adapt to address emerging challenges and opportunities. This may entail the enactment of new legislation, the revision of existing regulations and the establishment of ethical guidelines for AI usage across industries.

While the full extent of AI's impact remains to be seen, attorneys must keep abreast of and adapt to evolving technological landscapes and embrace opportunities for innovation and specialization in emerging AI-related legal domains.



# **Artificial Intelligence in Legal Products and Services: Practical Guidance and Key Insights**

## **Work Group Members:**

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This section aims to offer practical, actionable guidance for legal professionals seeking to integrate or who have integrated AI tools and services into their practices. It combines extensive research, including interviews with stakeholders across the AI and legal industries, with lived experience and AI expertise to provide a nuanced understanding of AI's role and its challenges.

AI tools, particularly those facing the public like ChatGPT, Bing, Gemini and Claude, are scrutinized for their suitability in legal matters. Accordingly, the Task Force recommends against their use for specific legal tasks due to potential ethical, privacy and security implications. Instead, it categorizes GAI tools and recommends a set of easy-to-follow questions to assist legal professionals in making informed decisions about employing AI in their practice. This guidance will be updated as technology advances.

Finally, this section emphasizes the need for a foundational framework to guide practitioners in evaluating AI technologies and ensure the upholding of ethical standards and privacy concerns.

## **State of Artificial Intelligence in the Legal Profession**

The rapid advancement of AI technology has fostered the development of many new tools in the legal industry, from upgrades and integration into existing software to novel innovations. Legal professionals are inundated with marketing materials touting the benefits of these AI solutions, including claims of significant time and cost savings. However, the need for established safety and data privacy standards, coupled with the absence of objective evaluation criteria, makes it difficult for practitioners to assess the effectiveness of these tools.

Concerns about security, privacy and regulatory compliance further complicate the adoption of AI in legal practice. Furthermore, the rise of generative AI introduces additional intricacies. This technology can produce novel content, such as textual compositions, imagery or sound, by identifying and applying patterns extracted from extensive data compilations encompassing a considerable segment of the internet, necessitating a continuous process of adaptation and assessment of any established guidelines.

Despite these challenges, this report provides a foundational framework through the use of easy-to-follow questions to help guide legal professionals in understanding, evaluating and determining whether to employ a given AI technology in a legal setting. This framework will continue to evolve as the technology and applications mature.

## **Our Research**

The findings presented in this section of the report result from extensive research, including interviews with AI technology providers, legal industry experts, AI specialists and legal practitioners. The insights from these interviews provide a nuanced understanding of the current landscape and the challenges legal professionals face in adopting AI. By combining input from

various companies and industry experts, the report aims to offer actionable recommendations and strategic insights for navigating the evolving terrain of AI in the legal profession.

Over 50 companies were evaluated, including vendors specializing in eDiscovery, law firm management, cybersecurity and data privacy, legal research, legal writing and contract drafting.

### **Integration of Artificial Intelligence in Law Firms and Legal Practice**

When evaluating GAI tools, it's crucial to classify them into specific categories based on their intended users. Distinguishing between tools that are specifically designed for the public and those designed for the practice of law will help to avoid potentially significant issues with respect to data privacy, ethics and other concerns.

#### **A. AI Tools Intended for the Public:**

##### **Guidance:**

Lawyers should only use AI tools designed for the practice of law, as opposed to those designed for the public when using client data, generating documents or conducting research (when using any AI, have a plan to prevent sharing or storing sensitive information). However, public tools can be useful to spark creativity and as an aid when structuring ideas for an email, letter or more, provided no client information is shared with them and any information they produce is comprehensively reviewed for accuracy. Examples of public AI tools generally unsuitable for sensitive or private information include, but are not limited to, ChatGPT, Gemini and Claude.

##### **Key Considerations:**

As with all essential tools, education, knowledge and guidance are needed to operate AI tools intended for the public safely.

AI tools intended for the public gather data from the internet and various other sources (Vial et al., 2021), often without citation. Unlike focused and vetted professional AI tools, which are designed for specific use cases in the legal profession and rely on carefully curated, highly accurate and factually proven sources and data, AI tools intended for the public generate content and provide potential insights on a wide range of topics drawn from all available sources, typically with minimal or no data protection or confidentiality. Their use for any matter that could be considered "the practice of law" should be restricted, and any other use requires careful consideration due to potential privacy, security and ethical concerns.

While there are risks associated with their use, the complete prohibition of legal practice AI tools or AI tools intended for the public in a legal practice may not be advisable. For example, public-facing AI may offer inspiration for simple, non-legal tasks. Additionally, the ongoing integration of AI into everyday tools underscores the inevitability of its presence in legal workflows. A blanket prohibition might inadvertently encourage unsanctioned or inappropriate use of AI tools intended for the public on personal devices.

## **B. Tools Tailored for Legal Professionals:**

### **Guidance:**

An expanding array of industry-specific AI tools tailored to the unique requirements of legal professionals is emerging. Many well-established legal software providers have either introduced or anticipate introducing and integrating AI or GAI features into their software. While these tools may offer enhanced privacy controls compared to AI tools intended for the public, evaluating their safety and capabilities remains challenging due to the absence of standardized regulations governing their development and implementation, but is essential to ensure compliance with the Rules of Professional Conduct.

### **Key Considerations:**

As legal AI becomes more prevalent, law firms and attorneys must evaluate its privacy, security and ethical implications. The absence of standardized regulations governing AI and GAI, coupled with the American Bar Association's amendment in 2012 to its Model Rules of Professional Conduct Rule 1.1 to include technological competence (Simons, 2018), underscores the need for a proactive approach to understanding and evaluating these tools' potential risks and benefits.

When considering the adoption of legal-specific AI tools, it's essential to scrutinize the vendor's handling of data, security measures and compliance with relevant legal and ethical standards. Additionally, understanding the tool's intended use, risks, limitations and potential biases is vital to ensuring its appropriate use and upholding the integrity of the work produced using the AI tools.

To assist legal professionals in this endeavor, this Task Force has compiled a practical **AI in Legal Products and Services Selection Criteria**. These criteria include questions and standards that can be used to evaluate whether a given AI tool is suitable for use.

## AI in Legal Products and Services Selection Criteria

### How to Use This Selection Criteria

This selection criteria provides a framework for evaluating AI products and services tailored for the legal profession. It offers questions, considerations and evaluation criteria to assist legal professionals in making informed decisions when assessing AI tools.

*Note: This selection criteria is not for use with public-facing AI tools like ChatGPT, Gemini, Copilot, Claude or similar platforms.*

### Software Reputation and Footprint: Moral and Ethical Alignment

When assessing legal AI tools, consider the provider's reputation, longevity and ownership. A company's track record reflects its reliability, stability and commitment to ethics.

Before committing to a new AI product or service, it may also be beneficial to thoroughly review the provider's ownership structure and identify potential conflicts of interest (particularly when evaluating newer companies). Understanding the ownership and leadership of the software provider can help to ensure that the AI tools you choose are compatible with the values and priorities of your legal practice.

These questions may be useful when evaluating the suitability of new AI tools and services.

Q. Does the company have a proven track record of providing reliable, secure and compliant solutions specifically tailored to the legal sector?

Q. Are there any case studies, testimonials or references from other legal professionals who have successfully used the tool? Reaching out to colleagues or requesting references from the provider can yield valuable insights.

Q. If the company is relatively unknown, who are its owners, and are there any potential ethical concerns related to the ownership structure? Researching the company's website, press releases and financial disclosures can help uncover this information.

### Key Considerations in Selecting an AI Vendor

- a. **Type of technology:** Understanding whether general AI or GAI has been used is critical in evaluating and avoiding potential risks.
- b. **Problem the AI is solving for:** Consider whether an AI product you are evaluating is designed to simplify an existing task. If not, it may complicate your practice and add an extra layer instead of improving efficiency. Before adopting an AI solution, evaluate if it aligns with your needs and can integrate into your current processes to provide benefits rather than challenges.
- c. **Data sources:** Gaining an understanding of the quality and source of the data used by AI systems is crucial for evaluating their potential reliability and performance. Equally important is understanding whether user prompts and/or

user-supplied data will be included in the AI system's training data, as this can lead to unintentional and unexpected confidentiality and ethics issues.

- d. **Privacy standards:** Evaluating vendors' data collection and ownership standards, privacy protocols and cybersecurity safeguards is essential for ensuring client confidentiality and regulatory compliance.
- e. **Cybersecurity measures:** It is important to assess the cybersecurity measures implemented by the vendor to maintain data integrity and avoid or minimize the risks posed by cyber threats.
- f. **Bias recognition:** Recognizing and mitigating bias within AI algorithms contributes to upholding fairness and equity in legal processes.
- g. **Integration, training and support:** Examining a vendor's provisions for integration, training and ongoing support can streamline implementation and enhance the user experience.
- h. **Data localization:** Consideration of the jurisdictional location of data and AI engines ensures compliance with regulatory frameworks and data sovereignty principles.
- i. **Updates and monitoring:** Examining the frequency of product updates, adherence to bias auditing, issue monitoring, technical and ethical standards, responsiveness to problems, update criteria and user notification methods offers insight into a company's dedication to your safety and success. Infrequent updates without an established cadence may be cause for concern.
- j. **Differences among software options:** Are there pricing plans offering differing levels of data access? If so, do the less expensive versions of the software rely on outdated data or datasets that need to be updated more frequently?

### **Danger Areas and Pitfalls**

Data privacy laws and regulations, much like AI, are continuously evolving. Several states, including New Jersey, have passed comprehensive data privacy legislation. However, the implementation of these laws is progressing at varying rates across different states. These privacy laws and regulations require an organization to understand and disclose to data subjects (individuals whose personal data is collected, processed, stored or otherwise used by organizations) the nature of the data collected, the legal basis for the collection and the rights a data subject has regarding their data.

AI systems are trained on data, so their use may be impacted by data privacy laws and regulations, particularly for organizations with international operations. International regulations, such as the European Union's General Data Protection Regulation (GDPR) (Voss & Houser, 2019) and the proposed EU AI Act, must be understood to ensure compliance and avoid potential financial and legal consequences.

### **Transparency and Accuracy in GAI Usage**

When using GAI, it is important to ask if its use is transparent to users when generating the data they engage with. Transparency helps legal professionals identify potential ethical risks and understand the content's nature, allowing them to make informed decisions about its reliability and relevance to their needs.

Furthermore, it is beneficial to ascertain if there is a straightforward process for users to provide feedback on errors or inconsistencies in AI-generated content. Understanding the vendor's prioritization of user feedback, their review and reporting processes, and who is responsible for monitoring and acting upon feedback offers insights into the company's integrity.

## **Artificial Intelligence Education for the Legal Profession**

### **Work Group Members:**

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Addressing the knowledge gap among attorneys regarding AI is critical. This section outlines a plan for educating the New Jersey legal community, including the NJSBA's AI Task Force's collaborative efforts with the New Jersey Supreme Court Committee on Artificial Intelligence to develop a dynamic curriculum and monitor advancements in AI.

A robust array of programs proposed for integration into the NJSBA's educational schedule for 2024 can be found at NJSBA.com. The programs will help ensure legal professionals are equipped to navigate the evolving AI landscape effectively.

### **Recommendations:**

#### **1. Development and Implementation of an Adaptable AI Curriculum:**

The NJSBA should continue the development and implementation of a comprehensive AI curriculum that addresses foundational concepts and emerging trends in AI technology. This curriculum should be adaptable, allowing for updates and revisions as new developments arise. Collaboration with experts from academia, industry and the legal profession should be sought to ensure the curriculum remains current and relevant.

#### **2. Proposal for a Monthly or Bi-Monthly AI Email Newsletter:**

The Task Force recommends the creation of a monthly or bi-monthly AI email newsletter distributed by the NJSBA. This newsletter would feature curated articles, case studies, instructional videos and updates on AI-related topics relevant to the legal profession.

Additionally, it could include highlights from recent court decisions involving AI, interviews with experts in the field and announcements about upcoming AI-related events and conferences.

#### **3. Creation of an AI Hub on NJSBA.com:**

The Task Force proposes the establishment of an AI hub on the NJSBA website. This hub would provide access to various resources, including educational videos, toolkits, best practice guides and FAQs.

#### **4. Publication of a Compendium of AI Legislation, Rules, and More:**

The Task Force recommends the publication of a comprehensive compendium of AI-related legislation, rules and other legal materials. Compiled by Judge Hedges and published by the NJSBA, this compendium would serve as a valuable resource for legal professionals seeking to navigate the complex legal landscape surrounding AI. Updated regularly, the compendium would be available as both an e-book and PDF on the NJSBA website, providing legal professionals with easy access to the latest information on AI-related legal frameworks. A draft of this compendium has been submitted to the Task Force for review and consideration.

**5. Proposed MCLE Requirement Revision:** The Task Force recommends requesting that the New Jersey MCLE Board consider amending the MCLE requirements to require attorneys to earn one CLE credit in technology-related subjects every two years. Given the ethical and social justice implications of technology in the legal system (such as safeguarding client data and understanding the potential risks associated with AI and GAI), we propose changing the current ethics and diversity requirement to "Ethics, Diversity, and Technology" and making the new one-hour credit requirement part of that mandate.

### **Next Steps**

The Task Force is committed to taking proactive measures to ensure ongoing education and adaptation to the evolving landscape of AI in the legal profession. Continuous monitoring of AI developments will be conducted, with regular updates provided to Task Force members and the broader legal community using the AI newsletter and AI hub on NJSBA.com. This will involve staying abreast of emerging technologies, regulatory changes and notable AI case law. Additionally, the Task Force will remain flexible, adjusting schedules and topics to address emerging trends and challenges.

The Task Force also recognizes the importance of interdisciplinary collaboration in navigating the complex intersection of AI and the law. To this end, efforts will be made to engage with allied professionals such as CPAs, cybersecurity experts, data privacy professionals and law enforcement. This collaboration will facilitate knowledge sharing, best practice development and the identification of potential areas for joint action.

By staying vigilant, fostering collaboration and engaging with stakeholders across various sectors, the Task Force aims to ensure that the legal community is well-equipped to navigate the opportunities and challenges presented by AI in the years to come.



## Artificial Intelligence and Social Justice Concerns

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Integrating AI into the legal system offers benefits but requires vigilance. The vast data processing and potential for inaccurate correlations demand:

1. Rigorous monitoring and evaluation to prevent misuse and unintended consequences.
2. Transparency regarding the data powering AI systems, especially those with legal implications.
3. Clear insight into the replicability of AI-generated results to maintain accountability and foster trust among legal professionals and the public.

### Public Use of AI and Unauthorized Practice of Law (UPL)

In an era where AI is increasingly integrated into daily life, the public – especially those unable to afford professional legal services and used to using AI for other purposes – might turn to publicly available AI tools for legal guidance. This trend could inadvertently expose individuals to legal risks without the safeguards provided by legal professionals. Additionally, AI's ability to produce seemingly authoritative and precise responses may lead laypersons to misconstrue its capabilities and outputs as infallible, fostering a false sense of legal security.

While this scenario remains speculative, it's crucial to recognize it as a potential future outcome requiring proactive consideration. To address this, we must collaborate with those regulating the practice of law to enhance public awareness of the limitations and risks associated with relying on AI for legal advice. Similarly, it may be necessary to implement stricter guidelines and regulatory frameworks for AI-generated legal content while ensuring the accessibility of affordable legal services. Above all, as these technologies evolve, continuous monitoring, discussion and collaboration are essential.

### Addressing Risks, Including At-Risk Populations

AI's rapid data processing capability offers efficiency and innovation opportunities but also harbors significant risks related to bias and discrimination (Chen et al., 2024). For instance, the case of Amazon discontinuing its AI recruitment tool due to gender bias underscores the necessity for ongoing AI system monitoring to ensure adherence to ethical guidelines and avoidance of perpetuating existing inequalities. Specifically, the bias stemmed from the tool being trained on a dataset predominantly comprising men's resumes, leading it to favor male candidates (Andrews & Bucher, 2022). This example emphasizes the dangers of unchecked AI in decision-making processes.

The legal industry should examine the lessons learned from the challenges faced by other sectors when developing and implementing AI to avoid repeating similar mistakes and to proactively address potential issues, including:

1. **Racial bias:** AI can exhibit bias or discriminatory behavior if it's trained on biased data or designed with biased algorithms. This can happen due to: use of historical training

data; biased labels or annotations in the data; algorithmic biases, feedback loops that perpetuate bias, lack of diversity in development teams and lack of transparency in algorithmic development (Blount, 2024).

2. **Economic inequality through automated decisions:** In financial sectors, AI-driven decisions such as loan approvals and credit scoring can perpetuate economic disparities, potentially sidelining those from disadvantaged backgrounds (Addy et al., 2024). A similar bias in legal decision-making AI could negatively impact vulnerable populations.
3. **Health care disparities:** AI in health care risks worsening existing disparities (Hastings, 2024) and raises concerns regarding how similar disparities could, without proper intervention, occur within the legal system.
4. **Privacy and surveillance:** The use of surveillance technologies, including facial recognition, may pose significant risks various communities (Swaminathan & Danks, 2024), emphasizing the need for responsible AI that respects privacy rights and provides accountability.
5. **Predictive policing:** Predictive policing relies on historical crime data and may amplify prejudice by disproportionately targeting minority communities and exacerbating systemic biases.

This approach can create a feedback loop where increased police presence in certain neighborhoods leads to more arrests and higher reported crime rates, reinforcing the perception that these areas are more prone to crime. This, in turn, leads to further over-policing and surveillance. Algorithms may disproportionately target minority communities due to the data they are trained on, often overlooking the underlying social and economic factors that contribute to criminal behavior.

Addressing the racial biases inherent in predictive policing requires careful consideration of the data used, increased transparency and accountability in algorithmic decision-making and a broader effort to address systemic inequalities within the criminal justice system.

6. **Forensic science:** Forensic science increasingly relies on software, including AI, for data analysis, probability calculations, model training and quality assurance. This reliance on "black box" software can be problematic, as it blurs the line between human judgment and machine judgment. Attorneys must be mindful of potential challenges to the admissibility of evidence and the credentials of experts who rely on AI in their analyses.

These examples emphasize the necessity for a nuanced approach to mitigate the risks associated with AI, particularly in the context of social justice concerns. They underscore the importance of integrating fairness and bias mitigation techniques into the development of legal AI products. Engaging a diverse range of professionals in designing, implementing and reviewing AI systems is crucial to ensuring equitable and responsible outcomes for society. Furthermore, it is imperative to draw lessons from past integrations of AI and related technologies to avoid repeating mistakes and to foster positive societal impacts.

## **AI and Access to Justice**

While much has been said about the potential pitfalls associated with AI, it also has the potential to help many people. For example, AI may improve access to justice by making legal services more efficient and available. However, this potential is contingent upon equitable access to AI tools and technologies, which requires reliable access to the internet, a rudimentary understanding of technology and the ability to navigate AI-driven systems.

Unequal access to high-speed internet, especially in rural and underserved urban areas, hinders the fair adoption of AI. Providing universal high-speed internet access enables vulnerable communities to benefit from AI-powered legal aid and support services. However, it is crucial to address the social inequalities that contribute to this digital divide, such as disparities in technological capital and resources (Comi et al., 2024). Bridging this gap is essential for ensuring that the benefits of AI in the legal system are accessible to all, regardless of their socioeconomic background or geographic location.

Moreover, there may come a time when providing legal aid and support for vulnerable communities in New Jersey leverages AI in a manner that addresses systemic inequities rather than exacerbating them. Upholding ethical guidelines and ensuring fairness in AI applications are imperative steps toward achieving access to justice for all residents of New Jersey. Policymakers, legal professionals and technology experts in New Jersey must collaborate and develop strategies that prioritize equitable access to AI tools and technologies, address digital disparities and uphold ethical standards to ensure that AI contributes positively to the pursuit of justice in the state.

## **Next Steps and Recommendations**

To effectively navigate the complexities presented by the integration of AI within a legal practice and to capitalize on its potential to foster social justice, the following strategic initiatives are recommended:

1. Although considerable advances have occurred that improve access to technology for all demographic and socio-economic groups, ongoing focus is required to ensure that all individuals have access to the technology and tools – including AI – that will allow them to understand and pursue available legal rights and remedies.
2. Guidelines and rules for the use of AI by both pro se litigants and attorneys should prioritize and ensure general awareness and appreciation of the limitations and risks of the use of AI and promote equitable access to AI tools and technologies.
3. Partnerships and collaborative networks should be established with a broad spectrum of legal entities, advocacy groups, social justice organizations and policymakers to promote fair, unbiased and ethical deployment of AI as a resource to be available and applied in appropriate civil and criminal matters. Such collective endeavors would enhance AI development and application in legal matters with a particular sensitivity toward justice, equality and ethical considerations.
4. A structured and reliable framework for ongoing dialogue, review and scrutiny of AI use by courts, legal service organizations and the bar must be established and maintained to

ensure appropriate access and implementation of AI for all demographics – in particular underserved, marginalized and at-risk communities. This entails tracking the evolution of AI and actively assessing the direct and ancillary effects on various demographic groups. Continuous monitoring and evaluation will enable the legal profession to proactively address potential disparities and strategies to mitigate any adverse impacts.

With time, consideration and open dialogue, the legal profession can help steer the course of AI integration to maximize its benefits while mitigating its risks. This proactive and inclusive approach ensures that the advancement of AI technologies in our industry aligns with the overarching principles of equity, justice and ethical responsibility, reinforcing the commitment to upholding the dignity and rights of all people.

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## **Appendix 1:**

### **Essential Factors for Selecting AI Products and Formulating an AI Policy in Legal Firms: A Starting Point**

This guidance provides initial discussion items law firms and/or legal professionals can use to navigate integrating AI tools into their practices.

From understanding the risks and advantages of AI to selecting appropriate tools, ensuring data protection and training staff, each aspect is designed to help legal professionals address vital factors that must be considered. When undertaking substantial AI projects, it is advisable to consult with data privacy and AI experts throughout the integration process. Simultaneously, it is of utmost importance to maintain detailed records of any interactions involving AI, GAI and client data.

#### **Disclaimer**

This guidance is designed to initiate conversations and serve as a starting point for law firms considering the integration of AI into their practices. It is not intended to replace a comprehensive AI policy. By addressing the key questions and considerations outlined in this guidance, law firms can take proactive steps toward using AI in alignment with ethical and legal considerations.

#### **Key Considerations**

1. **Understanding AI risks:** Alongside its advantages, AI presents potential risks such as data privacy concerns and ethical dilemmas. Conducting a thorough risk assessment is crucial for identifying and mitigating these risks.

Here are some key questions to consider, and if possible, ask the AI software provider when starting a risk assessment for AI:

1. What are the potential risks associated with the AI system, such as data privacy breaches, bias or unintended consequences?
2. How is the AI system trained, and what data sources are used? Are there any potential biases or limitations in the training data?
3. If the system is specifically designed to work with sensitive data of any kind, what measures are in place to ensure the security and privacy of the data used by the AI system?
4. How are the AI system's decisions or outputs validated and monitored for accuracy and fairness?
5. What are the potential legal and ethical implications of the AI system's actions or decisions?
6. What is the plan for addressing and mitigating any identified risks or unintended consequences?
7. How will transparency and replicability be monitored and maintained?

8. What is the process for involving stakeholders, such as AI experts, legal professionals and ethical advisers in the risk assessment and management process?

These questions can help organizations identify, evaluate and mitigate some of the potential risks when implementing AI systems.

**2. Leverage AI's advantages and choose the right tools:** Before investing in an AI tool, thoroughly investigate its capabilities to determine whether it can deliver the desired benefits, such as increased efficiency and cost savings, in a responsible and secure manner. With the exponential growth of AI tools tailored to the legal sector, it is essential to select tools aligned with your firm's needs and use cases.

Establishing key performance indicators (KPIs) can help gauge the effectiveness of AI tools in improving legal services. Given the wide range of choices available, retaining a trusted technology adviser can significantly assist in navigating the increasingly complex landscape of AI product options, especially for those in traditionally non-technical professions.

**3. Ensure data protection:** To address data protection and privacy concerns, establish clear policies for data usage with AI tools. Keep up to date with changing data protection laws and verify that both you and your AI software or service providers adhere to industry-standard best practices for data privacy and security.

The National Institute of Standards and Technology (NIST) provides a valuable resource, the NIST Privacy Framework, for organizations looking to establish robust data privacy standards. This comprehensive tool offers a structured approach to identifying, evaluating, and addressing privacy risks, along with recommendations for implementing effective controls and protective measures. By adopting the guidelines outlined in the NIST Privacy Framework, organizations can align their data privacy practices with industry standards and best practices (“Getting Started | NIST,” 2021).

More information about NIST’s Privacy Framework is available at <https://www.nist.gov/privacy-framework/getting-started-0>

**4. Train your staff:** Regular training sessions should cover technical aspects and ethical considerations of using AI tools. Law firm staff should be well-versed in data protection guidelines.

**5. Manage integrating AI with existing systems:** It is essential to collaborate with data privacy and AI professionals as necessary during the integration process of AI tools with existing systems. Additionally, it is crucial to document any interactions between AI, GAI and client data, specifying the tools used and the data involved.

**6. Stay current with technology:** Law firms must stay updated on advancements in technology in two ways – first, through maintaining subscriptions to relevant publications or by attending industry conferences, and second, through software updates that fix bugs, privacy and security issues and more.



**7. Attribute AI content when necessary:** Law firms should establish and follow clear guidelines on attributing content generated or inspired by AI. Providing staff with a framework for acknowledgment can streamline this process.

**8. Monitor AI for bias and errors:** Law firms must adopt and adhere to regular fact-checking and bias review procedures to ensure the accuracy and integrity of AI-generated content. It is vital for law firms to report any identified bias or errors to the AI software or service provider(s) immediately.

**9. Consider the impact of AI:** Evaluate how AI may affect the financial aspects of law practice, and if necessary, consider adapting billing models to align with client expectations regarding AI's ability to streamline tasks that were previously time-consuming. *Note: Ensure that any changes to billing models are clearly communicated to clients prior to engagement.*

**10. Know your legal obligations:** Using the guidance provided in this report, as well as educational materials and information published by the NJSBA, the Administrative Office of the Courts (AOC), and other trusted legal sources, ensure that you thoroughly understand the legal and ethical obligations you must consider or adhere to when incorporating AI or GAI into your legal practice.

## **Appendix 2:**

### **Sample Artificial Intelligence and Generative Artificial Intelligence Use Policy**

#### **1. Purpose**

This policy establishes guidelines for the ethical, responsible, and efficient use of Artificial Intelligence (AI) and Generative Artificial Intelligence (GAI) technologies within the law firm. It aims to ensure compliance with legal and ethical standards, safeguard client confidentiality and uphold the highest level of professional conduct while harnessing the benefits of AI and GAI tools.

#### **2. Scope**

This policy applies to all individuals who currently use or plan to use AI and GAI tools to support the practice of law, including employees, partners, associates, contractors, vendors, finance and accounting professionals, billing companies and law firm staff members.

Note: To comply with RPC 1.1, attorneys must reasonably understand the technology they use, including its risks and proper usage. They must also diligently protect confidentiality and privilege. When considering AI tools and services, attorneys should only use credible vendors that provide adequate safeguards to fulfill their professional responsibilities under the RPCs.

#### **3. Definitions**

3.1. Artificial Intelligence (AI): Computer systems simulate human intelligence processes, including learning, reasoning, and self-correction (“Artificial Intelligence | NIST,” 2024).

3.2. Generative Artificial Intelligence (GAI): A subset of AI focused on creating new content, such as text, images, or audio, based on patterns learned from training data (“Artificial Intelligence | NIST,” 2024).

#### **4. Approval and Oversight**

4.1. Any use of AI or GAI tools must receive approval from the firm's designated AI Oversight Committee before implementation.

4.2. The AI Oversight Committee is responsible for evaluating each AI or GAI tool's potential benefits, risks, and ethical implications and determining its suitability for firm-wide use.

4.3. The AI Oversight Committee conducts regular audits and assessments of AI and GAI tools to ensure ongoing compliance with this policy and relevant laws and regulations.

4.4 List the Firm’s AI Oversight Committee members here:

#### **5. Ethical and Legal Compliance**

5.1. All usage of AI and GAI tools must adhere to applicable laws, regulations and professional ethical standards, including the Rules of Professional Conduct (RPCs) governing client confidentiality, data protection and intellectual property.

5.2. AI and GAI tools shall not be used to engage in or promote discriminatory, biased or unethical practices.

5.3. The firm shall maintain transparency with clients when using AI and GAI tools on their matters and obtain informed consent when necessary.

5.4. Only GAI or AI tools designed explicitly for legal matters and with sufficient client data protection should be used for specific legal issues. No public-purposed AI tools should be used for specific legal matters, and no client or other sensitive or regulated data should be shared with public-purposed AI tools.

## **6. Data Protection and Confidentiality**

6.1. Any data used for training or operating AI and GAI tools must be appropriately secured and protected by the firm's data protection policies and relevant laws and regulations.

6.2. Strict access controls require only authorized personnel to use AI and GAI tools and access associated data. While ensuring this does not happen in today's remote work environment is complex, a strict compliance model and proper use of standard security technology like VPNs will provide incentives for correct usage and consequences for policy violation.

6.3. Necessary technical and organizational measures are implemented to prevent unauthorized disclosure or exposure of confidential client information through AI and GAI tools.

## **7. Human Oversight and Review**

7.1. All outputs generated by or with the assistance of AI and GAI tools must undergo review and validation by qualified human professionals before use in any legal matter (every review is cataloged for audit purposes).

7.2. AI and GAI tools augment and support human expertise, but do not replace it. Human professionals must make all final decisions and judgments.

7.3. Clear protocols are established for escalating issues or concerns related to AI and GAI tool outputs to the appropriate supervisory authority.

## **8. Training and Education**

8.1. All personnel using AI and GAI tools must receive comprehensive training on their proper use, limitations and potential risks before using them for any firm matter or activity.

8.2. Ongoing education and resources are provided to ensure personnel stay informed about AI and GAI technologies' developments and best practices in the legal profession.

## **9. Intellectual Property and Ownership:**

9.1. The firm respects third parties' intellectual property rights in developing, training and using AI and GAI tools.

9.2. AI or GAI models, algorithms or outputs developed using the firm's resources or data are considered the firm's intellectual property unless otherwise agreed upon.

## **10. Monitoring and Review**

10.1. The AI Oversight Committee continuously monitors AI and GAI tools' use and performance to identify potential issues, biases or errors.

10.2. The AI Oversight Committee regularly reviews and updates this policy to ensure continued relevance and effectiveness amid evolving technologies, legal standards and ethical norms.

10.3. Audits of work products created with GAI or AI are regularly performed to ensure accuracy, and the human review record is checked as part of this process.

## **11. Enforcement and Reporting**

11.1. Violations of this policy may result in disciplinary action, including termination of employment or position in the firm, regardless of what the level of that position may be.

11.2. All personnel must report suspected policy violations or concerns regarding the usage of AI and GAI tools to the AI Oversight Committee or firm management.

## **12. Acceptance**

As AI becomes more common, it will become increasingly important to understand its place in an expanded system of practice. It is important to note that this technology may change significantly and often. As such, it is the shared responsibility of all employees to maintain an understanding of the latest developments, risks and best use cases AI can provide.

By implementing an AI and GAI use policy, the law firm underscores its commitment to the ethical, responsible and compliant use of these technologies while using their potential to enhance the quality and efficiency of legal services provided to clients.

## **Appendix 3:**

### **Questions for Vendors When Selecting AI Products and Services**

What training is available to understand the technology better and avoid dangerous areas/pitfalls?

*Key considerations: Inquire about comprehensive training and support that covers technical issues, ethical considerations and best practices for applying AI in a legal context.*

Are there any case studies, testimonials or references from other legal professionals who have successfully used the tool?

*Key considerations: Reach out to colleagues or request references from the provider to gain valuable insights into the tool's effectiveness and user experiences.*

How do you monitor accuracy and detect potential issues?

*Key considerations: Understand the vendor's quality control measures, such as audits, testing and monitoring for errors or biases. Inquire about their process for addressing and resolving identified issues.*

Who is this software intended for: solo practitioners, small law firms, mid-size firms, large firms?

*Key considerations: Ensure the vendor's offering aligns with your legal practice's size and needs and can scale according to your growth plans.*

What are your recommended best practices for using this tool and adhering to the Rules of Professional Conduct (RPCs)?

*Key considerations: Seek guidance on using the AI tool in compliance with RPCs, including maintaining client confidentiality, ensuring proper supervision and avoiding conflicts of interest.*

How do we place appropriate data privacy and security disclosures in our retainer agreements and other documents to ensure clients understand and can be satisfied by the safeguards and protocols put in place when using your product?

*Key considerations: When discussing data privacy and security with an AI vendor, ensure they address the following:*

- 1. Data ownership, access, protection measures and compliance with laws and regulations*
- 2. Data breach notification, remediation, retention and deletion policies*
- 3. Subcontractor management and employee training practices*
- 4. Termination procedures and data handling post-termination*

*Addressing these points helps protect your data and meet your organization's privacy and security requirements.*

Does the company have a proven track record of providing reliable, secure and compliant solutions specifically tailored to the legal sector?

*Key considerations: Request any information the company will provide to assess its commitment to providing reliable and compliant solutions for the legal industry.*

Are there any other client disclosures required of attorneys beyond the retainer?

*Key considerations: Determine if additional disclosures or notifications are needed when using the AI tool, such as informing clients about AI usage, obtaining consent or explaining limitations and risks.*

If the company is relatively unknown, it may be helpful to know who the owners are and if there are any potential ethical concerns related to the ownership structure.

*Key considerations: Research the company's website, press releases and financial disclosures to uncover information about the owners and identify any potential ethical concerns.*

## Appendix 4

### Key Terms to Know

Understanding key terms in AI is essential for attorneys navigating the complex landscape of technology in the legal sphere. While the following terms represent critical concepts, it is important to note that this list is not exhaustive. Nonetheless, familiarity with these terms will empower legal professionals to engage with AI-related issues and make informed decisions effectively.

The key terms below have been referenced from NIST's Glossary, which can be found here: [https://airc.nist.gov/AI\\_RMF\\_Knowledge\\_Base/Glossary](https://airc.nist.gov/AI_RMF_Knowledge_Base/Glossary)

- 1. Artificial intelligence (AI):** Intelligent systems that mimic the human mind, such as solving complex problems, reasoning and problem-solving, often used in legal research, document analysis, and predictive analytics.
- 2. Machine learning:** A subset of AI that enables systems to learn from data and improve performance over time without being explicitly programmed, used for tasks like case prediction and contract analysis in legal practice.
- 3. Deep learning:** Advanced machine learning technique using neural networks with multiple layers to learn patterns and representations from data, applied in tasks like natural language processing (NLP) for contract review and sentiment analysis.
- 4. Natural language processing (NLP):** AI technology enables computers to understand, interpret and generate human language, which is critical for tasks like automated document summarization and legal document classification.
- 5. Bias:** Systematic errors or inaccuracies introduced by AI algorithms or data that result in unfair outcomes, requiring legal professionals to assess and mitigate bias in AI systems used for decision-making.
- 6. Transparency:** The degree to which AI systems' decisions, data usage and operations are understandable and explainable, which is crucial for ensuring accountability and regulatory compliance in legal contexts.
- 7. Replicability:** The ability to reproduce AI experiments or results to validate findings and ensure reliability is essential for establishing AI applications' credibility in legal research and analysis.
- 8. Large language model (LLM):** AI-powered software designed to manage and organize legal documents, streamline workflows and improve legal document review and production efficiency.
- 9. Algorithm:** A step-by-step procedure or rules for solving a problem or accomplishing a task. AI often uses it to process data and make decisions, and its legal applications include predictive modeling and risk assessment.
- 10. Bias auditing:** The process of systematically evaluating and identifying biases in AI systems, including data collection, model development and decision outputs, to ensure fairness and equity in legal applications and decision-making processes.

## NOTICE TO THE BAR

### LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS

Artificial intelligence (AI) includes a variety of rapidly evolving technologies with significant capabilities as well as significant risks. In furtherance of its responsibility to uphold the highest level of professionalism among lawyers, the New Jersey Supreme Court seeks to balance the benefits of innovation while safeguarding against the potential harms of misuse. To that end, the Court here provides preliminary guidelines on the use of AI to support lawyers who practice in New Jersey and the clients who depend on those lawyers.

#### Supreme Court Committee on AI and the Courts

The Supreme Court Committee on Artificial Intelligence and the Courts, which includes private and public lawyers, as well as judges, Judiciary leaders, technologists, and experts in academia and media, recommended these initial guidelines to support lawyers in continuing to comply with the existing Rules of Professional Conduct (RPCs) and the Rules of Court.

The attached preliminary guidelines are intended to inform and assist lawyers in navigating their ethical responsibilities in light of the current and anticipated effects of AI -- in particular generative AI -- on legal practice.

#### Questions and Suggestions

Lawyers with specific questions about their own prospective conduct related to the use of AI should continue to seek direction from the Attorney Ethics Hotline at (609) 815-2924 or in writing to [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov). As always, the identity of lawyers who pose such specific questions will remain confidential. However, the issues raised by such inquiries may inform the development of future, more detailed guidance regarding the ethical use of AI in the practice of law.

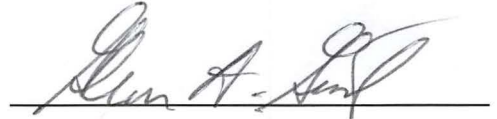
While these interim guidelines are effective immediately, the Supreme Court also invites comments and questions on the use of AI in legal practice, including suggestions of potential use cases for lawyers and the courts.



Questions regarding this notice should be directed to the Office of the Administrative Director of the Courts at (609) 376-3000. Written inquiries and any comments on the preliminary guidelines should be submitted via email to [Comments.Mailbox@njcourts.gov](mailto:Comments.Mailbox@njcourts.gov).



Stuart Rabner  
Chief Justice



Glenn A. Grant, J.A.D.  
Acting Administrative Director

Dated: January 24, 2024

## PRELIMINARY GUIDELINES ON NEW JERSEY LAWYERS' USE OF ARTIFICIAL INTELLIGENCE

Artificial intelligence (AI) refers to a machine-based system that can make predictions, recommendations, or decisions. AI systems use machine and human-based inputs to perceive environments, abstract such perceptions into models through automated analysis, and use model inference to formulate options. While various forms of AI have been widely used for years, the advent of generative artificial intelligence (Gen AI) -- a subset of AI in which machine-based systems create text or images based on predictive models derived from training with large datasets -- has elevated interest in and use of AI in legal and other professions. These preliminary guidelines refer generally to AI with the understanding that certain provisions relate primarily to generative AI. The ongoing integration of AI into other technologies suggests that its use soon will be unavoidable, including for lawyers. While AI potentially has many benefits, it also presents ethical concerns. For instance, AI can “hallucinate” and generate convincing, but false, information. These circumstances necessitate interim guidance on the ethical use of AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks.

### Artificial Intelligence Does Not Change Lawyers' Duties

Lawyers in some jurisdictions improperly relied on Gen AI to generate content, which in some cases resulted in the submission to courts of briefs containing references to fake case law (which those lawyers did not check before or after submission). At the other end of the spectrum, reputable resources including LexisNexis and Westlaw promise to improve the quality of legal practice through the integration of AI to provide faster, more reliable legal research and writing assistance. Larger law firms are continuing to develop in-house AI systems while vendors are marketing AI-facilitated contract review and administrative support to smaller firms and solo practitioners. In this complex and evolving landscape, lawyers must decide whether and to what extent AI can be used so as to maintain compliance with ethical standards without falling behind their colleagues.

The core ethical responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet. AI

tools must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of legal practice. While AI does not change the fundamental duties of legal professionals, lawyers must be aware of new applications and potential challenges in the discharge of such responsibilities. 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. This notice highlights particular RPCs that may be implicated by the use of AI, with the understanding that such references are not intended to be exhaustive.

### Accuracy and Truthfulness

A lawyer has a duty to be accurate and truthful. RPC 3.1 provides that a lawyer may not “assert or controvert an issue . . . unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous . . . .” RPC 4.1(a)(1) prohibits a lawyer from making a false statement of material fact or law. And RPC 8.4(c) states that it is misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Because AI can generate false information, a lawyer has an ethical duty to check and verify all information generated by AI to ensure that it is accurate. Failure to do so may result in violations of the RPCs.

### Honesty, Candor, and Communication

RPC 3.3 requires a lawyer to uphold candor to the tribunal, including by not knowingly making “a false statement of material fact or law . . . .” or offering “evidence that the lawyer knows to be false . . . .” RPC 3.3(a)(1); RPC 3.3(a)(4). A lawyer who uses AI in the preparation of legal pleadings, arguments, or evidence remains responsible to ensure the validity of those submissions. While the RPCs do not require a lawyer to disclose the use of AI, such use does not provide an excuse for the submission of false, fake, or misleading content. The RPCs prohibit a lawyer from using AI to manipulate or create evidence and prohibit a lawyer from allowing a client to use AI to manipulate or create evidence. See, e.g., RPC 1.2(d); RPC 1.4(d); RPC 3.4(b).

RPC 1.2 provides that a lawyer must “abide by a client’s decisions concerning the scope and objectives of representation . . . and as required by

RPC 1.4 shall consult with the client about the means to pursue them.” RPC 1.4(b), in turn, provides that a lawyer must promptly comply with a client’s reasonable requests for information, and RPC 1.4(c) provides that a lawyer must provide sufficient explanation for a client to make informed decisions regarding the representation. Those RPCs do not impose an affirmative obligation on lawyers to tell clients every time that they use AI. However, if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer’s use of AI. As to client interactions, a lawyer can use AI to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . . .” consistent with RPC 1.4, but the lawyer must continue to oversee such communications to ensure accuracy.

### Confidentiality

RPC 1.6 provides that “[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . .” To uphold this core duty, a lawyer must not only avoid intentional disclosure of confidential information but must also “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client.” RPC 1.6(f). Today, the market is replete with an array of AI tools, including some specifically designed for lawyers, as well as others in development for use by law firms. A lawyer is responsible to ensure the security of an AI system before entering any non-public client information.

### Prevention of Misconduct, Including Discrimination

A lawyer must not engage in misconduct, including “conduct involving dishonesty, fraud, deceit or misrepresentation;” “conduct that is prejudicial to the administration of justice;” and “conduct involving discrimination . . . .” RPC 8.4(c); 8.4(d); 8.4(g). Those duties are addressed in part by the ongoing requirements to ensure accuracy (and avoid falsification) of communications with clients and the court.

## Oversight

Law firms and lawyers are responsible for overseeing other lawyers and nonlawyer staff, as well as law students and interns, as they may be held responsible for ethical violations by those individuals. See, e.g., RPC 5.1 (Responsibilities of Partners, Supervisory Lawyers, and Law Firms); RPC 5.2 (Responsibilities of a Subordinate Lawyer); RPC 5.3 (Responsibilities Regarding Nonlawyer Assistance). This requirement extends to ensuring the ethical use of AI by other lawyers and nonlawyer staff.

## Conclusion

These preliminary guidelines are intended to assist lawyers in complying with the existing RPCs, which remain unchanged by the availability and use of AI. The references to specific RPCs are intended for illustration and not as an exhaustive list. For instance, the use of AI likely will affect lawyer billing practices and advertising. See, e.g., RPC 1.5 (Fees); RPC 7.2 (Advertising). Those and other specific applications can be addressed in future guidelines if and as needed.

## **NOTICE TO THE BAR**

### **ARTIFICIAL INTELLIGENCE – (1) SUMMARY OF RESPONSES TO JUDICIARY SURVEY OF NEW JERSEY ATTORNEYS; (2) PLANS FOR NO-COST CONTINUING LEGAL EDUCATION PROGRAMS**

As authorized by the Supreme Court, the Judiciary in April 2024 surveyed New Jersey attorneys regarding their knowledge, perception, and use of artificial intelligence (specifically generative artificial intelligence), in both personal and professional contexts. Based on the responses to the survey, the Judiciary plans to conduct a series of virtual continuing legal education courses on AI and generative AI that will be available to attorneys at no cost.

#### **Survey Response Summary**

More than 6,400 attorneys completed the survey, sharing areas of interest and concern, as well as preferences for education and training. In addition, responding attorneys also offered more than 1,800 narrative comments, which illustrated a broad spectrum of views and attitudes about generative AI technologies. The quantitative and qualitative data collected through the survey provide valuable insights about the current and potential future uses of generative AI in the practice of law in New Jersey. Additionally, the information gathered through this comprehensive outreach will inform the ongoing work of the Supreme Court Committee on Artificial Intelligence in the Courts.

Of the attorneys who completed the survey:

- More than half have been engaged in the practice of law for 20+ years.
- The most prevalent concerns about generative AI involved accuracy, ethical considerations, and lack of regulation.
- More than 60% indicated that they know “a little” about how generative AI works. Less than 20% of survey respondents reported having more than a little understanding of the functionality or application of generative AI.
- Only 14.5% of respondents stated that they currently use generative AI technologies in their legal practice.

- Nearly 80% of respondents have received no training on the use of generative AI in legal work.
  - Of those attorneys who have received training on AI, more than 80% indicated that such training increased their understanding of generative AI and what types of products generative AI can produce in the legal profession.
- Many attorneys reported a lack of available training on generative AI. Survey respondents expressed a preference for virtual training programs, followed by in-person workshops and AI-focused legal conferences.


### Upcoming CLE Programs on Generative AI

Most survey respondents reported only a little knowledge and understanding of how generative AI technologies work and the legal products they can produce. Further, many survey respondents expressed wide-ranging practical and ethical concerns about these new technologies. To enhance attorneys' understanding of AI and to mitigate against potential missteps, the Judiciary will develop and present a series of CLE programs regarding AI at no cost to attendees. The first program to be presented will be an overview of ethical considerations related to the use of generative AI, as follows:

- **July 24, 2024 from 12 – 2:00 p.m.**, Artificial Intelligence Fundamentals and the Ethics of AI Use by Lawyers (via live Zoom webinar (which meets the "live instruction" requirements of BCLE Reg. 103:1(n)). Advance registration is required and can be completed at this [link](#). This program will offer 2.0 credits in ethics/professionalism.

Details about this initial course and future programs will be posted on the Judiciary's website [njcourts.gov](http://njcourts.gov).

Questions about this notice or the Supreme Court Committee on Artificial Intelligence and the Courts may be directed by email to [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov).

  
\_\_\_\_\_  
Hon. Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts

Dated: June 11, 2024

Home / Daily News / No. 42 law firm by head count could face...

TECHNOLOGY

## No. 42 law firm by head count could face sanctions over fake case citations generated by AI

BY DEBRA CASSENS WEISS ([HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/4/](https://www.abajournal.com/authors/4/))

FEBRUARY 10, 2025, 10:30 AM CST



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**Updated:** Lawyers from plaintiffs law firm Morgan & Morgan are facing possible sanctions for a motion that cited eight nonexistent cases, at least some of which were apparently generated by artificial intelligence.

In a Feb. 6 order

([https://storage.courtlistener.com/recap/gov.uscourts.wyd.64014/gov.uscourts.wyd.64014.156.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.wyd.64014/gov.uscourts.wyd.64014.156.0_1.pdf)), U.S. District Judge Kelly H. Rankin of the District of Wyoming told lawyers from Morgan & Morgan and the Goody Law Group to provide copies of the cited cases, and if they can't, to show cause why they shouldn't be sanctioned.

Law360

(<https://www.law360.com/articles/2295236>)

*Lawyers from plaintiffs law firm Morgan & Morgan are facing possible sanctions for a motion that cited eight nonexistent cases, at least some of which were apparently generated by artificial intelligence. (Image from Shutterstock)*

and Original Jurisdiction (<https://davidlat.substack.com/p/morgan-and-morgan-order-to-show-cause-for-chatgpt-fail-in-wadsworth-v-walmart>) have coverage.

The cases cited by the court had been “hallucinated” by an internal AI platform and were not legitimate, the firms said in a Feb. 10 response ([https://www.abajournal.com/files/Feb\\_10\\_response\\_Wadsworth.pdf](https://www.abajournal.com/files/Feb_10_response_Wadsworth.pdf)) to the show-cause order.



“This matter comes with great embarrassment and has prompted discussion and action regarding the training, implementation and future use of artificial intelligence within our firm,” the response said. “This serves as a cautionary tale for our firm and all firms, as we enter this new age of artificial intelligence.”

The law firms’ brief had cited nine cases, but Rankin could locate only one of them. Some of the citations did lead to cases under different names.

The lawyers’ motion also included a description of the governing legal standard that was “peculiar,” Rankin said. The motion correctly cited a federal rule of evidence but then went on to say “Wyoming caselaw reinforces these principles.” To support the assertion about Wyoming caselaw, the motion cited fake federal district court cases.

“Notwithstanding this slight inconsistency, experienced litigators like plaintiffs’ counsel should know that this court is a federal court, and therefore federal procedural law governs evidentiary issues,” Rankin wrote.

Morgan & Morgan is ranked No. 42 in the United States based on firm head count, according to Original Jurisdiction, which cited figures from the American Lawyer. The Goody Law Group appears to be a small firm based in California.

“Moral of the story: Lawyers at large firms can misuse ChatGPT as well as anyone,” wrote Above the Law founder David Lat at Original Jurisdiction.



The case involves a hoverboard sold by Walmart that allegedly exploded and caught fire, according to Law360.

The lawyers who signed the now-withdrawn motion with the alleged fake cites were Rudwin Ayala and T. Michael Morgan of Morgan & Morgan and Taly Goody of the Goody Law Group.

They did not immediately respond to ABA Journal emails seeking comment. Morgan and Goody did not respond to Journal voicemails. A person who answered a call at Morgan & Morgan could not locate Ayala in the directory.

The communications director for Morgan & Morgan emailed the Journal a copy of the show-cause response after it was filed.

*Updated Feb. 12 at 8:50 a.m. to report on the response to the show-cause order.*

A	B	C	D	E	F	G	H	I	J	M
<b>WHY YOU'RE NOT LOSING WEIGHT</b>										
<b>WAKE UP TIME</b>	6 AM		7 AM		8 AM					
<b>DAILY MEALS</b>	1	2	3	4						
<b>HOURS OF SLEEP</b>										
<b>AGE</b>	18-25	26-35	36-55		56+					
<b>DAILY WATER INTAKE</b>										
<b>YOUR BMI</b>	40+	30+		25-30		20-25				
<b>FASTING SCHEDULE</b>	16:8	12:12	14:10		18:6					
<b>TAKE THE TEST</b>										

*Write a letter to the editor, share a story tip or update, or report an error.*

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 511R**

**May 8, 2024**

## **Confidentiality Obligations of Lawyers Posting to Listservs\***

*Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.*

### **Introduction**

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.<sup>1</sup> Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with individuals outside their law firms by other media and in other settings, including when lawyers discuss their work at in-person gatherings.<sup>2</sup>

### **Relevant Principles Regarding the Duty of Confidentiality**

Subject to exceptions not applicable here,<sup>3</sup> ABA Model Rule of Professional Conduct 1.6(a) provides that: "A lawyer shall not reveal information relating to the representation of a client

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\*Listerv® is a registered trademark. When the word "listservs" is used in this opinion, it is intended to describe and apply to any electronic-based discussion group and/or email community.

<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023.

<sup>2</sup> See ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 480 (2018) for a discussion of other forms of lawyer public commentary including blogs, writings, and educational presentations.

<sup>3</sup> This opinion does not discuss the exceptions to the confidentiality obligation provided for in paragraph (b) because we cannot envision a recurring situation in which any of the exceptions are likely to authorize disclosures of information relating to a representation on a lawyer's listserv.

unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”<sup>4</sup> Comment 3 explains that Rule 1.6 protects “all information relating to the representation, whatever its source” and is not limited to communications protected by attorney-client privilege.<sup>5</sup> A lawyer may not reveal even publicly available information, such as transcripts of proceedings in which the lawyer represented a client. As noted in ABA Formal Opinion 04-433 (2004), “the protection afforded by Model Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.” Among the information that is generally considered to be information relating to the representation is the identity of a lawyer’s clients.<sup>6</sup>

Because Rule 1.6 restricts communications that “could reasonably lead to the discovery of” information relating to the representation,<sup>7</sup> lawyers are generally restricted from disclosing such information even if the information is anonymized, hypothetical, or in abstracted form, if it is reasonably likely that someone learning the information might then or later ascertain the client’s identity or the situation involved.<sup>8</sup> Comment 4 explains, that without client consent, Rule 1.6 prohibits:

disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

The breadth of Rule 1.6 was emphasized in ABA Formal Opinion 496 (2021), which cautioned lawyers about responding to online criticism: Lawyers “who choose to respond online must not disclose information that relates to a client matter *or that could reasonably lead to the discovery of confidential information by another.*” (Emphasis added).

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<sup>4</sup> Comment 2 to Model Rule 1.6(a) emphasizes that a “fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”

<sup>5</sup> The attorney-client privilege is an evidentiary rule applicable to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence about a client. The duty of client-lawyer confidentiality is not limited to those circumstances, nor is it limited to matters communicated in confidence by the client. MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. [3].

<sup>6</sup> Comment 2 to Rule 7.2, for example, notes that in lawyer advertising, client consent is required before naming regularly represented clients. *See also* Wis. Formal Op. EF-17-02 (2017) (lawyer may not disclose current or former client’s identity without informed consent; not relevant that representation is matter of public record or case is long closed); Ill. State Bar Ass’n Advisory Op. 12-03 (2012) (lawyer must obtain informed consent before disclosing client names to professional networking group); Ill. State Bar Ass’n Advisory Op. 12-15 (2012) (lawyer may take part in an online discussion group if no information relating to the representation is disclosed and there is no risk that the client could be identified); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133-134 (10<sup>th</sup> ed. 2023).

<sup>7</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [4].

<sup>8</sup> *See, e.g.,* Colo. Bar Ass’n Formal Op. 138 (2019) (“Consultations using hypotheticals do not implicate [Rule] 1.6 provided that the hypotheticals do not create a ‘reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.’”).

Lawyers may disclose information relating to the representation with the client's informed consent. "Informed consent" is defined in Rule 1.0(e) to denote "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." Comments 6 and 7 to Rule 1.0 advise that the necessary communication will ordinarily require the lawyer to confer with the client and explain the advantages and disadvantages of the proposed course of conduct. And obtaining consent will usually require a client's affirmative response; a lawyer generally may not assume consent from a client's silence.<sup>9</sup>

Additionally, Rule 1.6(a) permits a lawyer to reveal information relating to the representation of a client if "the disclosure is impliedly authorized in order to carry out the representation."<sup>10</sup> Comment 5 to Rule 1.6 explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." Conversely, lawyers are generally not authorized to disclose information relating to the representation to lawyers outside the firm, including lawyers from whom the engaged lawyers seeks assistance.

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<sup>9</sup> Lawyers who anticipate using listservs for the benefit of the representation may seek to obtain the client's informed consent at the outset of the representation, such as by explaining the lawyer's intention and memorializing the client's advance consent in the lawyer's engagement agreement. Rule 1.0(e) provides that for a client's consent to be "informed," the lawyer must "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Therefore, the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved. It may not always be possible to provide sufficient detail until considering an actual post.

<sup>10</sup> Comment 5 to Rule 1.6 explains that a lawyer is impliedly authorized to make disclosures "when appropriate in carrying out the representation." In many situations, by authorizing the lawyer to carry out the representation, or to carry out some aspect of the representation, the client impliedly authorizes the lawyer to disclose information relating to the representation, to the extent helpful to the client, for the purpose of achieving the client's objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [5] ("In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation."). For example, when a client authorizes a lawyer to conduct settlement negotiations or transactional negotiations, the client impliedly authorizes the lawyer to disclose information relating to the representation insofar as the lawyer reasonably believes that doing so will advance the client's interests. What is impliedly authorized will depend "upon the particular circumstances of the representation." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 135. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (lawyer experiencing data breach may reveal information relating to representation to law enforcement if lawyer reasonably believes disclosure is impliedly authorized, will advance client's interests, and will not adversely affect client's material interests); N.C. Formal Op. 2015-5 (2015) ("[p]roviding a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation" and impliedly authorized); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 61 (3d ed. 2001) (A lawyer is impliedly authorized to disclose information that "will advance the interests of the client in the representation."). In at least one situation, the Rules themselves impliedly authorize the disclosure, even without the client's implicit approval. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [8] ("When taking protective action" on behalf of a client with diminished capacity pursuant to MODEL RULES OF PROF'L CONDUCT R. 1.14(b), "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.").

Rather, as a general matter, lawyers must obtain the client's informed consent before engaging lawyers in the representation other than lawyers in their firm.<sup>11</sup>

### Seeking Advice or Assistance from a Listserv Discussion Group

ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411.

Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, a lawyer must have the client's informed consent to post a

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<sup>11</sup> Comment 6 to Rule 1.1 states that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent..."

hypothetical to a listserv if, under the circumstances, the posted question could “reasonably lead to the discovery of” information relating to the representation because there is a “reasonable likelihood” that the reader will be able to ascertain the identity of the client or the situation involved. Although this opinion focuses on lawyers’ efforts to obtain information from other lawyers for the benefit of a legal representation, the obligation to avoid disclosing information relating to a representation applies equally when lawyers post on listservs for other purposes, such as to reply to requests for help, to develop their practices by networking, or simply to regale their professional colleagues with “war stories.”<sup>12</sup>

Not all inquiries to a listserv designed to elicit information helpful to a representation will disclose information relating to the representation. In some situations, because of the nature of the lawyer’s practice, the relevant client or the situation involved will never become known, and therefore the lawyer’s anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer’s clientele. In circumstances such as these, a lawyer may post general questions or hypotheticals because there is no reasonable possibility that any listserv member, or anyone else with whom the post may be shared, could identify the specific client or matter.<sup>13</sup>

Illustratively, the authors of Oregon Bar Opinion 2011-184 explained that “[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client” do not require client consent under Rule 1.6. Careful lawyers will often be able to use listservs to ask fellow practitioners for cases and articles on topics, for

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<sup>12</sup> Lawyers should keep in mind that the confidentiality obligation continues after the representation ends. *See* Rule 1.9(c)(2) (“A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.”). This restriction on the disclosure of information relating to a former representation applies even if the information is generally known. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 479 (2017) (discussing the “generally known” exception to the use of confidential information adversely to a former client allowed under Rule 1.9(c)(1) and distinguishing it from the broader prohibition against disclosure of that information). Unlike the counterpart provision (Disciplinary Rule 4-101) of the earlier Code of Professional Responsibility, Rule 1.6 does not permit disclosure of non-privileged information relating to a representation or former representation if its disclosure would not embarrass or harm a client and the client has not specifically asked the lawyer not to disclose it. Consequently, lawyers may not tell “war stories” about a former representation without the former client’s consent if the former client or situation can be identified. As we have noted in the past, the restriction imposed by Rule 1.6 may have First Amendment implications, but the constitutional right to freedom of speech has historically been interpreted consistently with lawyers’ confidentiality obligations to clients. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 480 (2018) (commenting on First Amendment considerations when lawyers act in representative capacities).

<sup>13</sup> For example, a general question requesting case law on whether a warrantless search of a garbage bin outside a residence violates the Fourth Amendment is less likely to allow a reader to infer the client’s identity than a hypothetical revealing the precise facts of a specific search. But if there is a reasonable likelihood that readers can correctly infer the client’s identity, then even the general question discloses information relating to the representation, requiring informed consent. For example, a reader could infer that a lawyer who posts a question to a listserv about the constitutionality of searches of garbage bins located outside of a residence is representing a client whose garbage bin was searched, evidence was found, the lawyer would like to move to suppress the evidence, and the lawyer is unsure of all the relevant case law. Regardless of whether the implicit disclosure of this “information relating the representation” is prejudicial to the client, Rule 1.6 provides that if the client’s identity could be ascertained, it is the client’s decision whether to disclose this sort of information broadly via a listserv to assist the lawyer in conducting useful legal research.

forms and checklists, and for information on how various jurisdictions address a court-connected concern without enabling other lawyers to identify the lawyer's client or the situation involved. Posting this sort of inquiry on a listserv, to the extent possible without disclosing information relating to the representation, may have advantages over a lawyer-to-lawyer consultation precisely because it is broadly disseminated. Maryland State Bar Association Ethics Opinion 2015-03 described peer-to-peer lawyer listservs as a "powerful tool" providing "the opportunity for a lawyer to test his or her understanding of legal principles and to clarify the best way to proceed in unique situations."

The more unusual the situation, however, the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6. Oregon Bar Opinion 2011-184 makes the point. Matters "[w]hen the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named," are among those in which "the lawyer must first obtain the client's informed consent for the disclosures."

Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."<sup>14</sup> Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.<sup>15</sup>

Finally, it bears emphasizing that lawyer listservs serve a useful function in educating lawyers without regard to any particular representation. Lawyers use listservs to update one another about newly published decisions and articles or to share recommendations for helpful contractors or fellow practitioners. Comment 8 to Rule 1.1 advises lawyers to "keep abreast of changes in the law and its practice," and lawyer listservs can help in doing so. These uses, unrelated to any particular representation, would not require a lawyer to secure the informed consent of a client. A lawyer must, however, remain aware of the possible risks to confidentiality involved in any posts to a listserv. Even a general question about the law, such as a request for cases on a specific topic, may in some circumstances permit other users to identify the client or the situation

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<sup>14</sup> Md. State Bar Ass'n Ethics Comm. Op. 2015-3 (2015).

<sup>15</sup> When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media. A lawyer should also be mindful of any possible risks to the attorney-client privilege if the posting references otherwise privileged communications with the client. Whether informed consent requires further disclosures will depend on specific facts.



involved. Therefore, before any post, a lawyer must ensure that the lawyer's post will not jeopardize compliance with the lawyer's obligations under Rule 1.6.

### **Conclusion**

Rule 1.6 prohibits a lawyer from posting comments or questions relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's posts will disclose information relating to the representation that would allow a reader then or later to recognize or infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's consent if the lawyer's contributions will not disclose information relating to a client representation.

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# ARTIFICIAL INTELLIGENCE DISCOVERY & ADMISSIBILITY CASE LAW AND OTHER RESOURCES

**By: Ronald J. Hedges**

**January 2024**



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## INTRODUCTION

I began this collection to assemble information on artificial intelligence (“AI”). Unsurprisingly, content grew and continues to grow as AI and generative artificial intelligence (“GAI”) have become mainstream and subjects of interest to many actors, including elected officials and regulators. I hope to update the collection on a regular basis, but the reader should appreciate that new AI- and GAI-related material appears daily.

The reader might also wish to look at compendiums of case law, etc., I have compiled on electronically stored information (“ESI”) in criminal investigations and proceedings which are hosted by the Massachusetts Attorney General’s Office and are available at <https://www.mass.gov/service-details/understanding-electronic-information-in-criminal-investigations-and-actions>.

With the above in mind, let’s start with some basic definitions (from Donahue):

**‘Artificial Intelligence’** is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data, and translating languages. AI mimics certain operations of the human mind.

**‘Machine learning’** is an application of AI in which computers use algorithms (rules) embodied in software to learn from data and adapt with experience.

A **‘neural network’** is a computer that classifies information – putting things into ‘buckets based on their characteristics.

And, with regard to the governance of AI, see “Key Terms for AI Governance,” *IAPP AI Governance Center* (June 2023), <https://iapp.org/resources/article/key-terms-for-ai-governance/>

For a preview of what might be coming in 2024, see D. Coldewey, “8 Predictions for AI in 2024,” *TechCrunch* (Dec. 19, 2023), <https://techcrunch.com/2023/12/19/8-predictions-for-ai-in-2024/>

Please remember that this collection is not intended to be comprehensive. Rather, it is an overview of complex – and fast-evolving -- technology and how law and society attempt to deal with that technology. **NB: Everything in “color” has been added since the last edition was released in September of 2023.**

Also, I have attempted to create sections or “buckets” of materials. Materials may fit into more than one bucket but are not cited more than once. Moreover, each section begins with case law or statutes and regulations, which are followed by relevant articles, although there are sections consisting solely of articles. **And bear in mind that, although most links lead to free article, some may be behind paywalls.**

One final note: Some may recall difficulties that rural and disadvantaged populations had with, among other things, finding secure and consistent Internet access during the pandemic. As we adopt AI and GAI (and anything else), we should bear those populations in mind. See, for example, M. Muro, *et al.*, “Building AI Cities: How to Spread the Benefits of Emerging Technology Across More of America,” *Brookings* (July 20, 2023), <https://www.brookings.edu/articles/building-ai-cities-how-to-spread-the-benefits-of-an-emerging-technology-across-more-of-america/> and M. Reynolds, “How Do Virtual Hearings Affect People on the Wrong Side of the Digital Divide?” *ABA J.* (Dec. 14, 2023), <https://www.abajournal.com/web/article/how-do-virtual-hearings-affect-people-on-the-wrong-side-of-the-digital-divide#:~:text=Practice%20Technology-,How%20do%20virtual%20hearings%20affect%20people%20on,side%20of%20the%20digital%20divide%3F&text=%E2%80%9CYou%20can%20imagine%20how%20horrible,counsel%20at%20Next%20Century%20Cities.>

There are also proposals to amend the Federal Rules of Evidence (or other evidence rules) to address “machine-generated” evidence. See, in this regard:

- A. Roth, “Proposal to the Advisory Committee on Rules of Evidence: Rule Changes to Address Machine-Generated Proof Beyond Authentication,” in Advisory Committee on Evidence Rules at 80 and Tabs 2A and 2B at (Oct. 27, 2023). Tab 2B is a “Proposed Modification of Current Rule 901(b)(9) to Address Authentication Regarding Artificial Intelligence” submitted by Paul W. Grimm and Maura R. Grossman,” [https://www.uscourts.gov/sites/default/files/2023-10\\_evidence\\_rules\\_agenda\\_book\\_final\\_10-5.pdf](https://www.uscourts.gov/sites/default/files/2023-10_evidence_rules_agenda_book_final_10-5.pdf)

- S. Martinson, “Law Scholars Propose Court Rule Tweak Aimed at Deepfakes,” *Law360* (Oct. 13, 2023), <https://www.law360.com/pulse/articles/1732270/law-scholars-propose-court-rule-tweak-aimed-at-deepfakes>

Comments, criticisms, and proposed additions are welcome. Please send to me at [r\\_hedges@live.com](mailto:r_hedges@live.com).

## **AI-RELATED CASE LAW**

There is limited case law on AI and GAI. However, as the representative decisions below indicate, expect to see courts address, among other things, discovery and admissibility issues.

Note that the Federal Judicial Center, the education arm of the Federal Judiciary, has published J.E. Baker, *et al.*, *An Introduction to Artificial Intelligence for Federal Judges*, in February of 2023. It is available at

[https://www.fjc.gov/sites/default/files/materials/47/An Introduction to Artificial Intelligence for Federal Judges.pdf?utm\\_source=thebrainyacts.beehiiv.com&utm\\_medium=newsletter&utm\\_campaign=122-so-damn-convincing](https://www.fjc.gov/sites/default/files/materials/47/An_Introduction_to_Artificial_Intelligence_for_Federal_Judges.pdf?utm_source=thebrainyacts.beehiiv.com&utm_medium=newsletter&utm_campaign=122-so-damn-convincing)

And see “Artificial Intelligence and the Courts: Materials for Judges,” a project of the American Association for the Advancement of Science. These materials are “primarily individual papers, prepared by experts in the relevant field, and finalized through a process that ensures both the technical accuracy of the content and its utility for judges,” and are available at <https://www.aaas.org/ai2/projects/law/judicialpapers>

### ***Congoo, LLC v. Revcontent LLC, Civil Action No. 16-401 (MAS), 2017 WL 3584205 (D.N.J. Aug. 10, 2017)***

In this action for, among other things, unfair competition, plaintiff sought discovery of defendants’ source code used to create the content of allegedly false and misleading advertising. The court denied plaintiff’s motion to compel:

In order for the production of source code to be compelled, Plaintiff must prove that it is relevant and necessary to the action. The relevancy and necessity requirements must be met, regardless of whether a Discovery Confidentiality Order exists. Courts have held that when source code is requested not only must it be relevant and necessary to the prosecution or defense of the case but when alternatives are available, a court will not be justified in ordering disclosure.

The majority of cases cited by Plaintiff are distinguishable in that they are patent cases in which production of the source code was necessary to prove infringement claims. The Court finds that unlike in a patent case alleging infringement, Plaintiff does not need to review the actual code because its interest is in the specific functionalities of the software, not the underlying code. \*\*\*

In this case, Plaintiff alleges that the Defendants have employed ‘false and misleading representations in advertising to generate greater income from their Ads and those of Defendants’ Advertisers in order to offer its services at more attractive rates than Plaintiff can offer, and to take Plaintiff’s business, erode Plaintiff’s market share and damage Plaintiff’s goodwill in association with Plaintiff’s native advertising business.’ The focus here is *what* Defendants are doing, that is, whether they are creating ads or influencing the creation or content of the ads. The Court is not convinced that an understanding of the Defendants’ influence on or creation of the ads requires production of the technology, i.e., the source code, utilized by the Defendants. Rather, the Court is persuaded that through witness testimony an understanding of the functionality of the software algorithm as it relates to issues in this case, e.g., selection of higher paying Content Recommendations, can be adequately addressed.

Assuming, however, that the source code is relevant, the Court finds that its highly confidential nature is such that it cannot be adequately safeguarded by a Discovery Confidentiality Order and therefore outweighs the need for production. The proprietary nature of Defendants’ source code is outlined in the declaration of Revcontent’s Chief Product Officer \*\*\*.

A weighing of the competing interests: an ability to elicit facts for a full assessment of the claims and defenses, on the one hand, and protecting trade secrets, on the other, must be made with full consideration of factors, including availability of other means of proof and dangers of disclosure. Given the proprietary nature of Defendants’ source code, which is not in dispute, and the irreparable harm that could occur if it is produced, the Court finds that production of the source code is not warranted, especially in light of Defendants’ representation that ‘the present discovery dispute concerns only several discrete functions of [Defendants’] technology.’ Moreover, weighing the competing interests, the existing Discovery Confidentiality Order is insufficient to justify production of Defendant Revcontent’s highly protected trade secret.

The Court finds that Plaintiff has not met its burden of demonstrating that production of the source code is relevant and necessary. The Court further finds that the information provided by Defendants regarding the source code and the additional information that Defendants are willing to provide regarding the functionality of the source code is sufficient and that production of the actual source code is not necessary for an adequate assessment of the claims and defenses in this case. Specifically, Defendants have provided a Declaration from Defendants’ Chief Product Officer in which he explains the functionality of Defendants’ technology. Defendants have also provided a proposed stipulation as to the source code which describes how the technology determines which native ads will be displayed in the Revcontent widget from the pool of available native ads. The Court notes that Plaintiff can also depose the employees involved in the creation of the ads in order to prove its false and misleading advertising claims. \*\*\*. [citations and footnote omitted].



***In re Google RTB Consumer Privacy Litig., Case No. 21-cv-02155-YGR (VKD)***  
**(N.D. Ca. Nov. 2, 2022)**

The plaintiffs in this class action sought to compel the defendant to produce documents related to its “automated data selection process” used to select data for distribution to third-party participants in auctions. The court addressed certain disputes as follows:

During the hearing, Google suggested that it does not necessarily have documents that show all of the details of the automated data selection process that plaintiffs say they require. In that case, plaintiffs may of course use other means to obtain the discovery they need, including deposing any witnesses whose testimony may be necessary to provide a more complete understanding of the process or to identify relevant sources of information about the process. If this deposition testimony is important for class certification briefing, the Court expects the parties to cooperate in promptly scheduling such depositions. \*\*\*.

RFP [Request for Production] 96 asks for documents sufficient to show ‘the architecture of the software program(s)’ that comprise the automated data selection process. Google says that this is highly sensitive information and that production of such detailed technical information is unnecessary for plaintiffs to understand how data is distributed through the RTB auction. \*\*\*. Plaintiffs argue that Google has not shown that the architecture of the software underlying the data selection process is sensitive or trade secret, but even if it is, the protective order affords adequate protection. \*\*\*.

The Court is skeptical that discovery of the architecture-level details of Google's software is relevant and proportional to the needs of the case, particularly in view of Google's representation at the hearing that it has no objection to producing (and did not withhold from its prior production) internal design documents that reveal how the automated data selection

process operates. \*\*\*. Absent a more specific showing of need for information about the architecture of Google's software, the Court agrees that production of design documents, including schematics, showing how the automated data selection process operates should be sufficient.

***In re JUUL Labs, Inc., Marketing, Sales Practices, and Prod. Liability Litig., Case No. 19-md-02913, 2023 WL 6205473 (N.D. Ca. Sept. 19, 2023)***

The district court granted final approval to a proposed class action settlement. In doing so, it overruled objections to the Claims Administrator's rejection of claims submitted by ClaimClam, a third-party "claims aggregator:"

Class Counsel directed the Settlement Administrator (Epiq) to reject the 'tens of thousands' of claims submitted 'en masse' by ClaimClam. \*\*\*. Class Counsel argues that participation claims aggregators like ClaimClam in class action claims administration can generally create confusion. Specific to this case, Class Counsel point to evidence that the information provided by ClaimClam to Class Members about the JLI Class Settlement and claims process was incorrect or potentially misleading. \*\*\*.

The Settlement Administrator appropriately rejected the ClaimClam submissions. The method and contents of the notices given to class members — including the explanation of the case and instructions on how to participate, opt-out, or object — were all approved by the Court \*\*\*. The Court also approved the appointment of Epiq as the Claims Administrator based on representations of Epiq's qualifications and experience and an outline of administrative and communication services to be provided to class members, under the supervision of Class Counsel and ultimately the Court. The Court takes these steps to ensure that class members' due process rights are fully protected. Allowing en masse submissions by claims aggregators like ClaimClam raises real risks that Class Members will not receive accurate information regarding the scope of the class and the claims process. Allowing a third-party to submit hundreds or thousands of aggregated claims also hinders the ability of the Court-appointed Claims Administrator to communicate directly with claimants and conduct required follow up to identify fraudulent claims or verify the accuracy of claims and to resolve claim disputes (e.g., confirm hours worked in wage and hour suits, or the amount of product purchased in consumer suits).

***Liapes v. Facebook, Inc., A164880 (Ca. Ct. App. 1<sup>st</sup> App. Dist. Div. 3 Sept. 21, 2022)***

Samantha Liapes filed a class action against Facebook, Inc. (Facebook, now known as Meta Platforms, Inc.), alleging it does not provide women and older people equal access to insurance ads on its online platform in violation of the Unruh Civil Rights Act and Civil Code section 51.5 — both of which prohibit businesses from discriminating against people with

protected characteristics, such as gender and age. \*\*\*. Liapes alleged Facebook requires all advertisers to choose the age and gender of its users who will receive ads, and companies offering insurance products routinely tell it to not send their ads to women or older people. She further alleged Facebook's ad-delivery algorithm, the system that determines which users will receive ads, discriminates against women and older people by relying heavily on the two key data points of age and gender. As a result, Liapes alleged, women and older people were excluded from receiving insurance ads.

The trial court sustained Facebook's demurrer, deciding Liapes did not plead sufficient facts to support her discrimination claims. It concluded Facebook's tools are neutral on their face and simply have a disproportionate impact on a protected class, rather than intentionally discriminating. The court further concluded Facebook was immune under section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230 (section 230)), which applies to interactive computer service providers acting as a 'publisher or speaker' of content provided by others. Liapes appealed. We review de novo the ruling on the demurrer. \*\*\*. Liberally construing the complaint and drawing all reasonable inferences in favor of Liapes's claims, we conclude the complaint alleges facts sufficient to state a cause of action and reverse. \*\*\*.

\*\*\*

Facebook's Lookalike Audience tool and ad-delivery algorithm underscore its role as a content developer. According to the complaint, Facebook uses its internal data and analysis to determine what specific people will receive ads. The algorithm relies heavily on age and gender to determine which users will actually receive any given ad. This occurs even if an advertiser did not expressly exclude certain genders or older people. The algorithm then sends or excludes users from viewing ads based on protected characteristics such as age and gender. Because the algorithm ascertains data about a user and then targets ads based on the users' characteristics, the algorithm renders Facebook more akin to a content developer. \*\*\*. Facebook is not entitled to section 230 immunity for the claims here.

Disputing this conclusion, Facebook argues its ad tools are neutral because third parties, not Facebook, create the allegedly illegal content. True, providing neutral tools to users to make illegal or unlawful searches does not constitute 'development' for immunity purposes. \*\*\*. But the system must do 'absolutely nothing to enhance' the unlawful message at issue 'beyond the words offered by the user.' \*\*\*. For example, 'a housing website that allows users to specify whether they will or will not receive emails by means of user-defined criteria might help some users exclude email from other users of a particular race or sex.' \*\*\*. 'However, that website would be immune, so long as it does not require the use of discriminatory criteria.' \*\*\*. Here, Liapes alleged Facebook 'does not merely provide a framework that could be utilized for proper or improper purposes.' \*\*\*. Rather, Facebook, after requiring users to disclose protected characteristics of age and gender, relied on 'unlawful criteria' and developed an ad

targeting and delivery system ‘directly related to the alleged illegality — a system that makes it more difficult for individuals with certain protected characteristics to find or access insurance ads on Facebook. \*\*\*. That third-party advertisers are the content providers does not preclude Facebook ‘from also being an information content provider by helping ‘develop’ at least ‘in part’ the information’ at issue here, contrary to Facebook’s assertions. \*\*\*. [footnote and citations omitted].

***I/M/O Madison Sq. Garden Entertainment Corp. v. NY State Liq. Auth., 2023 NY Slip Op 06090 (App. Div. 1<sup>st</sup> Dept. Nov. 28, 2023)***

In the hybrid article 78 proceeding, petitioners failed to establish a clear legal right to a writ of prohibition based on the allegation that SLA exceeded its authority by investigating and charging them under the Alcoholic Beverages Control Law and regulations promulgated thereunder \*\*\*. We reject petitioners' contention that SLA lacks authority to revoke their special on-premises licenses based on the allegation that, among other things, their venues — Madison Square Garden, the Beacon Theater, and Radio City Music Hall — ‘cease[d] to be operated as a bona fide premises within the contemplation of the license issued for such premises, in the judgment of the Authority,’ on the grounds that a policy excluding certain attorneys bringing actions against any of their affiliates renders the venues no longer open to the general public \*\*\*.

***Modern Font Applications v. Alaska Airlines, Case No. 2:19-cv-00561-DBB-CMR (D. Utah Feb. 3, 2021), interlocutory appeal dismissed, No. 2021-1838 (Fed. Cir. Dec. 29, 2022)***

The district court issued a protective order pursuant to which the defendant designated source code. The plaintiff sought modification to allow its in-house counsel access. The court upheld the designation, finding that the source code contained trade secrets and that inadvertent disclosure would be harmful. The court also denied the plaintiff’s request for modification:

Here, Plaintiff argues that even if its in-house counsel is a competitive decisionmaker, his specialized knowledge, the risk of financial hardship to Plaintiff, and the ability to mitigate the risk of disclosure through an amended protective order establish good cause to allow access \*\*\*. Defendant responds that Plaintiff has access to competent outside counsel and has otherwise failed to show good cause to amend the protective order \*\*\*. The court acknowledges that Plaintiff's in-house counsel has specialized knowledge as a software engineer and institutional knowledge regarding the Patent-in-Suit. However, the fact that Plaintiff has competent outside counsel and could hire outside experts reduces the risk of

prejudice to Plaintiff. Even if reliance on outside counsel and experts causes some financial hardship, the normal burdens of patent litigation are insufficient to outweigh the significant risk of inadvertent disclosure of confidential information in this case. Further, amending the protective order would be insufficient to mitigate this risk because, as explained above, this heightened risk remains even with the existence of a protective order. \*\*\*. The court has carefully balanced the conflicting interests in this case and concludes that the risk of inadvertent disclosure outweighs the risk of prejudice to Plaintiff. The court therefore declines to modify the standard protective order or the confidentiality designations therein. [citations omitted].

***People v. Wakefield*, 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019), affirmed, No. 2022-02771 (N.Y. Ct. App. Apr. 26, 2022)**

From the Third Department decision:

Defendant was subsequently charged in a multicount indictment in connection with the victim's death. Law enforcement collected a buccal swab from defendant to compare his DNA to that found at the crime scene. The data was eventually sent to Cybergenetics, a private company that used a software program called TrueAllele Casework System, for further testing. The DNA analysis by TrueAllele revealed, to a high degree of probability, that defendant's DNA was found on the amplifier cord, on parts of the victim's T-shirt and on the victim's forearm. \*\*\*. At the *Frye* hearing, Supreme Court heard the testimony of Mark Perlin, the founder, chief scientist and chief executive officer of Cybergenetics, among others. Following the *Frye* hearing, the court rendered a decision concluding that TrueAllele was generally accepted within the relevant scientific community. \*\*\* Perlin also testified that TrueAllele is designed to have a certain degree of artificial intelligence to make additional inferences as more information becomes available. Perlin explained that, after objectively generating all genotype possibilities, TrueAllele answers the question of "how much more the suspect matches the evidence [than] a random person would," and the answer takes the form of a likelihood ratio. \*\*\*

Supreme Court found that 'there [was] a plethora of evidence in favor of [TrueAllele], and there [was] no significant evidence to the contrary.' In view of the evidence adduced at the *Frye* hearing, we find that the court's ruling was proper.

As described in the affirmance by the Court of Appeals:

He argued that the report generated by TrueAllele was testimonial, Prior to trial, defendant moved for disclosure of the source code in order 'to meaningfully exercise his that the computer program was the functional equivalent of a laboratory analyst and that the source code was the witness that must be produced to satisfy his right to confrontation. He claimed that Perlin's 'surrogate' trial testimony without disclosure of the source code was inadequate— 'the TrueAllele Casework System source code itself,

and not Dr. Perlin, is the declarant with whom [defendant] has a right to be confronted.’ The court denied the motion, finding that the source code was not a witness or testimonial in nature, and that defendant would have the opportunity to confront and cross-examine Dr. Perlin-the analyst and the developer of the software.

Defendant again raised his confrontation argument prior to Dr. Perlin’s trial testimony, asserting that the TrueAllele Casework System was the witness and that he needed the source code to effectively cross-examine that witness. When the court questioned how one cross-examines a computer program, defendant represented that, once his experts had the opportunity to review the source code, he would then pose questions to Dr. Perlin based on the experts’ review. The court denied the request, stating that the issue defense counsel raised was a discovery issue and that defendant’s ability to cross-examine Dr. Perlin, the developer of the source code, satisfied his right to confrontation.

\*\*\*

We must address whether the trial court abused its discretion in determining that TrueAllele ‘is not novel but instead is ‘generally accepted’ under the Frye standard.’

\*\*\*

Here, the evidence presented at the Frye hearing established that the relevant scientific community generally accepted TrueAllele’s DNA interpretation process and that the continuous probabilistic genotyping approach is more efficacious than human review of the same data using the stochastic threshold. It was undisputed that the foundational mathematical principles (MCMC and Bayes’ theorem) are widely accepted in the scientific community. It was also undisputed that the relevant scientific community was fully represented by those persons and agencies who weighed in on the approach. Although the continuous probabilistic approach was not used in the majority of forensic crime laboratories at the time of the hearing, the methodology has been generally accepted in the relevant scientific community based on the empirical evidence of its validity, as demonstrated by multiple validation studies, including collaborative studies, peer-reviewed publications in scientific journals and its use in other jurisdictions. The empirical studies demonstrated TrueAllele’s reliability, by deriving reproducible and accurate results from the interpretation of known DNA samples.

Defendant and the concurrence raise the legitimate concern that the technology at issue is proprietary and the developer of the software is involved in many of the validation studies. This skepticism, however, must be tempered by the import of the empirical evidence of reliability demonstrated here and the acceptance of the methodology by the relevant scientific community. [citations and footnote omitted].

***Rodgers v. Christie*, 795 Fed. Appx. 878 (3d Cir. 2020)**

This was an appeal from the dismissal of a products liability action brought under the New Jersey Products Liability Act (NJPLA) against the entity responsible for the development of the “Public Safety Assessment (PSA), a multifactor risk estimation model that forms part of the state’s pretrial release system.” The plaintiff’s son had been murdered by a man who had been granted pretrial release. The Court of Appeals held that the PSA was not a “product” and affirmed:

The NJPLA imposes strict liability on manufacturers or sellers of certain defective ‘product[s].’ But the Act does not define that term. To fill the gap, the District Court looked to the Third Restatement of Torts, which defines ‘product’ as ‘tangible personal property distributed commercially for use or consumption’ or any ‘[o]ther item[]’ whose ‘context of \*\*\* distribution and use is sufficiently analogous to [that] of tangible personal property.’ It had good reason to do so, as New Jersey courts often look to the Third Restatement in deciding issues related to the state’s products liability regime. And on appeal, both parties agree the Third Restatement’s definition is the appropriate one. We therefore assume that to give rise to an NJPLA action, the ‘product’ at issue must fall within section 19 of the Third Restatement.

\*\*\*

The PSA does not fit within that definition for two reasons. First, as the District Court concluded, it is not distributed commercially. Rather, it was designed as an objective, standardized, and \*\*\* empirical risk assessment instrument’ to be used by pretrial services programs like New Jersey’s. Rodgers makes no effort to challenge this conclusion in her briefing and has thus forfeited the issue. Second, the PSA is neither ‘tangible personal property’ nor remotely ‘analogous to’ it. As Rodgers’ complaint recognizes, it is an ‘algorithm’ or ‘formula’ using various factors to estimate a defendant’s risk of absconding or endangering the community. As the District Court recognized, ‘information, guidance, ideas, and recommendations’ are not ‘product[s]’ under the Third Restatement, both as a definitional matter and because extending strict liability to the distribution of ideas would raise serious First Amendment concerns. Rodgers’s only response is that the PSA’s defects ‘undermine[] New Jersey’s pretrial release system, making it ‘not reasonably fit, suitable or safe’ for its intended use. But the NJPLA applies only to defective *products*, not to anything that causes harm or fails to achieve its purpose. [citations and footnote omitted].

***State v. Ghigliotti*, 463 N.J. Super. 355 (App. Div. 2020)**

At issue in this interlocutory appeal was whether the trial court had erred in directing that a *Frye* hearing be conducted to determine the scientific reliability of

proposed expert testimony on the positive identification of a bullet fragment recovered from a murder victim. The Appellate Division affirmed:

An application of the Frye test at an evidentiary hearing was necessary in this case because BULLETRAX is a new, untested device, operated by Matchpoint, a novel software product. As the trial court found, 'BULLETRAX is a highly automated technology that does not merely photograph the bullet's surface, as suggested by the State, but instead digitally recreates the entire surface area.' The parties did not provide the court with any judicial opinions or authoritative scientific and legal writings demonstrating the reliability of this machine.

In addition, neither Sandford [the State's expert witness] nor Boyle [a salesman with the business that offered the technology] were experts in the science behind the BULLETRAX system and, therefore, were unable to address whether it provided reliable images. In that regard, both witnesses conceded that BULLETRAX created some degree of distortion when it 'stitched together' the images of the bullet fragment and the test bullets that Sandford used to reach his conclusions. The trial court also correctly found that, for many of these same reasons, 'the reliability of Matchpoint' was '[e]qually unproven at this time.'

Under these circumstances, we affirm the trial court's determination that a Frye hearing was necessary to protect defendant's due process rights and ensure that the images produced by BULLETRAX were sufficiently reliable to be admissible under N.J.R.E. 702.

The appellate court also addressed the trial court's order that, among other things, the State provide to defendant algorithms used by the technology in advance of the *Frye* hearing:

The trial court ordered the State to produce the BULLETRAX and Matchpoint algorithms based solely upon defense counsel's request. While it is certainly possible that this information might be needed by defendant's experts to evaluate the reliability of the new technology, the defense did not present a certification from an expert in support of this claim for disclosure. Thus, there is currently nothing concrete in the record to support the court's conclusion that granting defendant 'the opportunity to review the algorithms and elicit testimony concerning' BULLETRAX is necessary 'in order to completely explore and test the integrity of the images it produces.'

Under these circumstances, defendant is required to make a more definitive showing of his need for this material to provide the court with a rational basis to order the State to attempt to produce it. *In that regard, the trial court was aware that the algorithms are proprietary information within UEFT's, rather than the State's, sole possession. While the court was open to issuing a protective order to attempt to overcome UEFT's reluctance to disclose this information to the State, the parties did not submit suggested language to the court to assist it in attempting to craft and issue such an order.*



Therefore, we vacate the court's order directing the turnover of the algorithms, and remand the discovery issues to the court for further consideration. The court must promptly conduct a case management conference with the parties to determine the most efficient way to proceed to identify the types of information that must be shared by them in advance of the Frye hearing. Resolution of discovery issues must be made after a N.J.R.E. 104 hearing to ensure the development of a proper, reviewable record that supports the court's ultimate decision. [emphasis added].

***State v. Loomis*, 371 Wis.2d 235, 881 N.W.2d 749 (2016), cert. denied, 137 S. Ct. 2290 (2017)**

The defendant was convicted of various offenses arising out of a drive-by shooting. His presentence report included an evidence-based risk assessment that indicated a high risk of recidivism. On appeal, the defendant argued that consideration of the risk assessment by the sentencing judge violated his right to due process. The Supreme Court rejected the argument. However, it imposed conditions on the use of risk assessments.

***State v. Morrill*, No. A-1-CA-36490, 2019 WL 3765586 (N.M. App. July 24, 2019)**

Defendant asks this Court to 'find that the attestations made by a computer program constitute 'statements,' whether attributable to an artificial intelligence software or the software developer who implicitly offers the program's conclusions as their own.' (Emphasis omitted.) Based on that contention, Defendant further argues that the automated conclusions from Roundup and Forensic Toolkit constitute inadmissible hearsay statements that are not admissible under the business record exception. In so arguing, Defendant acknowledges that such a holding would diverge from the plain language of our hearsay rule's relevant definitions that reference statements of a 'person.' \*\*\* Based on the following, we conclude the district court correctly determined that the computer generated evidence produced by Roundup and Forensic Toolkit was not hearsay. Agent Peña testified that his computer runs Roundup twenty-four hours a day, seven days a week and automatically attempts to make connections with and downloads from IP addresses that are suspected to be sharing child pornography. As it does so, Roundup logs every action it takes. Detective Hartsock testified that Forensic Toolkit organizes information stored on seized electronic devices into various categories including graphics, videos, word documents, and internet history. Because the software programs make the relevant assertions, without any intervention or modification by a person using the software, we conclude that the assertions are not statements by a person governed by our hearsay rules.

***State v. Pickett*, 466 N.J. Super. 270 (App. Div. 2021), motions to expand record, for leave to appeal, and for stay denied, *State v. Pickett*, 246 N.J. 48 (2021)**

In this case of first impression addressing the proliferation of forensic evidentiary technology in criminal prosecutions, we must determine whether defendant is entitled to trade secrets of a private company for the sole purpose of challenging at a Frye hearing the reliability of the science underlying novel DNA analysis software and expert testimony. At the hearing, the State produced an expert who relied on his company's complex probabilistic genotyping software program to testify that defendant's DNA was present, thereby connecting defendant to a murder and other crimes. Before cross-examination of the expert, the judge denied defendant access to the trade secrets, which include the software's source code and related documentation.

This is the first appeal in New Jersey addressing the science underlying the proffered testimony by the State's expert, who designed, utilized, and relied upon TrueAllele, the program at issue. TrueAllele is technology not yet used or tested in New Jersey; it is designed to address intricate interpretational challenges of testing low levels or complex mixtures of DNA. TrueAllele's computer software utilizes and implements an elaborate mathematical model to estimate the statistical probability that a particular individual's DNA is consistent with data from a given sample, as compared with genetic material from another, unrelated individual from the broader relevant population. For this reason, TrueAllele, and other probabilistic genotyping software, marks a profound shift in DNA forensics.

TrueAllele's software integrates multiple scientific disciplines. At issue here—in determining the reliability of TrueAllele—is whether defendant is entitled to the trade secrets to cross-examine the State's expert at the Frye hearing to challenge whether his testimony has gained general acceptance within the computer science community, which is one of the disciplines. The defense expert's access to the proprietary information is directly relevant to that question and would allow that expert to independently test whether the evidentiary software operates as intended. Without that opportunity, defendant is relegated to blindly accepting the company's assertions as to its reliability. And importantly, the judge would be unable to reach an informed reliability determination at the Frye hearing as part of his gatekeeping function.

Hiding the source code is not the answer. The solution is producing it under a protective order. Doing so safeguards the company's intellectual property rights and defendant's constitutional liberty interest alike. Intellectual property law aims to prevent business competitors from stealing confidential commercial information in the marketplace; it was never meant to justify concealing relevant information from parties to a criminal prosecution in the context of a Frye hearing. [footnote omitted].

***State v. Saylor, 2019 Ohio 1025 (Ct. App. 2019) (concurring opinion of Froelich, J.)***

{¶ 49} Saylor is a 27-year-old heroin addict, who the court commented has ‘no adult record [\* \* \* and] has led a law-abiding life for a significant number of years’; his juvenile record, according to the prosecutor, was ‘virtually nothing.’ The prosecutor requested an aggregate sentence of five to seven years, and defense counsel requested a three-year sentence. The trial court sentenced Saylor to 12 1/2 years in prison. Although it found Saylor to be indigent and did not impose the mandatory fine, the court imposed a \$500 fine and assessed attorney fees and costs; the court also specifically disapproved a Risk Reduction sentence or placement in the Intensive Program Prison (IPP).

{¶ 50} I have previously voiced my concerns about the almost unfettered discretion available to a sentencing court when the current case law apparently does not permit a review for abuse of discretion. *State v. Roberts*, 2d Dist. Clark No. 2017-CA-98, 2018-Ohio-4885, ¶ 42-45, (Froelich, J., dissenting). However, in this case, the trial court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12, the individual sentences were within the statutory ranges, and the court’s consecutive sentencing findings, including the course-of-conduct finding under R.C. 2929.14(C)(4)(b), were supported by the record.

{¶ 51} As for the trial court’s consideration of ORAS, the ‘algorithmization’ of sentencing is perhaps a good-faith attempt to remove unbridled discretion – and its inherent biases – from sentencing. Compare *State v. Lawson*, 2018-Ohio-1532, 111 N.E.3d 98, ¶ 20-21 (2d Dist.) (Froelich, J., concurring). However, ‘recidivism risk modeling still involves human choices about what characteristics and factors should be assessed, what hierarchy governs their application, and what relative weight should be ascribed to each.’ Hillman, *The Use of Artificial Intelligence in Gauging the Risk of Recidivism*, 58 *The Judges Journal* 40 (2019).

{¶ 52} The court’s statement that the ‘moderate’ score was ‘awfully high,’ given the lack of criminal history, could imply that the court believed there must be other factors reflected in the score that increased Saylor’s probable recidivism. There is nothing on this record to refute or confirm the relevance of Saylor’s ORAS score or any ORAS score. Certainly, the law of averages is not the law. The trial court’s comment further suggested that its own assessment of Saylor’s risk of recidivism differed from the ORAS score. The decision of the trial court is not clearly and convincingly unsupported by the record, regardless of any weight potentially given to the ORAS score by the trial court. Therefore, on this record, I find no basis for reversal.

***State v. Stuebe*, No. 249 Ariz. 127, 1 CA-CR 19-0032 (AZ Ct. App. Div. 1. June 30, 2020)**

The defendant was convicted of burglary and possession of burglary tools. On appeal, he challenged the admissibility of an email and attached videos generated by an automated surveillance system. The Arizona Court of Appeals affirmed. First, the court addressed whether the system was a “person” for hearsay purposes:

¶9 In general, hearsay evidence is inadmissible unless an exception applies. Ariz. R. Evid. 801, 802. Hearsay is ‘a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.’ Ariz. R. Evid. 801(c). A ‘statement’ is a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.’ Ariz. R. Evid. 801(a). A ‘declarant’ is ‘the person who made the statement.’ Ariz. R. Evid. 801(b).

¶10 Because the rule against hearsay applies to ‘a person’s statements and ‘the person who made the statement,’ Ariz. R. Evid. 801(a) and (b), we must determine whether a machine that generates information may qualify as a ‘person’ under the Rules. The Rules do not define ‘person.’ See Ariz. R. Evid. 101. Therefore, we may interpret the word according to its common definition. A.R.S. § 1-213 (2002) (‘Words and phrases shall be construed according to the common and approved use of the language.’); *State v. Wise*, 137 Ariz. 468, 470 n.3 (1983) (stating that unless the legislature expressly defines a statutory term, courts give the word its plain and ordinary meaning, which may be taken from the dictionary). \*\*\*

¶11 \*\*\* Neither statute supports the proposition that a machine can legally be considered a ‘person.’ Additionally, because ‘Arizona’s evidentiary rules were modeled on the federal rules[,]’ we may consider federal precedent to interpret them. *State v. Winegardner*, 243 Ariz. 482, 485, ¶ 8 (2018). The federal circuit courts have repeatedly held that a ‘person’ referenced in the rules of evidence does not include a ‘machine’ or ‘machine-produced’ content. See *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015) (‘[W]e join other circuits that have held that machine statements aren’t hearsay.’) (collecting federal circuit court cases); *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (holding that for hearsay purposes ‘raw data generated by the machines were not the statements of technicians’ who operated the machines); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (holding that neither header nor date and time information automatically generated by a facsimile machine was hearsay because they were not statements made by a person).

¶12 Applied to the facts here, the motion-activated security camera automatically recorded the video after a sensor was triggered. The automated security system then produced an email and immediately sent it to the property manager. No ‘person’ was

involved in the creation or dissemination of either. The email only contained the date, time, client ID, serial number, camera location code, and language that read ‘Automated message – please do not reply to this address.’ Because the email and video were ‘machine produced,’ they were not made by a ‘person’ and are not hearsay.

¶13 Machine-produced statements may present other evidentiary concerns. *See Washington*, 498 F.3d at 231 (noting that concerns about machine-generated statements should be ‘addressed through the process of authentication not by hearsay or Confrontation Clause analysis’). At trial, the court denied Stuebe’s authentication objection to the video, *see Ariz. R. Evid. 901*, but Stuebe has not raised this issue on appeal.

The Court of Appeals also rejected the defendant’s argument that admission of the email and video violated the Confrontation Clause:

¶14 The Sixth Amendment’s Confrontation Clause states, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ U.S. Const. amend. VI. In general, testimonial evidence from a declarant who does not appear at trial may be admitted only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); *State v. Forde*, 233 Ariz. 543, 564, ¶ 80 (2014) (citing *Crawford*, 541 U.S. at 68). ‘[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.’ *Ohio v. Clark*, 576 U.S. 237, 245 (2015). ‘Testimony’ means ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Crawford*, 541 U.S. at 51. Statements are testimonial when the primary purpose is to ‘establish or prove past events potentially relevant to later criminal prosecution.’ *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (holding forensic reports on substances alleged to be drugs, prepared in anticipation of prosecution, are testimonial statements). But statements are not testimonial if made to law enforcement during an ongoing emergency, *see Davis*, 547 U.S. at 827, and are ‘much less likely to be testimonial’ if made to someone other than law enforcement, *Clark*, 576 U.S. at 246.

¶15 Considering all the circumstances we cannot conclude that the ‘primary purpose’ of the email and video was to ‘creat[e] an out-of-court substitute for trial testimony.’ *Id.* at 245 (alteration in original) (quoting *Bryant*, 562 U.S. at 358). And Stuebe does not argue otherwise. The email was sent to the property manager, not law enforcement, and was not made in anticipation of criminal prosecution. Thus, it was not testimonial. *See Davis*, 547 U.S. at 827-28 (finding recording of a 911 call seeking police assistance was not testimonial); *State v. Damper*, 223 Ariz. 572, 575, ¶ 12 (App. 2010) (finding text message from murder victim seeking help not testimonial); *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 191, ¶ 35 (App. 2006) (holding breathalyzer calibration reports not testimonial). The property manager testified and was cross-examined about the email and the video, and the admission of the email and video did not implicate the Confrontation Clause. *State v.*

*Fischer*, 219 Ariz. 408, 418, ¶ 37 (App. 2008) ('Non-testimonial statements are not subject to a confrontation challenge.');

*cf. United States v. Waguespack*, 935 F.3d 322, 334 (5th Cir. 2019) (holding that machine-generated images were not 'statements' in the context of the Confrontation Clause).

**Defendant's Motion for New Trial, *United States v. Michel*, Case No. 1:19-cr-00148-CKK (D.D.C. Oct. 16, 2023)**

The defendant was convicted on campaign finance and foreign influence charges. He moved for a new trial for, among other things, ineffective assistance of counsel. His argument includes the allegation that his attorney "used an experimental AI program to write his closing argument, which made frivolous arguments, conflated the schemes, and failed to highlight key weaknesses in the Government's case."

***United States v. Shipp*, 392 F. Supp. 3d 300 (E.D.N.Y. July 15, 2019)**

The court has serious concerns regarding the breadth of Facebook warrants like the one at issue here. The Second Circuit has observed that '[a] general search of electronic data is an especially potent threat to privacy because hard drives and e-mail accounts may be 'akin to a residence in terms of the scope and quantity of private information [they] may contain.' *Ulbricht*, 858 F.3d at 99 (quoting *Galpin*, 720 F.3d at 445); see also *Galpin*, 720 F.3d at 447 (explaining that '[t]his threat demands a heightened sensitivity to the particularity requirement in the context of digital searches'). This threat is further elevated in a search of Facebook data because, perhaps more than any other location—including a residence, a computer hard drive, or a car—Facebook provides a single window through which almost every detail of a person's life is visible. Indeed, Facebook is designed to replicate, record, and facilitate personal, familial, social, professional, and financial activity and networks. Users not only voluntarily entrust information concerning just about every aspect of their lives to the service, but Facebook also proactively collects and aggregates information about its users and non-users in ways that we are only just beginning to understand. Particularly troubling, information stored in non-Facebook applications may come to constitute part of a user's 'Facebook account'—and thus be subject to broad searches—by virtue of corporate decisions, such as mergers and integrations, without the act or awareness of any particular user.

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Compared to other digital searches, therefore, Facebook searches both (1) present a greater 'risk that every warrant for electronic information will become, in effect, a general warrant,' *Ulbricht*, 858 F.3d at 99, and (2) are more easily limited to avoid such constitutional concerns. In light of these considerations, courts can and should take

particular care to ensure that the scope of searches involving Facebook are ‘defined by the object of the search and the places in which there is probable cause to believe that it may be found.’ [citations omitted in part].

***In re: Vital Pharmaceutical, Case No. 22-17842 (Bankr. S.D. Fla. June 16, 2023).***

**The Bankruptcy Court addressed the question of how to determine ownership rights to a social media account. In doing so the court prompted ChatGPT for an answer:**

Nor has Congress or the states regulated the use of artificial intelligence, another area where the evolution of technology has outpaced the law, and regulation is needed to mitigate its risks. Matt O'Brien, *ChatGPT Chief Says Artificial Intelligence Should be Regulated by a US or Global Agency*, Associated Press, May 16, 2023, <https://apnews.com/article/chatgpt-openai-ceo-sam-altman-congress-73ff96c6571f38ad5fd68b3072722790> (‘The head of the artificial intelligence company that makes ChatGPT told Congress . . . that government intervention will be critical to mitigating the risks of increasingly powerful AI systems.’). In preparing the introduction for this Memorandum Opinion, the Court prompted ChatGPT to prepare an essay about the evolution of social media and its impact on creating personas and marketing products. Along with the essay it prepared, ChatGPT included the following disclosure: ‘As an AI language model, I do not have access to the sources used for this essay as it was generated based on the knowledge stored in my database.’ It went on to say, however, that it ‘could provide some general sources related to the topic of social media and its impact on creating personas and marketing products.’ It listed five sources in all. As it turns out, none of the five seem to exist. For some of the sources, the author is a real person; for other sources, the journal is real. But all five of the citations seem made up, which the Court would not have known without having conducted its own research. The Court discarded the information entirely and did its own research the old-fashioned way. Well, not quite old fashioned; it's not like the Court used actual books or anything. But this is an important cautionary tale. Reliance on AI in its present development is fraught with ethical dangers.

***Wi-LAN Inc. v. Sharp Electronics Corp., 992 F.3d 1366 (Fed. Cir. 2021)***

This was an appeal from an award of summary judgment of noninfringement. The district court held that the plaintiff lacked sufficient admissible evidence to prove direct infringement after it found a printout of source code inadmissible. The plaintiff sought to admit the source code to establish that systems used by the defendants “actually practiced” a methodology patented by the plaintiff. The Federal Circuit affirmed.

The plaintiff argued on appeal, among other things, that the source code printout was a business record that was admissible under the business records exception to the hearsay rule:

To establish that the source code printout was an admissible business record under Rule 803(6), Wi-LAN was required to establish by testimony from a ‘custodian or other another qualified witness’ that the documents satisfied the requirements of the Rule. Wi-LAN argues that it properly authenticated the source code printout through the declarations of the chip manufacturers’ employees. We agree with the district court that the declarations could not be used to authenticate the source code printout on the theory that the declarations were a proxy for trial testimony or themselves admissible as business records.

As Wi-LAN notes, declarations are typically used at summary judgment as a proxy for trial testimony. But declarations cannot be used for this purpose unless the witness will be available to testify at trial. Under Federal Rule of Civil Procedure 56(c)(2), Wi-LAN was required to ‘explain the admissible form that is anticipated.’ Fed. R. Civ. P. 56(c)(2) advisory committee’s notes on 2010 amendments. Wi-LAN argued that it met this burden by explaining that the declarants were available to testify at trial. The district court, however, found the opposite. Indeed, when asked by the court at the summary judgment hearing whether the declarants would appear at trial, Wi-LAN’s counsel responded that Wi-LAN did not ‘think that [it would be] able to force them to come to trial.’

Wi-LAN thus did not establish that the declarants would be available to testify at trial and, as a result, the declarations could not be used as a substitute for trial testimony. *E.g.*, *Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016) (testimony admissible if declarants were available to testify at trial); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) (‘[H]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that ‘would be admissible at trial.’ (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 465 n.12 (3d Cir. 1989)).

Wi-LAN also seems to argue that it properly authenticated the source code printout because the declarations were custodial declarations that were themselves admissible as business records under Rule 803(6). Wi-LAN, however, admits that it obtained the source code printout and declarations by filing lawsuits against the manufacturers and then dismissing the lawsuits without prejudice after the manufacturers provided Wi-LAN with the source code printout and declarations it sought. Wi-LAN even explains that ‘[t]he lawsuits were necessary to secure production of the source code and declarations because [the system-on-chip manufacturers] had refused to cooperate in discovery.’ *The declarations thus do not constitute a ‘record [that] was kept in the course of a regularly conducted activity of a business.’* Fed. R. Evid. 803(6)(B). *Instead, the declarations were created and prepared for the purposes of litigation, placing them outside the scope of the*



*exception. As a result, the declarations were not admissible as business records for use to authenticate the source code printout. [emphasis added].*

The Federal Circuit also rejected the plaintiff's reliance on Rule 901(b)(4):

Wi-LAN also appears to argue that the district court should have found the source code printout admissible under Federal Rule of Evidence 901(b)(4). Rule 901(b)(4) permits a record to be admitted into evidence if '[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances' 'support a finding that the item is what the proponent claims it is.' Fed. R. Evid. 901(a), (b)(4).

In support of its Rule 901(b)(4) argument, Wi-LAN states only that 'there was no legitimate reason to question the trustworthiness of the source code.' The district court concluded that the source code printout's 'appearance, contents, substance, internal patterns, [and] other distinctive characteristics,' Fed. R. Evid. 901(b)(4), did not satisfy Rule 901(b)(4)'s strictures 'given the highly dubious circumstances surrounding the production and the lack of indicia of trustworthiness in the source code,' as described in the previous Section. On this record, the district court did not abuse its discretion in refusing to treat the source code printout as evidence under Rule 901(b)(4).

Moreover, the Federal Circuit rejected the plaintiff's reliance on Rule 703:

Wi-LAN alternatively argues that the source code printout should have been admitted into evidence under Federal Rule of Evidence 703. Wi-LAN's expert submitted a report stating that Sharp's and Vizio's television sets infringe the claimed methods of the '654 patent by the use of the source code. Wi-LAN's expert did not attempt to authenticate the source code printout. But Wi-LAN argues that its expert should be able to opine on the meaning of the inadmissible source code printout and to provide the inadmissible source code printout to the jury despite Wi-LAN's failure to authenticate the source code printout.

Wi-LAN's argument presents two separate and distinct questions: (1) whether the source code printout was admissible because it was relied on by the expert and (2) whether the expert's testimony relying on the source code was admissible to establish infringement. The answer to the first question is 'no' because expert reliance does not translate to admissibility. The answer to the second question is also 'no' because Wi-LAN did not establish that experts in the field 'reasonably rely on' unauthenticated source code.

Concluding its discussion of admissibility, the Federal Circuit rejected the plaintiff's argument that the court below should have extended discovery:

In light of these admissibility issues, Wi-LAN's fallback position is that the district court should have granted it additional time to obtain an admissible version of the source code. We disagree. Wi-LAN had ample time to obtain the source code and to find custodial

witnesses to authenticate the source code over the course of discovery but failed to do so.

Wi-LAN had been on notice since early 2016 that it was going to need the system-on-chip source code from third parties to prove its direct infringement case. Throughout the litigation, Wi-LAN repeatedly requested extensions of time to obtain the source code from the third-party manufacturers. Ultimately, however, Wi-LAN only procured a single printout version of the source code with declarations after suing the third-party manufacturers.

Wi-LAN, as the district court found, 'had ample time and opportunities over years of litigation to obtain evidence of infringement from the [system-on-chip] manufacturers' but failed to do so. Given this record, the district court did not abuse its discretion in denying Wi-LAN an additional opportunity to obtain an admissible form of the source code. [citations omitted in part].

## **AI IN LITIGATION ARTICLES**

The Federal Judicial Center, the education arm of the Federal Judiciary, has published J.E. Baker, *et al.*, *An Introduction to Artificial Intelligence for Federal Judges*, in February of 2023. It is available at [https://www.fjc.gov/sites/default/files/materials/47/An\\_Introduction\\_to\\_Artificial\\_Intelligence\\_for\\_Federal\\_Judges.pdf?utm\\_source=thebrainyacts.beehiiv.com&utm\\_medium=newsletter&utm\\_campaign=122-so-damn-convincing](https://www.fjc.gov/sites/default/files/materials/47/An_Introduction_to_Artificial_Intelligence_for_Federal_Judges.pdf?utm_source=thebrainyacts.beehiiv.com&utm_medium=newsletter&utm_campaign=122-so-damn-convincing)

And see “Artificial Intelligence and the Courts: Materials for Judges,” a project of the American Association for the Advancement of Science. These materials are “primarily individual papers, prepared by experts in the relevant field, and finalized through a process that ensures both the technical accuracy of the content and its utility for judges,” and are available at <https://www.aaas.org/ai2/projects/law/judicialpapers>

J. Bambauer, “Negligent AI Speech: Some Thoughts About Duty,” 3 *J. of Free Speech Law* 343 (2023), <https://www.journaloffreespeechlaw.org/bambauer2.pdf>

C. Cwik, P. Grimm, M. Grossman and T. Walsh, “Artificial Intelligence, Trustworthiness, and Litigation.” *Artificial Intelligence and the Courts: Materials for Judges* (AAAS 2022), [https://www.aaas.org/sites/default/files/2022-09/Paper%20AI%20and%20Trustworthiness\\_NIST\\_FINAL.pdf](https://www.aaas.org/sites/default/files/2022-09/Paper%20AI%20and%20Trustworthiness_NIST_FINAL.pdf)

C. Gismondi, *et al.*, “Have Algorithms Opened Up Your Software to Product Liability?” (ABA Litigation Section: July 24, 2023), <https://www.americanbar.org/groups/litigation/resources/newsletters/mass-torts/have-algorithms-opened-your-software-product-liability/>

P.W. Grimm, “New Evidence Rules and Artificial Intelligence,” 45 *Litigation* 6 (2018),

[https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Committees/Rules\\_of\\_Evidence/Grimm.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Rules_of_Evidence/Grimm.pdf)

P.W. Grimm, M.R. Grossman & G.V. Cormack, “Artificial Intelligence as Evidence,” 19 *Nw. J. Tech. & Intell. Prop.* 9 (2021), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1349&context=njtip>

M.R. Grossman, “Is Disclosure and Certification of the Use of Generative AI Really Necessary?” *Judicature*, Vol. 107, No. 2, October 2023 (Forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4537496#:~:text=Concerns%20about%20the%20misuse%20of,in%20connection%20with%20legal%20filings.](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537496#:~:text=Concerns%20about%20the%20misuse%20of,in%20connection%20with%20legal%20filings.)

R. Hedges, G. Gottehrer & J.C. Francis IV, “Artificial Intelligence and Legal Issues,” *Litigation* (ABA: Fall 2020), [Artificial Intelligence and Legal Issues \(americanbar.org\)](https://www.americanbar.org/publications/litigation)

“How to Determine the Admissibility of AI-Generated Evidence in Courts?” *UNESCO News* (updated July 21, 2023), <https://www.unesco.org/en/articles/how-determine-admissibility-ai-generated-evidence-courts>

## **NIST PUBLICATIONS, INCLUDING THE “FRAMEWORK”**

P. Phillips, *et al.*, “Four Principles of Explainable Artificial Intelligence” (NIST: Sept. 2021), <https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8312.pdf>

We introduce four principles for explainable artificial intelligence (AI) that comprise fundamental properties for explainable AI systems. We propose that explainable AI systems deliver accompanying evidence or reasons for outcomes and processes; provide explanations that are understandable to individual users; provide explanations that correctly reflect the system’s process for generating the output; and that a system only operates under conditions for which it was designed and when it reaches sufficient confidence in its output. We have termed these four principles as explanation, meaningful, explanation accuracy, and knowledge limits, respectively. Through significant stakeholder engagement, these four principles were developed to encompass the multidisciplinary nature of explainable AI, including the fields of computer science, engineering, and psychology. Because one-size fits-all explanations do not exist, different users will require different types of explanations. We present five categories of explanation and summarize theories of explainable AI. We give an overview of the algorithms in the field that cover the major classes of explainable algorithms. As a baseline comparison, we assess how well explanations provided by people follow our four principles. This assessment provides insights to the challenges of designing explainable AI systems.

R. Schwartz, *et al.*, “Toward a Standard for Identifying and Managing Bias in Artificial Intelligence,” NIST Special Pub. 1270 (Mar. 2022), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf>

On January 26, 2023, the National Institute of Standards and Technology (“NIST”) released the Artificial Intelligence Risk Management Framework, together with related materials. The Framework is described as follows:

In collaboration with the private and public sectors, NIST has developed a framework to better manage risks to individuals, organizations, and society associated with artificial intelligence (AI). The NIST AI Risk Management Framework (AI RMF) is intended for voluntary use and to improve the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of AI products, services, and systems.

The Framework and related materials can be found at <https://www.nist.gov/itl/ai-risk-management-framework>

On August 24, 2023, NIST announced that it would begin the process of standardizing algorithms intended to resist attacks by quantum computers. See “NIST to Standardize Encryption Algorithms That Can Resist Attack by Quantum

Computers,” (Aug. 24, 2023), <https://www.nist.gov/news-events/news/2023/08/nist-standardize-encryption-algorithms-can-resist-attack-quantum-computers#:~:text=NIST's%20effort%20to%20develop%20quantum,by%20the%20November%202017%20deadline.>

“What’s Wrong with This Picture? NIST Face Analysis Program Helps to Find Answers,” *News* (NIST: Sept. 20, 2023), <https://www.nist.gov/news-events/news/2023/09/whats-wrong-picture-nist-face-analysis-program-helps-find-answers>

E. Tabassi, “Minimizing Harms and Maximizing the Potential of Generative AI,” *Taking Measure* (NIST: Nov. 20, 2023), <https://www.nist.gov/blogs/taking-measure/minimizing-harms-and-maximizing-potential-generative-ai>

“NIST Calls for Information to Support Safe, Secure and Trustworthy Development and Use of Artificial Intelligence” (NIST: Dec. 19, 2023), <https://www.nist.gov/news-events/news/2023/12/nist-calls-information-support-safe-secure-and-trustworthy-development-and#:~:text=NIST%20seeks%20information%20to%20support,2%2C%202024.>

“NIST Offers Draft Guidance on Evaluating a Privacy Protection Technique for the AI Era,” *News* (NIST: Dec. 11, 2023), <https://www.nist.gov/news-events/news/2023/12/nist-offers-draft-guidance-evaluating-privacy-protection-technique-ai-era>

On December 19, 2023, NIST issued a “Request for Information: NIST’s Assignments under Executive Order 14110 on Safe, Secure, and Trustworthy Development and Use of AI,” <https://www.nist.gov/news-events/news/2023/12/nist-calls-information-support-safe-secure-and-trustworthy-development-and>. For “NIST’s Responsibilities Under the October 30, 2023 Executive Order,” see <https://www.nist.gov/artificial-intelligence/executive-order-safe-secure-and-trustworthy-artificial-intelligence>

J. Daniels & A. Chipperson, “NIST Framework Can Nudge Companies Toward Trustworthy AI Use,” *Bloomberg Law* (Aug. 30, 2023), <https://news.bloomberglaw.com/ip-law/nist-framework-can-nudge-companies-toward-trustworthy-ai-use>

W.J. Denvil, *et al.*, “NIST Publishes Artificial Intelligence Risk Management Framework and Resources,” *Engage* (Hogan Lovells: Jan. 31, 2023), <https://www.engage.hoganlovells.com/knowledgeservices/news/nist-publishes-artificial-intelligence-risk-management-framework-and-resources/>

J. Johnson, *et al.*, “NIST Releases New Artificial Intelligence Risk Management Framework” *Inside Privacy* (Covington: Feb. 1, 2023), <https://www.insideprivacy.com/artificial-intelligence/nist-releases-new-artificial-intelligence-risk-management-framework/>

C.F. Kerry, “NIST’s AI Risk Management Framework Plants a Flag in the AI Debate,” *Brookings TechTank* (Feb. 15, 2023), [https://www.brookings.edu/blog/techtank/2023/02/15/nists-ai-risk-management-framework-plants-a-flag-in-the-ai-debate/?utm\\_campaign=Center%20for%20Technology%20Innovation&utm\\_medium=email&utm\\_content=247081757&utm\\_source=hs\\_email](https://www.brookings.edu/blog/techtank/2023/02/15/nists-ai-risk-management-framework-plants-a-flag-in-the-ai-debate/?utm_campaign=Center%20for%20Technology%20Innovation&utm_medium=email&utm_content=247081757&utm_source=hs_email)

J. Near, *et al.*, “The UK-US Blog Series on Privacy: Preserving Federated Learning: Introduction,” *Cybersecurity Insights* (NIST: Dec. 7, 2023), <https://www.nist.gov/blogs/cybersecurity-insights/uk-us-blog-series-privacy-preserving-federated-learning-introduction>

D. Pozza, “Federal Guidance Offers Framework to Minimize Risks in AI Use,” *Bloomberg Law* (Feb. 9, 2023), <https://news.bloomberglaw.com/us-law-week/federal-guidance-offers-framework-to-minimize-risks-in-ai-use>

S. Witley, "AI Risks Guide Sets Starting Point for Compliance, Regulation," *Bloomberg Law* (Feb. 1, 2023), <https://news.bloomberglaw.com/privacy-and-data-security/ai-risks-guide-sets-starting-point-for-compliance-regulation>



## **FEDERAL, STATE, AND LOCAL GOVERNMENT “RESPONSES” TO AI**

### **INTRODUCTION**

AI is being used by business entities to, among other things, sift through job candidates. This use has led to concerns about, among other things, lack of transparency and possible bias in the selection process. Expect statutory and regulatory responses. Here are some.

For an introduction of sorts—and a suggested regulatory framework, see A. Engler, “A Comprehensive and Distributed Approach to AI Regulation,” *Brookings* (Aug. 30, 2023), <https://www.brookings.edu/articles/a-comprehensive-and-distributed-approach-to-ai-regulation/>

And for another introduction to what is being done on the federal level by Congress, federal agencies, and the White House, see S.M. Anstey, “Artificial Intelligence – Congress, Federal Agencies, and the White House Solicit Information and Take Action,” *JDSUPRA* (Sept. 27, 2023), <https://www.jdsupra.com/legalnews/artificial-intelligence-congress-8504605/>

### **FEDERAL-WHITE HOUSE**

“Statement of Interest of the United States” submitted in *Louis v. Saferent Solutions, LLC*, Case No. 22cv10800-AK (D. Mass. Jan. 9, 2023), [https://www.justice.gov/d9/2023-01/u.s. statement of interest - louis et al v. saferent et al.pdf](https://www.justice.gov/d9/2023-01/u.s.%20statement%20of%20interest%20-%20louis%20et%20al%20v.%20saferent%20et%20al.pdf)

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 5171 to assist the Court in evaluating the application of the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., in challenges to an algorithm-based tenant screening system. The United States has a strong interest in ensuring the correct interpretation and application of the FHA’s pleading

standard for disparate impact claims, including where the use of algorithms may perpetuate housing discrimination.

Various federal agencies have weighed in on AI in employment decision-making. See “Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems” (undated), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf)

“Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People” (White House Office of Science and Technology: Oct. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

Summary of the Blueprint at <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>

“Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” (Feb. 16, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>

“FACT SHEET: Biden-Harris Admin. Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI,” *White House* (July 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/>

Executive Order 14110, “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” (The White House: Oct. 30, 2023), <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/](#)

S. Friedler, *et al.*, “How the AI Executive Order and OMB Memo Introduce Accountability for Artificial Intelligence,” *Brookings* (Nov. 16, 2023), [https://www.brookings.edu/articles/how-the-ai-executive-order-and-omb-memo-introduce-accountability-for-artificial-intelligence/](#)

J. Gatto, “Equity and Civil Rights Issues in the White House Executive Order on AI,” *AI Law and Policy Blog* (Sheppard Mullin: Nov. 9, 2023), [https://www.jdsupra.com/legalnews/equity-and-civil-rights-issues-in-the-4760997/](#)

L.A. Harris & C. Jaikaran, “Highlights of the 2023 Executive Order on Artificial Intelligence for Congress,” *Cong. Research Service R47843* (Nov. 17, 2023), [https://crsreports.congress.gov/product/pdf/R/R47843](#)

T.J. Schwartz, *et al.*, “AI Executive Order – Patent Issues,” *MoFo Tech* (Morrison & Foerster: Nov. 8, 2023), [https://mofotech.mofo.com/topics/ai-executive-order-patent-issues](#)

P. Stockburger, “AI Technical Standards Need a Bigger Push than Executive Order,” *Bloomberg Law* (Nov. 6, 2023), [https://news.bloomberglaw.com/environment-and-energy/ai-technical-standards-need-a-bigger-push-than-executive-order](#)

J. Villasenor, “How the White House’s AI Executive Order Could Increase U.S. Cyber Vulnerabilities,” *Brookings* (Nov. 22, 2023), [https://www.brookings.edu/articles/how-the-white-houses-ai-executive-order-could-increase-u-s-cyber-](#)

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## **FEDERAL-CONGRESS**

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Today, in a landmark collaboration, the U.S. Cybersecurity and Infrastructure Security Agency (CISA) and the UK National Cyber Security Centre (NCSC) are proud to announce the release of the [Guidelines for Secure AI System Development](#). Co-sealed by 23 domestic and international cybersecurity organizations, this publication marks a significant step in addressing the intersection of artificial intelligence (AI), cybersecurity, and critical infrastructure.

The Guidelines, complementing the [U.S. Voluntary Commitments on Ensuring Safe, Secure, and Trustworthy AI](#), provide essential recommendations for AI system development and emphasize the importance of adhering to [Secure by Design](#) principles. The approach prioritizes ownership of security outcomes for customers, embraces radical transparency and accountability, and establishes organizational structures where secure design is a top priority.

The Guidelines apply to all types of AI systems, not just frontier models. We provide suggestions and mitigations that will help data scientists, developers, managers, decision-makers, and risk owners make informed decisions about the secure design, model development, system development, deployment, and operation of their machine learning AI systems.

This document is aimed primarily at providers of AI systems, whether based on models hosted by an organization or making use of external application programming interfaces. However, we urge all stakeholders—including data scientists, developers, managers, decision-makers, and risk owners make—to read this guidance to help them make informed decisions about the design, deployment, and operation of their machine learning AI systems.

CISA invites stakeholders, partners, and the public to explore the [Guidelines for Secure AI System Development](#) as well as our recently published [Roadmap for AI](#) to learn more about our strategic vision for AI technology and cybersecurity. To access learn more, visit [CISA.gov/AI](#).

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advertising tool (known as the ‘Special Ad Audience’ tool) for housing ads and developed a new system to address racial and other disparities caused by its use of personalization algorithms in its ad delivery system for housing ads. On January 9, 2023, the Justice Department announced that it reached agreement with Meta, as required by the settlement, on compliance targets for that new system. Under the terms of the June 2022 settlement, Meta also will not provide any ad targeting options for housing advertisers that directly describe or relate to FHA-protected characteristics. The settlement also requires Meta to pay a civil penalty of \$115,054, the maximum penalty available under the FHA. The case involves a Secretary-initiated HUD complaint and was referred to the Justice Department after the U.S. Department of Housing and Urban Development (HUD) conducted an investigation and issued a charge of discrimination. [hyperlinks in original].

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California SB-313 to create an Office of Artificial Intelligence, introduced Feb. 6, 2023,

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB313:](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB313)

This bill would establish, within the Department of Technology, the Office of Artificial Intelligence, and would grant the office the powers and authorities necessary to guide the design, use, and deployment of automated systems by a state agency to ensure that all AI systems are designed and deployed in a manner that is consistent with state and federal laws and regulations regarding privacy and civil liberties and that minimizes bias and promotes equitable outcomes for all Californians. \*\*\*.

California Privacy Rights Act (“CPRA”), Cal. Civ. Code Sec. 1798.185 (a)(16)

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Colorado S.B. 169, “Restrict Insurers’ Use of External Consumer Data:” The act prohibits an insurer from \*\*\* using any external consumer data and information source, algorithm, or predictive model (external data source) with regard to any insurance practice that unfairly discriminates against an individual based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression.

A Gesser, *et al.*, “The Final Colorado AI Insurance Regulations: What’s New and How to Prepare,” *Debevoise in Depth* (Debevoise & Plimpton: Oct. 3, 2023), <https://www.debevoise.com/insights/publications/2023/10/the-final-colorado-ai-insurance-regulations-whats>

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Illinois Artificial Intelligence Video Interview Act, 820 ICLS 42/  
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[Maryland] House Bill 1202, “Labor and Employment – Use of Facial Recognition Services – Prohibition,

[https://mgaleg.maryland.gov/2020RS/Chapters\\_noln/CH\\_446\\_hb1202t.pdf](https://mgaleg.maryland.gov/2020RS/Chapters_noln/CH_446_hb1202t.pdf):

FOR the purpose of prohibiting an employer from using certain facial recognition services during an applicant’s interview for employment unless the applicant consents under a certain provision of this Act; authorizing an applicant to consent to the use of certain facial recognition service technologies during an interview by signing a waiver; providing for the contents of a certain waiver; defining certain terms; and generally relating to employer use of facial recognition service technologies during job interviews.

New York State Education Dept., “**Order Bans the Use of Facial Recognition Technology in Schools**” (Sept., 27, 2023),

<https://www.nysed.gov/news/2023/state-education-department-issues-determination-biometric-identifying-technology-schools>

New York State Education Department Commissioner Betty A. Rosa today issued a determination on the use of biometric identifying technology in schools, as required by [State Technology Law](#) Section 106-b. The order prohibits schools in New York State from purchasing or utilizing facial recognition technology. Schools can decide whether to use biometric identifying technology other than facial recognition technology at the local level so long as they consider the technology’s privacy implications, impact on civil rights, effectiveness, and parental input.

In reaching this decision, Commissioner Rosa considered the recommendations of the [biometrics report](#) conducted by the Office of Information Technology Services, which was released on August 7, 2023. She concluded that serious concerns surrounding the use of facial recognition technology do not outweigh its claimed benefits.

**2023 ND H 1361 (Enacted Apr. 11, 2023)**

**SECTION 1. AMENDMENT.** Subsection 8 of section 1-01-49 of the North Dakota Century Code is amended and reenacted as follows:

8. 'Person' means an individual, organization, government, political subdivision, or government agency or instrumentality. The term does not include environmental elements, artificial intelligence, an animal, or an inanimate object.

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure.

Z. Williams, "AI Impact Measurements Gain Favor in States to Combat Abuse," *Bloomberg Law* (Nov. 8, 2023), <https://news.bloomberglaw.com/artificial-intelligence/ai-impact-measurements-gain-favor-in-states-to-combat-abuse>

## LOCAL

New York City Local Law No. 1894-A

Effective April 15, 2023, regulates use of “automated employment decision tools” in hiring and promotion, requires notice prior to being subject to a tool, allows opting-out and another process, and requires annual, independent “bias audit.” See [Legislation Text - Int 1894-2020 \(srz.com\)](#).

M. Capezza, *et al.*, “Deploying a Holistic Approach to Automated Employment Decision-Making in Light of NYC’s AEDT Law” (Mintz: Feb. 3, 2023), <https://www.mintz.com/insights-center/viewpoints/2226/2023-02-03-deploying-holistic-approach-automated-employment>

Press Release, “Mayor Adams Releases First-of-Its-Kind Plan for Responsible Artificial Intelligence Use in NYC Government,” (Office of the Mayor: Oct. 16, 2023), <https://www.nyc.gov/office-of-the-mayor/news/777-23/mayor-adams-releases-first-of-its-kind-plan-responsible-artificial-intelligence-use-nyc#/0>.

The plan outlines 37 key actions — 29 of which are set to be started or completed within the next year. Under this plan, the city will, among other things:

- Establish a framework for AI governance that acknowledges the risks of AI, including bias and disparate impact;
- Create an external advisory network to consult with stakeholders across sectors around the opportunities and challenges posed by AI;
- Build AI knowledge and skills in city government to prepare city employees to effectively and responsibly work with and on AI;
- Enable responsible AI acquisition with AI-specific procurement standards or guidance to support agency-level contracting; and
- Publish an annual AI progress report to communicate about the city’s progress and implementation.



## **OTHER AI ARTICLES**

As noted above, documents related to AI appear daily. Here is a sampling:

S. Anderson, “The Alt-Right Manipulated My Comic. Then A.I. Claimed It.” *N.Y. Times* (Dec. 31, 2022), <https://www.nytimes.com/2022/12/31/opinion/sarah-andersen-how-algorithm-took-my-work.html>

L.F. Barrett, “Darwin Was Wrong: Your Facial Expressions Do Not Reveal Your Emotions,” *Scientific American* (Apr. 27, 2022), <https://www.scientificamerican.com/article/darwin-was-wrong-your-facial-expressions-do-not-reveal-your-emotions/>

E.M. Bosman & M. Robinson, “AI Trends for 2023 – Budgeting for the Future of AI,” *MoFo Tech* (Dec. 29, 2022), <https://www.mofo.com/resources/insights/221229-ai-trends-for-2023-budgeting>

D. Brin, “Give Every AI a Soul – or Else,” *Wired* (July 6, 2023), <https://www.wired.com/story/give-every-ai-a-soul-or-else/> **PS HE IS A GREAT WRITER OF SCIENCE FICTION!**

S. Bushwick, “10 Ways AI was Used for Good This Year,” *Scientific American* (Dec. 15, 2022), <https://www.scientificamerican.com/article/10-ways-ai-was-used-for-good-this-year/>

B. Chakravorti & The Conversation, “How Will AI Change Work? A Look Back at the ‘Productivity Paradox’ of the Computer Age Shows It’s Won’t Be So Simple,”

*Fortune* (June 25, 2023), <https://fortune.com/2023/06/25/ai-effect-jobs-remote-work-productivity-paradox-computers-iphone-chatgpt/>

P. Coffee, “An Anticipated Wave of AI Specialist Jobs Has Yet to Arrive,” *Wall St. J.* (Dec. 20, 2023), <https://www.wsj.com/articles/an-anticipated-wave-of-ai-specialist-jobs-has-yet-to-arrive-01a8169c>

L. Donahue, “A Primer on Using Artificial Intelligence in the Legal Profession,” *JOLT Digest* (Jan. 3, 2018), <http://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession>

K.D. Finley, “How to Be ‘Smart’ About Using Artificial Intelligence in the Workplace,” (JDSUPRA: Jan. 31, 2023), <https://www.jdsupra.com/legalnews/how-to-be-smart-about-using-artificial-3826623/>

D. Frost & H. Nolan, “The Potential and Peril in AI in the Newsroom,” *The Media Today* (Columbia Journalism Rev.: Oct. 25, 2023), [https://www.cjr.org/the\\_media\\_today/the-potential-and-peril-of-ai-in-the-newsroom.php#:~:text=As%20Hamilton%20Nolan%20puts%20it,needs%20to%20be%20carefully%20negotiated](https://www.cjr.org/the_media_today/the-potential-and-peril-of-ai-in-the-newsroom.php#:~:text=As%20Hamilton%20Nolan%20puts%20it,needs%20to%20be%20carefully%20negotiated)

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R. Giarda & C. Ambrosini, “Artificial Intelligence in the Administration of Justice,” *Global Litig. News* (Baker McKenzie: Feb. 15, 2022), <https://globalitigationnews.bakermckenzie.com/2022/02/15/artificial-intelligence-in-the-administration-of-justice/#page=1>

M. Ingram, “Researchers Under Attack, as Platforms Cut Back and AI-Powered Disinfo Grows,” *The Media Today* (Columbia Journalism Review: Sept. 28, 2023), [https://www.cjr.org/the\\_media\\_today/researchers\\_under\\_attack\\_disinformation.php](https://www.cjr.org/the_media_today/researchers_under_attack_disinformation.php)

Misinformation and disinformation have arguably never been as prominent or widely distributed as they are now, thanks to smartphones, the social Web, and apps such as Facebook, X (formerly Twitter), TikTok, and YouTube. Unfortunately, as the US draws closer to a pivotal election in which trustworthy information is likely to be more important than ever, various researchers and academic institutions are scaling back or even canceling their misinformation programs, due to legal threats and government pressure. At the same time, a number of large digital platforms have laid off hundreds or even thousands of the employees who specialized in finding and removing hoaxes and fakes, in some cases leaving only a skeleton staff to handle the problem. And all of this is happening as the quantity of fakes and conspiracy theories is expanding rapidly, thanks to cheap tools powered by artificial intelligence that can generate misinformation at the click of a button. In other words, a perfect storm could be brewing.

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J.M. McNichols, "How Do You Cross-Examine Siri If You Think She's Lying?" *Litigation News* (ABA: May 24, 2022), <https://www.wc.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRVPMQilSsw4pDt0ZC/document.name=/How%20Do%20You%20CrossExamine%20Siri%20If%20You%20Think%20She%E2%80%99s%20Lying.pdf>

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S. Morrow, "Machine Learning to Fully Automate Insulin Delivery System," *Illinois Tech* (Dec. 7, 2022), <https://www.iit.edu/news/machine-learning-fully-automate-insulin-delivery-system>

H. Nolan, "Writing the AI Rulebook: The Pursuit of Collective Commitment, with Journalism's Future at Stake," *Columbia Journalism Review* (Oct. 16, 2023), [https://www.cjr.org/business\\_of\\_news/writing-ai-rulebook-artificial-intelligence-journalism.php](https://www.cjr.org/business_of_news/writing-ai-rulebook-artificial-intelligence-journalism.php)

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## **INTELLECTUAL PROPERTY- FEDERAL AGENCIES AND PRIVATE CAUSES OF ACTION**

**U.S. Copyright Office, Library of Congress, Copyright Registration Guidance, 88 Fed. Reg. 16190 (Mar. 16, 2023),**

**<https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>**

The Copyright Office issues this statement of policy to clarify its practices for examining and registering works that contain material generated by the use of artificial intelligence technology.

**U.S. Copyright Office, Library of Congress, Notice of Inquiry and Request for Comments, 88 Fed. Reg. 59942 (Aug. 30, 2023)**

The United States Copyright Office is undertaking a study of the copyright law and policy issues raised by artificial intelligence ('AI') systems. To inform the Office's study and help assess whether legislative or regulatory steps in this area are warranted, the Office seeks comment on these issues, including those involved in the use of copyrighted works to train AI models, the appropriate levels of transparency and disclosure with respect to the use of copyrighted works, and the legal status of AI-generated outputs.

***Request for Comments Regarding Artificial Intelligence and Inventorship, 88 FR 9492 (Feb. 14, 2023)***

The United States Patent and Trademark Office (USPTO) plays an important role in incentivizing and protecting innovation, including innovation enabled by artificial intelligence (AI), to ensure continued U.S. leadership in AI and other emerging technologies (ET). In June 2022, the USPTO announced the formation of the AI/ET Partnership, which provides an opportunity to bring stakeholders together through a series of engagements to share ideas, feedback, experiences, and insights on the intersection of intellectual property and AI/ET. To build on the AI/ET Partnership efforts, the USPTO is seeking stakeholder input on the current state of AI technologies and inventorship issues that may arise in view of the advancement of such technologies, especially as AI plays a greater role in the innovation process. As outlined in sections II to IV below, the USPTO is pursuing three main avenues of engagement with stakeholders to inform its future efforts on inventorship and promoting AI-enabled innovation: a series of stakeholder engagement sessions; collaboration with academia through scholarly



research; and a request for written comments to the questions identified in section IV. The USPTO encourages stakeholder engagement through one or more of these avenues.

**Comment of the United States Federal Trade Commission to the United States Copyright Office, Docket No. 2023-6 (Oct. 30, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p241200\\_ftc\\_comment\\_to\\_copy\\_right\\_office.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copy_right_office.pdf)**

**Comment of the Copia Institute, Docket No. 2023-6 (Oct. 30, 2023), see <https://www.techdirt.com/2023/11/03/wherein-the-copia-institute-tells-the-copyright-office-theres-no-place-for-copyright-law-in-ai-training/>**

**Reply Comment of the Copia Institute, Docket No. 2023-6 (Dec. 6, 2023), see <https://www.techdirt.com/2023/12/08/the-copia-institute-tells-the-copyright-office-again-that-copyright-law-has-no-business-obstructing-ai-training/>**

***Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise* (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071 (Copyright Review Board: Feb. 14, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>)**

This was the denial of a request by Steven Thaler (see above) to reconsider his attempt to register a “two-dimensional artwork claim” that had been rejected by the Registration Program of the United States Copyright Office. Thaler identified the author of the artwork as the “Creativity Machine,” and stated that it was “autonomously created by a computer algorithm running on a machine.” The Office refused to register the claim as it lacked “human authorship necessary to support a copyright claim.” The Review Board affirmed the refusal to register the claim:

Thaler does not assert that the Work was created with contribution from a human author, so the only issue before the Board is whether, as he argues, the Office’s human authorship requirement is unconstitutional and unsupported by case law. Currently, ‘the Office will refuse to register a claim if it determines that a human being did not create the work.’ Under that standard, the Work is ineligible for registration. After reviewing the statutory text, judicial precedent, and longstanding Copyright Office practice, the Board again concludes that human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered. [citation and footnote omitted].

The Review Board also rejected Thaler’s argument that the human authorship requirement was unconstitutional:

[T]he Board rejects Thaler’s argument that the human authorship requirement is ‘unconstitutional’ because registration of machine-generated works would ‘further the underlying goals of copyright law, including the constitutional rationale for copyright protection.’ Congress is not obligated to protect all works that may constitutionally be protected. ‘[I]t is generally for Congress,’ not the Board, ‘to decide how best to pursue the Copyright Clause’s objectives.’ *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). The Board must apply the statute enacted by Congress; not second-guess whether a different statutory scheme would better promote the progress of science and useful arts. [citation omitted].

***Re: Zarya of the Dawn (Registration # V Au001480196), United States Copyright Office (Feb. 21, 2023), [Letter: In re Zarya of the Dawn](#)***

The Office has completed its review of the Work’s original registration application and deposit copy, as well as the relevant correspondence in the administrative record. We conclude that Ms. Kashtanova is the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the Work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created. [footnote admitted].

***Re: Second Request for Reconsideration for Refusal to Register Theatre D’opera Spatial (Correspondence ID 1-5T5320R; SR # 1-11743923581 (Copyright Review***

**Board: Sept. 5, 2023), <https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf>**

***Andersen v. Stability AI Ltd., Case No. 23-cv-00201-WHO (N.D. Ca. Oct. 30, 2023)***

In this putative class action, various artists challenged the defendants’ creation or use of an AI software product that, they alleged, was trained on their copyrighted works of art. The district court “largely” granted the defendants’ motion to dismiss, but granted plaintiffs leave to amend to “provide clarity regarding their theories of how each defendant separately violated their copyrights, removed or altered their copyright management information, or violated their rights of publicity and plausible facts in support.’

***Kadrey v. Meta Platforms, Inc., Case No. 23-cv-03417-VC (N.D. Ca. Nov. 20, 2023)***

This civil action arose from plaintiffs’ allegations that defendant’s large language model (“LLaMA”) was trained on their works and, among other things, that the use of their works constituted copyright infringement. The district court granted defendant’s motion to dismiss the infringement claim:

1. The plaintiffs allege that the ‘LLaMA language models are themselves infringing derivative works’ because the ‘models cannot function without the expressive information extracted’ from the plaintiffs’ books. This is nonsensical. A derivative work is ‘a work based upon one or more preexisting works’ in any ‘form in which a work may be recast, transformed, or adapted.’ \*\*\*. There is no way to understand the LLaMA models themselves as a recasting or adaptation of any of the plaintiffs’ books.

2. Another theory is that ‘every output of the LLaMA language models is an infringing derivative work,’ and that because third-party users initiate queries of LLaMA, ‘every output from the LLaMA language models constitutes an act of vicarious copyright infringement.’ But the complaint offers no allegation of the contents of any output, let alone of one that could be understood as recasting, transforming, or adapting the plaintiffs’ books. Without any plausible allegation of an infringing output, there can be no vicarious infringement. \*\*\*.

***Thomson Reuters Enterprise Centre GMBH v. Ross Intelligence Inc., No. 1:20-cv-613-SB (D. Del. Sept. 25, 2023)***

Facts can be messy even when parties wish they were not. But summary judgment is proper only if factual messes have been tidied. Courts cannot clean them up.

Thomson Reuters, a media company, owns a well-known legal research platform, Westlaw. It alleges that Ross, an artificial intelligence startup, illegally copied important content from Westlaw. Thomson Reuters thus seeks to recover from Ross. Both sides move for summary judgment on a variety of claims and defenses. But many of the critical facts in this case remain genuinely disputed. So I largely deny Thomson Reuters's and Ross's motions for summary judgment.

The underlying facts included the following:

Ross Intelligence is a legal-research industry upstart. It sought to create a 'natural language search engine' using machine learning and artificial intelligence. \*\*\*. It wanted to 'avoid human intermediated materials.' \*\*\*. Users would enter 3 questions and its search engine would spit out quotations from judicial opinions—no commentary necessary.

It is sufficient to note that plaintiff asserted causes of action for copyright infringement and tortious interference and that defendant raised a fair use defense, all of which (with some exceptions) will go to the jury.

***Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH) (D.D.C. Aug. 18, 2023)**

The plaintiff appealed from the denial of his copyright application:

Plaintiff Stephen Thaler owns a computer system he calls the 'Creativity Machine,' which he claims generated a piece of visual art of its own accord. He sought to register the work for a copyright, listing the computer system as the author and explaining that the copyright should transfer to him as the owner of the machine. The Copyright Office denied the application on the grounds that the work lacked human authorship, a prerequisite for a valid copyright to issue, in the view of the Register of Copyrights. Plaintiff challenged that denial, culminating in this lawsuit against the United States Copyright Office and Shira Perlmutter, in her official capacity as the Register of Copyrights and the Director of the United States Copyright Office ('defendants'). Both parties have now moved for summary judgment, which motions present the sole issue of whether a work generated entirely by an artificial system absent human involvement should be eligible for copyright. See Pl.'s Mot. Summ. J. (Pl.'s Mot.), ECF No. 16; Defs.' Cross-Mot. Summ. J. ('Defs.' Mot.), ECF No. 17. For the reasons explained below, defendants are correct that human authorship is an essential part of a valid copyright claim, and therefore plaintiff's pending motion for summary judgment is denied and defendants' pending cross-motion for summary judgment is granted.

***Thaler v. Hirshfeld*, No. 1:20-cv-903-(LMB/TCB), 2021 WL 3934803 (E.D. Va. Sept. 2, 2021), affirmed, *Thaler v. Vidal*, 2021-2347 (Fed. Cir. Aug. 5, 2022), petition for panel and rehearing *en banc* denied (Fed. Cir. Oct. 20, 2022)**

This was an appeal from the refusal of the USPTO to process two patent applications. The plaintiff alleged that he was the owner of DABUS, “an artificial intelligence machine” listed as the inventor on the applications. The applications included a document through which DABUS had “ostensibly assigned all intellectual property rights” to the plaintiff. The court held:

Before the Court are the parties’ cross-motions for summary judgment, which address the core issue—can an artificial intelligence machine be an ‘inventor’ under the Patent Act? Based on the plain statutory language of the Patent Act and Federal Circuit authority, the clear answer is no.

[P]laintiff’s policy arguments do not override the overwhelming evidence that Congress intended to limit the definition of ‘inventor’ to natural persons. As technology evolves, there may come a time when artificial intelligence reaches a level of sophistication such that it might satisfy accepted meanings of inventorship. But that time has not yet arrived, and, if it does, it will be up to Congress to decide how, if at all, it wants to expand the scope of patent law.

***Sedlik v. Von Drachenberg*, CV 21-1102 (C.D. Ca. Oct. 10, 2023)**

The district court granted in part motions for reconsideration of prior summary judgement rulings, concluding that the Supreme Court decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) had made a material change in the evaluation of the fair use defense and that there was a triable issue of fact on fair use.

Class Action Complaint, *Chabon v. OpenAI, Inc.*, Case No. 3:23-cv-03625-PHK (N.D. Ca. filed Sept. 8, 2023), <https://www.courtlistener.com/docket/67778017/chabon-v-openai-inc/>. Complaint alleges that OpenAI, among other things, used plaintiffs’ copyrighted works as training material for GPT models without their consent. (see *Wester* below).

Class Action Complaint, Silverman v. OpenAI, Inc., Case No. 3:23-cv-03416 (N.D. Ca. July 7, 2023), <https://www.courtlistener.com/docket/67569254/silverman-v-openai-inc/>. Complaint alleges that defendants wrongfully used copyrighted materials in training sets. (see Davis below).

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## **GAI INTRODUCTION**

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## **GAI AND JUDGES**

This section is a little different than the others because it begins with a short introduction rather than “diving” immediately into references. Not surprisingly, given the availability of GAI, attorneys are – or may – rely on it to do research. This has led to the imposition of sanctions in the *Mata* decision (see below) and proactive attempts by judges to deal with the possible use of GAI by attorneys. There does not appear to be any likelihood that the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence will be amended to address GAI or, for that matter, AI. But we will see. And with that, let’s look at some case law and actions by individual federal judges.

### ***Mata v. Avianca, Inc.*, No. 22-cv-1461, 2023 WL 3696209 (PKC) (S.D.N.Y. June 22, 2023)**

The plaintiff’s attorneys in this civil action “submitted non-existent judicial opinions with fake quotes and citations created by \*\*\* ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.” The district court concluded that the attorneys acted with subjective bad faith and violated Rule 11. The court held the firm that represented the plaintiff jointly and severally liable for the attorney’s violation but rejected the imposition of sanctions under Section 1927 because, “[r]eliance on fake cases has caused several harms but dilatory tactics and delay were not among them.” The

court also held that, “alternatively” to Rule 11, sanctions were appropriate under its inherent power. The court imposed a \$5,000.00 monetary penalty, required the attorneys to “inform their client and the judge whose names were wrongfully invoked of the sanctions imposed,” but did not require an apology from the attorneys.

***Berman v. Matteucci*, Case No. 6:23-cv-00660-MO (D. Ore. July 10, 2023)**

The *pro se* petitioner in this *habeas* proceeding responded to an order to show cause why it should not be dismissed as untimely by asserting that, prior to April 2023, when “an artificial intelligence chatbot provided him with insights that helped him discover his claims” that the policy under which he had been sentenced violated several constitutional provisions, “artificial intelligence technology was not sufficiently advanced to impart this knowledge to him.” The district court held that the petitioner’s understanding of his legal claim was not a “factual predicate” under *habeas* law and that his lack of understanding of “the legal significance of known facts” was insufficient to avoid dismissal.

***Ex Parte Allen Michael Lee*, No. 10-22-00281-CR, 2023 WL 4624777 (Tex. Crim. App. July 19, 2023)**

The appellate court here noted that “none of the three published cases cited [in the petitioner’s brief] actually exist \*\*\*. Each citation provides the reader a jump-cite into the body of a different case that has nothing to do with the propositions cited by Lee. Two of the citations take the reader to cases from Missouri.” The court observed: “It appears that at least the ‘Argument’ portion of the brief may have been prepared by artificial intelligence AI,” but took no action.

***People v. Crabill, 23 PDJ067 (Colorado Office of Attorney Regulation: Nov. 22, 2023)***

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Zachariah C. Crabill (attorney registration number 56783) for one year and one day, with ninety days to be served and the remainder to be stayed upon Crabill's successful completion of a two-year period of probation, with conditions. The suspension took effect November 22, 2023.

In April 2023, a client hired Crabill to prepare a motion to set aside judgment in the client's civil case. Crabill, who had never drafted such a motion before working on his client's matter, cited case law that he found through the artificial intelligence platform, ChatGPT. Crabill did not read the cases he found through ChatGPT or otherwise attempt to verify that the citations were accurate. In May 2023, Crabill filed the motion with the presiding court. Before a hearing on the motion, Crabill discovered that the cases from ChatGPT were either incorrect or fictitious. But Crabill did not alert the court to the sham cases at the hearing. Nor did he withdraw the motion. When the judge expressed concerns about the accuracy of the cases, Crabill falsely attributed the mistakes to a legal intern. Six days after the hearing, Crabill filed an affidavit with the court, explaining that he used ChatGPT when he drafted the motion.

Through this conduct, Crabill violated Colo. RPC 1.1 (a lawyer must competently represent a client); Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 3.3(a)(1) (a lawyer must not knowingly make a false statement of material fact or law to a tribunal); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

***United States v. Cohen, 18-CR-602 (JMF) (S.D.N.Y.)***

On December 12, 2023, Judge Jesse M. Furman issued an Order directing counsel for defendant to show cause why sanctions should not be imposed on him for citing what appeared to be decisions that did not exist, assuming that counsel could not provide copies of the decisions. Counsel's response is available at <https://www.courthousenews.com/wp-content/uploads/2023/12/Cohen-declaration.pdf>.

R. Buckland, "AI, Judges and Judgment: Setting the Scene," M-RCBG Associate Working Paper Series 2023.220, Harvard University, Cambridge, MA, Nov. 2023), <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/senior fellows/2023-24/Buckland%20paper%20final.pdf>

Artificial intelligence (AI) in the administration of justice is growing at rapid pace. <sup>1</sup> This is driven by widespread recognition of AI justice’s undeniable advantages, despite the risks it presents to the integrity of legal systems.

AI justice may, for example, lower the administrative burden of cases. The Crown Courts in England and Wales ended 2022 with a near-record load of over 60,000 outstanding cases.<sup>2</sup> AI can dramatically increase court efficiency and reduce backlogs, providing standardised outcomes faster and at lower cost. After all, AI judges do not need to rest. At the same time, AI-driven judicial decision-making could make justice more accessible to the large segments of society that cannot afford human lawyers.

Proponents also argue algorithms could improve the fairness of judgements because ‘AI judges strictly follow precedents, restrict improper judicial discretion, prevent personal biases and preferences of individual judges, handle large amounts of information, complete complicated calculative balances, and discover statistical representations of variations of fact patterns and legal factors.’ Even where AI tools assist human judges, these tools can push relevant legal provisions through comprehensive data retrieval. This in turn can improve judges’ understanding of cases, helping them avoid one-sided access to data and information.

At this point, it is important to clarify the different ways in which AI is being deployed in the courtroom. At a foundation level, AI may be used for auxiliary administrative functions. This includes communication between judicial personnel, allocation of resources and cases, and ensuring the anonymisation of judicial decisions, documents, or data. These activities may ostensibly appear separate from the core of judicial decision-making but carry subtler implications. For instance, the allocation of a case to a specific judge, given their unique expertise or biases, could indirectly influence the outcome. These nuances notwithstanding, the primary objective of these AI-driven tasks remain administrative in nature, aiming to streamline the judicial process rather than directly determine case outcomes. [footnotes omitted].

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E. Volokh, “Lawyer’s Affidavit in the Colorado AI-Hallucinated Precedent Case,” *Reason* (The Volokh Conspiracy: June 16, 2023), <https://reason.com/volokh/2023/06/16/lawyers-affidavit-in-the-colorado-ai-hallucinated-precedent-case/>

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## ORDERS

“Interim Rules on the Use of Generative AI,” Utah Judicial Council (Oct. 25, 2023), <https://legacy.utcourts.gov/utc/judicial-council/wp-content/uploads/sites/48/2023/10/2023-10-23Judicial-Council-Materials-1.pdf>:

These rules set forth the only authorized use of generative AI tools for court-related work or on court owned devices. 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. [footnote omitted].

The United States Court of Appeals for the Fifth Circuit is considering amending its Rule 32.3 and Form 6 as shown below. Proposed changes are underlined:

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.

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.

“*In re: Use of Unverified Sources*,” General Order 23-1 (D. Hawaii Nov. 14, 2023):

Briefs and memoranda generated by artificial intelligence (AI) platforms (for example, ChatGPT or Bard) and online briefs or memoranda drafted by persons compensated to produce materials not tailored to specific cases (collectively, ‘unverified sources’), have increased the courts concern about the reliability and accuracy of filings and other court submissions. In



particular, the court is concerned about whether factual or legal citations or references in court filings and submissions have been properly vetted by counsel and pro se parties. For example, courts sometimes receive briefs containing fictitious case cites either generated by AI or by human authors.

To address these concerns, if any counsel or pro se party submits to the court any filing or submission generated by an unverified source, that attorney or pro se party must submit a declaration concurrently with that material captioned “Reliance on Unverified Source” that: (1) advises the court that counsel or the pro se party has relied on one or more unverified sources; and (2) verifies that the counsel or pro se party has confirmed that any such material is not fictitious. The scope of the required declaration is that required by Rule 11 of the Federal Rules of Civil Procedure.

This order does not affect the use of basic research tools such as Westlaw, Lexis, or Bloomberg, and no declaration is required if all sources can be located on such well-accepted basic research tools.

“Mandatory Certification Regarding Generative Artificial Intelligence,” Judge Specific Requirement of Judge Brantley Starr, Northern District of Texas, <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>:

All attorneys and pro se litigants \*\*\* must, 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 data bases, by a human being. \*\*\*.

“Order on Artificial Intelligence,” Judge Stephen Alexander Vaden, U.S. Ct. of International Trade (June 8, 2023), <https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf>:

\*\*\* *any* submission in a case assigned to Judge Vaden that contains text drafted with the assistance of a generative artificial intelligence program on the basis of natural language prompts, including but not limited to ChatGPT and Google Bard, must be accompanied by:

A disclosure notice that identifies the program used and the specific portions of text that have been so drafted;

A certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party \*\*\*.

“Notice to counsel: New AI Provision Effective as of July 14, 2023,” Judge Michael J. Newman, Southern District of Ohio, Western Division, Dec. 14, 2023):

## VI. ARTIFICIAL INTELLIGENCE (“AI”) PROVISION

No attorney for a party, or a *pro se* party, may use Artificial Intelligence (“AI”) in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, *inter alia*, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.

“Standing Order Re: Artificial Intelligence (‘AI’) in Cases Assigned to Judge Baylson,” Eastern District of Pennsylvania (June 6, 2023), <https://www.paed.uscourts.gov/documents/standord/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf>:

If any attorney for a party, or a *pro se* party, has used Artificial Intelligence (‘AI’) in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, **MUST**, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and **CERTIFY**, that each and every citation to the law or the record in the paper, has been verified as accurate. [emphasis in original].

General Order 23-11, General Order Amending Local Rules (E.D. Tex. Oct. 30, 2023)

Added to Local Rule CV-11:

- (g) Use of Technology by Pro Se Litigants. Litigants remain responsible for the accuracy and quality of legal documents produced with the assistance of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services). Litigants are cautioned that certain technologies may produce factually or legally inaccurate content. If a litigant chooses to employ technology, the litigant continues to be bound by the requirements of Fed. R. Civ. P. 11 and must review and verify any computer-generated content to ensure that it complies with all such standards. See also Local Rule AT-3(m).

COMMENT: Recent advancements in technology have provided *pro se* litigants access to tools that may be employed in preparing legal documents or pleadings. However, often the product of those tools may be factually or legally inaccurate. Local Rule CV-11 is amended to add new subsection (g) to alert *pro se* litigants to this risk. The rule also alerts litigants that they remain bound by the certification requirements of Fed. R. Civ. P. 11 when employing such tools to verify all content meets those standards. A similar rule, Local Rule AT-3(m), is added to the standards of practice to be observed by attorneys.

### Added to Local Rule AT-3:

(m) If the lawyer, in the exercise of his or her professional legal judgment, believes that the client is best served by the use of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services), then the lawyer is cautioned that certain technologies may produce factually or legally inaccurate content and should never replace the lawyer’s most important asset – the exercise of independent legal judgment. If a lawyer chooses to employ technology in representing a client, the lawyer continues to be bound by the requirements of Federal Rule of Civil Procedure 11, Local Rule AT-3, and all other applicable standards of practice and must review and verify any computer-generated content to ensure that it complies with all such standards.

COMMENT: Recent advancements in technology have provided the legal profession with many useful tools for daily practice. Ultimately, however, the most valuable benefit a lawyer provides to a client is the lawyer’s independent judgment as informed by education, professional experiences, and participation in the legal and professional community in which the lawyer practices. Although technology can be helpful, it is never a replacement for abstract thought and problem solving. Local Rule AT-3 is amended to add new subsection (m) to remind lawyers of their continuing duties under applicable rules of practice despite any choice to employ technological tools in the course of providing legal services.

In re: Pleadings Using Generative Artificial Intelligence, General Order 2023-03 (N.D. Tex. Bankr. Ct. June 21, 2023),  
<https://www.txnb.uscourts.gov/news/general-order-2023-03-pleadings-using-generative-artificial-intelligence>:

If any portion of a pleading or other paper filed on the Court’s docket has been drafted utilizing generative artificial intelligence, including but not limited to ChatGPT, Harvey.AI, or Google Bard, the Court requires that all attorneys and pro se litigants filing such pleadings or other papers verify that any language that was generated was checked for accuracy, using print reporters, traditional legal databases, or other reliable means. Artificial intelligence systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States and are likewise not factually or legally trustworthy sources without human verification. Failure to heed these instructions may subject attorneys or pro se litigants to sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011.

Standing Order for Civil Cases Before Magistrate Judge Fuentes, Magistrate Judge Gabriel A. Fuentes (N.D. Ill.),  
<https://www.ilnd.uscourts.gov/assets/documents/forms/judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20revision%208-11-23.pdf>:

The Court has adopted a new requirement in the fast-growing and fast-changing area of generative artificial intelligence ('AI') and its use in the practice of law. The requirement is as follows: Any party using any generative AI tool in the preparation or drafting of documents for filing with the Court must disclose in the filing that AI was used and the specific AI tool that was used to conduct legal research and/or to draft the document. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, 'I'm sorry, Dave, I'm afraid I can't do that .... This mission is too important for me to allow you to jeopardize it.' 2001: A SPACE ODYSSEY (MetroGoldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes 'bogus judicial decisions' cited for substantive propositions of law. See *Mata v. Avianca, Inc.*, \*\*\*. Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2). \*\*\*.

*Belenzon v. Paws Up Ranch, LLC*, CV 23-69-M-DWM (D. Mont. June 22, 2023):

Order granting *pro hac* admission on "condition that *pro hac* counsel shall do his or her own work. This means that *pro hac* counsel must do his or her own writing; sign his or her own pleadings, motions, and briefs; and appear and participate personally, Use of artificial intelligence automated drafting programs, such as Chat GPT, is prohibited."

Paragraph IB, "Use of Generative Artificial Intelligence," Judge Evelyn Padin's General Pretrial and Trial Procedures (Revised Nov. 13, 2023), <https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf>:

The use of any GAI (e.g., OpenAI's ChatGPT or Google's Bard) for any court filings requires a mandatory disclosure/certification that: (1) identifies the GAI program; (2) identifies the portion of the filing drafted by GAI; and (3) certifies that the GAI work product was diligently reviewed by a human being for accuracy and applicability.

Paragraph 8F, Individual Practices in Civil Cases, District Judge Arun Subramanian (S.D.N.Y.) (revised July 29, 2023), [https://www.nysd.uscourts.gov/sites/default/files/practice\\_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf](https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf):

**Use of ChatGPT and Other Tools.** Counsel is responsible for providing the Court with complete and accurate representations of the record, the procedural history of the case, and any cited legal authorities. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.

*“Court Advisory Concerning Discovery and Other Matters,” Nine Line Apparel, Inc. v. Sergio, Civil Action No. SA-23-CV-0997-FB (W.D. Tex. Oct. 31, 2023):*

As this case begins, the Court wishes to apprise counsel and the parties of the Court’s expectations concerning the conduct of discovery and other matters: \*\*\*

**6. In this modern environment of artificial intelligence, counsel are reminded of traditional obligations of professional responsibility to be honest with the Court and opposing counsel, regardless of drafting methodology employed. The signature of counsel on all pleadings constitutes an affirmation that all the pleading contents have been validated for accuracy and authenticity. [emphasis in original].**

Baroness Carr of Walton-on-the-Hill,  
Lady Chief Justice of England & Wales, *et al.*, “Artificial Intelligence (AI): Guidance for Judicial Office Holders,” *Courts and Tribunals Judiciary* (Dec. 12, 2023), <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/>

From the Introduction:

This guidance has been developed to assist judicial office holders in relation to the use of Artificial Intelligence (AI).

It sets out key risks and issues associated with using AI and some suggestions for minimising them. Examples of potential uses are also included.

Any use of AI by or on behalf of the judiciary must be consistent with the judiciary’s overarching obligation to protect the integrity of the administration of justice.

This guidance applies to all judicial office holders under the Lady Chief Justice and Senior President of Tribunal’s responsibility, their clerks and other support staff.

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## **GAI AND THE PRACTICE OF LAW**

### ***MillerKing, LLC v. DoNotPay, Inc., Case No. 3:23-CV-863 (S.D. Ill. Nov, 17, 2023)***

This case pits real lawyers against a robot lawyer. Defendant DoNotPay, Inc. ('DNP'), is an online subscription service that touts its robot lawyer's ability to allow consumers to '[f]ight corporations, beat bureaucracy and sue anyone at the press of a button.' But, DNP and its robot lawyer are not actually licensed to practice law. So, Plaintiff MillerKing, Inc. ('MK'), a small Chicago law firm that claims to be a direct competitor of DNP, has sued DNP for false association and false advertising under the Lanham Act and Illinois state law.

Now pending before the Court is DNP's motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). \*\*\*. DNP essentially asks MK, in the words of Justice Antonin Scalia, 'What's it to you?' More precisely, how has DNP's conduct injured MK such that it has standing under Article III of the U.S. Constitution to sue DNP in federal court? This Court finds that MK has not adequately alleged such an injury and, thus, its complaint must be dismissed for lack of standing.

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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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## DEEPAKES (CIVIL OR CRIMINAL)

New York Bill No. SO1042 signed into law Sept. 29, 2023, “includes ‘deep fake’ images created by digitalization within the definition of unlawful dissemination or publication of an intimate image.” See Z. Williams, “New York Bans Deepfake Revenge Porn Distribution as AI Use Grows,” *Bloomberg Law* (Oct. 2, 2023), <https://news.bloomberglaw.com/in-house-counsel/n-y-outlaws-unlawful-publication-of-deepfake-revenge-porn>

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### Abstract:

Picture this: You are arrested and accused of a serious crime, like carjacking, assault with a deadly weapon, or child abuse. The only evidence against you is a cellphone video showing the act of violence. To the naked eye, the perpetrator on the video is you. But you are innocent. The video is a ‘deepfake’ – an audiovisual recording created using readily available Artificial Intelligence technology that allows anyone with a smartphone to believably map one person’s movements and words onto another person’s face. How will you prove the video is deepfake in court? And, who—the judge or the jury—gets to decide if it’s fake? The law does not provide clear answers.

But this much is certain--deepfake evidence is an emerging threat to our justice system’s truth-seeking function. Deepfakes will invade court proceedings from several directions—parties may fabricate evidence to win a civil action, governmental actors may rely on deepfakes to secure criminal convictions, or lawyers may purposely exploit juror bias and skepticism about what is real.

Currently, no evidentiary procedure explicitly governs the presentation of deepfake evidence in court. The existing legal standards governing the authentication of evidence are inadequate because the rules were developed before the advent of deepfake technology. As a result, they do not solve the urgent problems of--how to show a video is fake and how to show it isn’t. In addition, although in the last several years, legal scholarship and the popular news media have addressed certain facets of deepfakes, there has been no commentary on the procedural aspects of deepfake evidence in court. Absent from the discussion is who gets to decide whether a deepfake is authentic. This article addresses the matters that prior academic scholarship about deepfakes obscures. It is the first to propose a new rule of evidence reflecting a unique reallocation of the fact-determining responsibilities between the jury and the judge, treating the question of

deepfake authenticity as one for the court to decide as part of an expanded gatekeeping function under the rules of evidence. Confronting deepfakes evidence in legal proceedings demands that courts and lawyers use imagination and creativity to navigate pitfalls of proof and manage a jury's doubts and distrust about what is real. Your freedom may depend on how we meet these challenges.

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## **LAW ENFORCEMENT APPLICATIONS OF AI**

Technology is neutral. That does not mean, however, that a given technology cannot have a military use. AI is no exception, as the examples in this and the section following it demonstrate.

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## **MILITARY APPLICATIONS OF AI**

USDOD, *Autonomy in Weapon Systems*, DoD Directive 3000.09 (Jan. 25, 2023), <https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/300009p.pdf>

The purpose of the Directive:

- Establishes policy and assigns responsibilities for developing and using autonomous and semiautonomous functions in weapon systems, including armed platforms that are remotely operated or operated by onboard personnel.
- Establishes guidelines designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements.
- Establishes the Autonomous Weapon Systems Working Group.

Bureau of Arms Control, Verification and Compliance, US State Dept., *Political Declaration on Responsible Use of Artificial Intelligence and Autonomy* (Feb. 16, 2023), <https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy/>

An increasing number of States are developing military AI capabilities, which may include using AI to enable autonomous systems. Military use of AI can and should be ethical, responsible, and enhance international security. Use of AI in armed conflict must be in accord with applicable international humanitarian law, including its fundamental principles. Military use of AI capabilities needs to be accountable, including through such use during military operations within a responsible human chain of command and control. A principled approach to the military use of AI should include careful consideration of risks and benefits, and it should also minimize unintended bias and accidents. States should take appropriate measures to ensure the responsible development, deployment, and use of their military AI capabilities, including those enabling autonomous systems. These measures should be applied across the life cycle of military AI capabilities. [footnote omitted].

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Although the U.S. government has no official definition of artificial intelligence, policymakers generally use the term AI to refer to a computer system capable of human-level cognition. AI is further divided into three categories: narrow AI, general AI, and artificial superintelligence. Narrow AI systems can perform only the specific task that they were trained to perform, while general AI systems would be capable of performing a broad range of tasks, including those for which they were not specifically trained. Artificial superintelligence refers to a system “that greatly exceeds the cognitive performance of humans in virtually all domains of interest.” General AI systems and artificial superintelligence do not yet—and may never—exist.

Narrow AI is currently being incorporated into a number of military applications by both the United States and its competitors. Such applications include but are not limited to intelligence, surveillance, and reconnaissance; logistics; cyber operations; command and control; and semiautonomous and autonomous vehicles. These technologies are intended in part to augment or replace human operators, freeing them to perform more complex and cognitively demanding work. In addition, AI-enabled systems could (1) react significantly faster than systems that rely on operator input; (2) cope with an exponential increase in the amount of data available for analysis; and (3) enable new concepts of operations, such as swarming (i.e., cooperative behavior in which unmanned vehicles autonomously coordinate to achieve a task) that could confer a warfighting advantage by overwhelming adversary defensive systems.

Narrow AI, however, could introduce a number of challenges. For example, such systems may be subject to algorithmic bias as a result of their training data or models. Researchers have repeatedly discovered instances of racial bias in AI facial recognition programs due to the lack of diversity in the images on which the systems were trained, while some natural language processing programs have developed gender bias. Such biases could hold significant implications for AI applications in a military context. For example, incorporating undetected biases into systems with lethal effects could lead to cases of mistaken identity and the unintended killing of civilians or noncombatants.

Similarly, narrow AI algorithms can produce unpredictable and unconventional results that could lead to unexpected failures if incorporated into military systems. In a commonly cited demonstration of this phenomenon \*\*\*, researchers combined a picture that an AI system correctly identified as a panda with random distortion that the computer labeled ‘nematode.’ The difference in the combined image is imperceptible to the human eye, but it resulted in the AI system labeling the image as a gibbon with 99.3% confidence. Such vulnerabilities could be exploited intentionally by adversaries to disrupt AI-reliant or -assisted target identification, selection, and engagement. This could, in turn, raise ethical concerns—or, potentially, lead to violations of the law of armed conflict—if it results in the system selecting and engaging a target or class of targets that was not approved by a human operator.

Finally, recent news reports and analyses have highlighted the role of AI in enabling increasingly realistic photo, audio, and video digital forgeries, popularly known as ‘deep fakes.’ Adversaries could deploy this AI capability as part of their information operations in a ‘gray zone’ conflict. Deep fake technology could be used against the United States and its allies to generate false news reports, influence public discourse, erode public trust, and attempt blackmail of government officials. For this reason, some analysts argue that social media platforms—in addition to deploying deep fake detection tools—may need to expand the means of labeling and authenticating content. Doing so might require that users identify the time and location at which the content originated or properly label content that has been edited. Other analysts have expressed concern that regulating deep fake technology could impose an undue burden

on social media platforms or lead to unconstitutional restrictions on free speech and artistic expression. These analysts have suggested that existing law is sufficient for managing the malicious use of deep fakes and that the focus should be instead on the need to educate the public about deep fakes and minimize incentives for creators of malicious deep fakes.

Government Accountability Office, “Artificial Intelligence: DOD Needs Department-Wide Guidance to Inform Acquisitions,” GAO-23-105850 (June 2023), <https://www.gao.gov/products/gao-23-105850>. Conclusions:

Because of the opportunities AI presents, efforts to acquire AI tools or integrate AI into DOD weapon systems are poised for rapid growth— growth that could outpace DOD’s efforts to develop appropriate and sufficiently broad guidance for those acquisitions. AI offers the potential for broad application across the military services and joint acquisition programs to significantly enhance capabilities available to the warfighter. However, DOD has not issued department-wide guidance to provide a framework to ensure that acquisition of AI is consistent across the department and accounts for the unique challenges associated with AI.

It is especially important that DOD and the military services issue guidance to provide critical oversight, resources, and provisions for acquiring AI given that the U.S. will face AI-enabled adversaries in the future. Without such guidance, DOD is at risk of expending funds on AI technologies that do not consistently address the unique challenges associated with AI and are not tailored to each service’s specific needs. The private company observations previously discussed offer numerous considerations DOD may wish to leverage in guidance, as appropriate, as it continues to pursue AI-enabled capabilities.

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# LawSites

Tracking Technology and Innovation for the Legal Profession

## A Compendium of Legal Ethics Opinions on Gen AI (As Compiled by – You Guessed It – Gen AI)

ChatGPT 4o
Share

Create a report detailing every legal ethics opinion from every national, state, local and specialty bar association or lawyer licensing body pertaining to the ethics of lawyers' use of generative artificial intelligence.

To provide a comprehensive report, could you specify:

- Do you want opinions from only U.S. bar associations and lawyer licensing bodies, or should this include international organizations as well?
- Should the report focus on formal ethics opinions, or would you like to include informal guidance, advisory statements, or policy discussions?
- Do you need a summary of each opinion, or just citations and links where available?
- Should the report cover only currently active opinions, or include historical perspectives as well?
- Any specific format or structure you prefer for the report?

Include opinions from only the U.S., but do include both formal and informal guidance. The report should include summaries of each opinion. I do not have a preference on format.

Got it! I will compile a report detailing every legal ethics opinion from national, state, local, and specialty bar associations or lawyer licensing bodies in the U.S. regarding the ethical use of generative artificial intelligence by lawyers. This will include both formal ethics opinions and informal guidance, along with summaries of each opinion.

Message ChatGPT

+ Search Deep research ...
🗨️

ChatGPT can make mistakes. Check important info.

By ***Bob Ambrogi*** on February 7, 2025



This week, I have been experimenting with **Deep Research**, the AI agent OpenAI released on Sunday that it says is capable of completing multi-step research tasks and synthesizing large amounts of online information. Not to be confused with the controversial Chinese AI product DeepSeek), Deep Research is said to be particularly useful for people in fields such as finance, science and law.

Already this week, I published two of these experiments. In the first, I used it **to analyze the legality of President Trump's pause of federal grants**. In about 10 minutes, it produced a 9,000 word detailed memorandum, concluding that the pause “appears to rest on shaky legal ground.”

Next, I used it to research and recommend the best law practice management suite for a four-lawyer firm. It **produced a fairly detailed response**, including two charts comparing features, pricing, usability, security, support and user satisfaction.

For today's task, I asked it to create a report detailing every legal ethics opinion pertaining to generative AI. Here was my exact prompt:

“Create a report detailing every legal ethics opinion from every national, state, local and specialty bar association or lawyer licensing body pertaining to the ethics of lawyers’ use of generative artificial intelligence.”

It responded to my prompt with several questions about the scope of the research I’d requested, such as whether it should focus only on formal ethics opinions or also include informal guidance. After I answered its questions, it produced the report published below. After it produced the report, I asked it to also summarize the findings in a chart, which is what you see immediately below.

I have not verified that this is a complete list. If anyone knows where I can find a complete list to compare against, please let me know.

That said, I was again impressed by its ability to conduct comprehensive research across multiple sources and generate a report. The entire task took it 15 minutes.



<b>Issuing Body</b>	<b>Opinion Title/Number</b>	<b>Date Issued</b>	<b>Key Themes</b>	<b>Disclosure Required</b>	<b>Billing Guidance</b>
<b><u>ABA</u></b>	Formal Opinion 512	July 2024	Competence, Confidentiality, Supervision, Candor, Fees	Case-dependent	AI efficiency should reduce fees
<b><u>California</u></b>	Practical Guidance	November 2023	Confidentiality, Competence, AI Disclosure, Supervision	Not mandatory, but recommended	Efficiency gains must be fair to clients
<b><u>Florida</u></b>	Advisory Opinion 24-1	January 2024	Confidentiality, Supervision, Fees, AI Transparency	Client informed consent advised	Must not charge for AI time savings
<b><u>New York State Bar</u></b>	Task Force Report	April 2024	Competence, Bias, AI Oversight, Client Communication	Recommended in certain cases	Clients should benefit from AI-driven efficiency
<b><u>New York City Bar</u></b>	Formal Opinion 2024-5	August 2024	Confidentiality, Competence, Supervision, AI Disclosure	Required for external AI use	No overcharging for AI use
<b><u>New Jersey Supreme Court</u></b>	Preliminary Guidelines	January 2024	Competence, Candor, Supervision, AI Verification	Not always, but recommended	No billing for time not actually spent
<b><u>Pennsylvania &amp; Philadelphia Bars</u></b>	Joint Opinion 2024-200	June 2024	Competence, Candor, AI Hallucinations, Billing Ethics	Yes, in some AI use cases	Cannot bill AI time as manual work
<b><u>Kentucky</u></b>	Ethics Opinion KBA E-457	March 2024	Competence, AI Use in Billing, Supervision, Client Consent	Depends on AI's impact on case	Cannot bill for AI learning time
<b><u>North Carolina</u></b>	Formal Ethics Opinion 2024-1	November 2024	Competence, Supervision, Confidentiality, AI Oversight	Not always, but must protect confidentiality	AI-based efficiency should lower costs
<b><u>Texas</u></b>	Proposed Opinion 2024-6	November 2024	Competence, Confidentiality, AI Trustworthiness,	Not explicitly required	Fair pricing required for AI use

			Supervision		
<b><u>Virginia</u></b>	AI Guidance Update	August 2024	Confidentiality, Billing, Supervision, AI Court Compliance	Not mandated but recommended	AI costs must align with ethical billing
<b><u>D.C. Bar</u></b>	Ethics Opinion 388	September 2024	Competence, AI Verification, Supervision, Client Files	Required in specific situations	No excess fees for AI use
<b><u>USPTO</u></b>	Practice Guidance (2023–2024)	April 2024	Candor, Confidentiality, AI Use in Legal Submissions	Court compliance required	Legal AI use cannot inflate costs

## National Bar Associations

### American Bar Association – Formal Opinion 512 (July 2024)

The ABA Standing Committee on Ethics and Professional Responsibility issued **Formal Opinion 512, “Generative Artificial Intelligence Tools,” on July 29, 2024.** [americanbar.org](https://www.americanbar.org) [americanbar.org](https://www.americanbar.org). This is the ABA’s first ethics guidance focused on generative AI use by lawyers. It instructs attorneys to “*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.*” [jenkinslaw.org](https://www.jenkinslaw.org) In short, existing ABA Model Rules apply to AI just as they do to any technology.

**Key concerns and recommendations:** The opinion emphasizes that lawyers must maintain technological **competence** – understanding the benefits and risks of AI tools they use [jenkinslaw.org](https://www.jenkinslaw.org). It notes the duty of **confidentiality** (Model Rule 1.6) requires caution when inputting client data into AI tools; lawyers should ensure no confidential information is revealed without informed client consent [jenkinslaw.org](https://www.jenkinslaw.org). Lawyers should also evaluate whether to **inform or obtain consent from clients** about AI use, especially if using it in ways that affect the representation [jenkinslaw.org](https://www.jenkinslaw.org). AI outputs must be independently verified for accuracy to fulfill duties of **candor** and avoid filing false or frivolous material (Rules 3.3, 3.1) [jenkinslaw.org](https://www.jenkinslaw.org). The ABA highlights that “hallucinations”

(convincing but false outputs) are a major pitfall [americanbar.org](https://www.americanbar.org). **Supervision** duties (Rules 5.1 and 5.3) mean lawyers must oversee both subordinate lawyers and nonlawyers *and* the AI tools they use [jenkinslaw.org](https://www.jenkinslaw.org). The opinion also warns that **fees** must be reasonable – if AI improves efficiency, lawyers should not overbill for time not actually spent [kaiserlaw.com](https://www.kaiserlaw.com). Overall, Formal Op. 512 provides a comprehensive framework mapping generative AI use to existing ethics rules [americanbar.org](https://www.americanbar.org) [americanbar.org](https://www.americanbar.org).

(See ABA Formal Op. 512 [jenkinslaw.org](https://www.jenkinslaw.org) for full text.)

### State Bar Associations and Regulatory Bodies

#### California – “Practical Guidance” by COPRAC (November 2023)

The **State Bar of California** took early action by issuing “**Practical Guidance for the Use of Generative AI in the Practice of Law**,” approved by the Bar’s Board of Trustees on Nov. 16, 2023

[calbar.ca.gov](https://www.calbar.ca.gov) [jdsupra.com](https://www.jdsupra.com). Rather than a formal opinion, it is a guidance document (in chart format) developed by the Committee on Professional Responsibility and Conduct (COPRAC). It applies California’s Rules of Professional Conduct to generative AI scenarios.

**Key points:** California’s guidance stresses **confidentiality** – attorneys “*must not input any confidential client information*” into AI tools that lack adequate protections [calbar.ca.gov](https://www.calbar.ca.gov). Lawyers should vet an AI vendor’s security and data use policies, and **anonymize or refrain from sharing sensitive data** unless certain it will be protected [calbar.ca.gov](https://www.calbar.ca.gov) [calbar.ca.gov](https://www.calbar.ca.gov). The **duty of competence and diligence** requires understanding how the AI works and its limitations [jdsupra.com](https://www.jdsupra.com). Lawyers should review AI outputs for accuracy and bias, and “*AI should never replace a lawyer’s professional judgment.*” [jdsupra.com](https://www.jdsupra.com) If AI assists with research or drafting, the attorney must critically review the results. The guidance also addresses **supervision**: firms should train and supervise lawyers and staff in proper AI use [jdsupra.com](https://www.jdsupra.com). **Communication with clients** may entail disclosing AI use in some cases – e.g. if it materially affects the representation – but California did *not mandate* disclosure in all instances [jdsupra.com](https://www.jdsupra.com). Finally, the guidance notes **candor**: the duty of candor to tribunals means attorneys must check AI-generated citations and facts to avoid false statements in court [jdsupra.com](https://www.jdsupra.com). Overall, California’s approach is to treat AI as another technology that must be used consistent with existing rules on competence, confidentiality, supervision, etc., providing “guiding principles rather than best practices” [calbar.ca.gov](https://www.calbar.ca.gov).

(Source: State Bar of CA Generative AI Guidance [jdsupra.com](https://www.jdsupra.com) [jdsupra.com](https://www.jdsupra.com).)

#### Florida – Advisory Opinion 24-1 (January 2024)

The **Florida Bar** issued **Proposed Advisory Opinion 24-1** in late 2023, which was adopted by the Bar’s Board of Governors in January 2024 [floridabar.org](https://www.floridabar.org) [floridabar.org](https://www.floridabar.org). Titled “*Lawyers’ Use of Generative AI*,” this formal ethics opinion gives a green light to using generative AI “**to the extent that the lawyer can reasonably guarantee compliance with the lawyer’s ethical obligations.**” [floridabar.org](https://www.floridabar.org) It identifies four focus areas: confidentiality, oversight, fees, and advertising [hinshawlaw.com](https://www.hinshawlaw.com) [hinshawlaw.com](https://www.hinshawlaw.com).

**Key points: Confidentiality:** Florida stresses that protecting client confidentiality (Rule 4-1.6) is paramount. Lawyers should take “*reasonable steps to prevent inadvertent or unauthorized disclosure*” of client info by an AI system [jdsupra.com](https://www.jdsupra.com). The opinion “*advisable to obtain a client’s informed consent before using a third-party AI that would disclose confidential information.*”

[jdsupra.com](https://www.jdsupra.com) This aligns with prior cloud-computing opinions. **Oversight:** Generative AI must be treated like a non-lawyer assistant – the lawyer must supervise and vet its work [jdsupra.com](https://www.jdsupra.com). The opinion warns that lawyers relying on AI face “*the same perils as relying on an overconfident nonlawyer assistant*” [floridabar.org](https://www.floridabar.org). Attorneys must review AI outputs (research, drafts, etc.) for accuracy and legal soundness before use [floridabar.org](https://www.floridabar.org). Notably, after the infamous *Mata v. Avianca* incident of fake cases, Florida emphasizes **candor**: no frivolous or false material from AI should be submitted [floridabar.org](https://www.floridabar.org). **Fees:** Improved efficiency from AI cannot be used to charge inflated fees. A lawyer “*can ethically only charge a client for actual costs incurred*” – time saved by AI should not be billed as if the lawyer did the work [jdsupra.com](https://www.jdsupra.com). If a lawyer will charge for using an AI tool (as a cost), the client must be informed in writing [jdsupra.com](https://www.jdsupra.com). And **training time** – a lawyer’s time learning an AI tool – *cannot* be billed to the client [jdsupra.com](https://www.jdsupra.com). **Advertising:** If lawyers advertise their use of AI, they must not be false or misleading. Florida

specifically notes that if using a chatbot to interact with potential clients, those users must be told they are interacting with an AI, not a human lawyer [jdsupra.com](#). Any claims about an AI’s capabilities must be objectively verifiable (no puffery that your AI is “better” than others without proof) [floridabar.org floridabar.org](#). In sum, Florida concludes: “a lawyer may ethically utilize generative AI, but only to the extent the lawyer can reasonably guarantee compliance with duties of confidentiality, candor, avoiding frivolous claims, truthfulness, reasonable fees, and proper advertising.” [floridabar.org](#).

(Sources: Florida Bar Op. 24-1 [floridabar.org jdsupra.com](#).)

#### **New York State Bar Association – Task Force Report (April 2024)**

The **New York State Bar Association (NYSBA)** did not issue a formal ethics opinion via its ethics committee, but its **Task Force on Artificial Intelligence** produced a comprehensive *85-page report* adopted by the House of Delegates on April 6, 2024 [floridabar.org floridabar.org](#). This report includes a chapter on the “*Ethical Impact*” of AI on law practice [floridabar.org](#), effectively providing guidance to NY lawyers. It mirrors many concerns seen in formal opinions elsewhere.

**Key points:** The NYSBA report underscores **competence** and cautions against “techno-solutionism.” It notes that “a refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent representation” [nysba.org nysba.org](#) – implying lawyers should stay current with helpful AI tools. At the same time, it warns attorneys not to blindly trust AI as a silver bullet. The report coins “*techno-solutionism*” as the overbelief that new tech (like gen AI) can solve all problems, reminding lawyers that human verification is still required [nysba.org nysba.org](#). The infamous Avianca case is cited to illustrate the need to **verify AI outputs** and supervise the “nonlawyer” tool (AI) under Rule 5.3 [nysba.org](#). The report addresses the **duty of confidentiality & privacy** in depth: Lawyers must ensure client information isn’t inadvertently shared or used to train public AI models [nysba.org nysba.org](#). It suggests that if AI tools store or learn from inputs, that raises confidentiality concerns [nysba.org](#). Client consent or use of secure “closed” AI systems may be needed to protect privileged data. The report also covers **supervision** (Rule 5.3) – attorneys should supervise AI use similarly to how they supervise human assistants [nysba.org](#). It touches on **bias** and fairness, noting generative AI trained on biased data could perpetuate discrimination, which lawyers must guard against [lawnext.com](#). Interestingly, the NYSBA guidance also links AI use to **reasonable fees**: it suggests effective use of AI can factor into whether a fee is reasonable [jdsupra.com jdsupra.com](#) (e.g. inefficiently refusing to use available AI might waste client money, whereas using AI and still charging full hours might be unreasonable). In sum, New York’s bar leaders affirm that ethical duties of competence, confidentiality, and supervision fully apply to AI. They encourage using AI’s benefits to improve service, but caution against its risks and urge ongoing attorney oversight [floridabar.org floridabar.org](#).

(Sources: NYSBA Task Force Report [nysba.org nysba.org](#).)

#### **New York City Bar Association – Formal Opinion 2024-5 (August 2024)**

The **New York City Bar Association Committee on Professional Ethics** issued **Formal Ethics Opinion 2024-5** on August 7, 2024 [nydailyrecord.com nydailyrecord.com](#). This opinion, in a user-friendly chart format, provides practical guidelines for NYC lawyers on generative AI. The Committee explicitly aimed to give “guardrails and not hard-and-fast restrictions” in this evolving area [nydailyrecord.com](#).

**Key points: Confidentiality:** The NYC Bar draws a distinction between “*closed*” AI systems (e.g. an in-house or vendor tool that does **not** share data externally) and public AI services like ChatGPT. If using an AI that stores or shares inputs outside the firm, **client informed consent is required** before inputting any confidential information [nydailyrecord.com](#). Even with closed/internal AI, lawyers must maintain internal confidentiality protections. The opinion warns lawyers to review AI **Terms of Use** regularly to ensure the provider isn’t using or exposing client data without consent [nydailyrecord.com](#). **Competence:** Echoing others, NYC advises that lawyers “*understand to a reasonable degree how the technology works, its limitations, and the applicable Terms of Use*” before using generative AI [nydailyrecord.com](#). Attorneys should avoid delegating their professional judgment to AI; any AI output is just a starting point or draft [nydailyrecord.com](#). Lawyers must ensure outputs are **accurate and tailored to the client’s needs** – essentially, *verify everything* and edit AI-generated material so that it truly serves the client’s interests [nydailyrecord.com](#). **Supervision:** Firms should implement policies and training for lawyers and staff on acceptable AI use [nydailyrecord.com](#). The Committee notes that **client intake chatbots** (if used on a firm’s website, for



example) require special oversight to avoid inadvertently forming attorney-client relationships or giving legal advice without proper vetting [nydailyrecord.com](https://www.nydailyrecord.com). In other words, a chatbot interacting with the public should be carefully monitored by lawyers to ensure it doesn't mislead users about its nature or create unintended obligations [nydailyrecord.com](https://www.nydailyrecord.com). The NYC Bar's guidance aligns with California's in format and substance, reinforcing that the core duties of confidentiality, competence (tech proficiency), and supervision all apply when lawyers use generative AI tools [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com).

(Source: NYC Bar Formal Op. 2024-5 [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com).)

#### New Jersey Supreme Court – Preliminary Guidelines (January 2024)

In New Jersey, the state's highest court itself weighed in. On January 24, 2024, the **New Jersey Supreme Court's Committee on AI and the Courts** issued "**Preliminary Guidelines on the Use of AI by New Jersey Lawyers**," which were published as a Notice to the Bar [njcourts.gov](https://www.njcourts.gov) [njcourts.gov](https://www.njcourts.gov). These guidelines, effective immediately, aim to help NJ lawyers comply with existing Rules of Professional Conduct when using generative AI [njcourts.gov](https://www.njcourts.gov).

**Key points:** The Court made clear that **AI does not change lawyers' fundamental duties**. Any use of AI "*must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of practice.*" [njcourts.gov](https://www.njcourts.gov) In other words, tech advances *do not* dilute responsibilities. The NJ guidelines highlight **accuracy and truthfulness:** lawyers have an ethical duty to ensure their work is accurate, so they must *always check AI-generated content for "hallucinations" or errors* before relying on it [jdsupra.com](https://www.jdsupra.com). Submitting false or fake information generated by AI would violate rules against misrepresentations to the court. The guidelines reiterate **candor to tribunals** – attorneys must not present AI-produced output containing fabricated cases or facts (the *Mata/Avianca* situation is alluded to) [jdsupra.com](https://www.jdsupra.com). Regarding **communication and client consent**, NJ took a measured approach: There is "*no per se requirement to inform a client*" about every AI use, *unless* not telling the client would prevent the client from making informed decisions about the representation [jdsupra.com](https://www.jdsupra.com). For example, if AI is used in a trivial manner (typo correction, formatting), disclosure isn't required; but if it's used in substantive tasks that affect the case, lawyers should consider informing the client, especially if there's heightened risk. **Confidentiality:** Lawyers must ensure any AI tool is secure to avoid inadvertent disclosures of client info [jdsupra.com](https://www.jdsupra.com). This echoes the duty to use "*reasonable efforts*" to safeguard confidential data (RPC 1.6). **No misconduct:** The Court reminds that all rules on attorney misconduct (dishonesty, fraud, bias, etc.) apply in AI usage [jdsupra.com](https://www.jdsupra.com). For instance, using AI in a way that produces discriminatory outcomes or that frustrates justice would breach Rule 8.4. **Supervision:** Law firms must supervise how their lawyers and staff use AI [jdsupra.com](https://www.jdsupra.com) – establishing internal policies to ensure ethical use. Overall, New Jersey's top court signaled that it embraces innovation (noting AI's potential benefits) but insists lawyers "*balance the benefits of innovation while safeguarding against misuse.*" [njcourts.gov](https://www.njcourts.gov)

(Sources: NJ Supreme Court Guidelines [jdsupra.com](https://www.jdsupra.com) [jdsupra.com](https://www.jdsupra.com).)

#### Pennsylvania & Philadelphia Bars – Joint Opinion 2024-200 (June 2024)

The **Pennsylvania Bar Association (PBA)** and **Philadelphia Bar Association** jointly issued **Formal Opinion 2024-200** in mid-2024 [lawnext.com](https://www.lawnext.com) [lawnext.com](https://www.lawnext.com). This collaborative opinion ("Joint Formal Op. 2024-200") provides ethical guidance for Pennsylvania lawyers using generative AI. It repeatedly emphasizes that *the same rules apply to AI as to any technology* [lawnext.com](https://www.lawnext.com).

**Key points:** The joint opinion places heavy emphasis on **competence (Rule 1.1)**. It famously states "*Lawyers must be proficient in using technological tools to the same extent they are in traditional methods*" [lawnext.com](https://www.lawnext.com). In other words, attorneys should treat AI as part of the competence duty – understanding e-discovery software, legal research databases, *and now generative AI*, is part of being a competent lawyer [lawnext.com](https://www.lawnext.com). The opinion acknowledges generative AI's unique risk: it can **hallucinate** (generate false citations or facts) [lawnext.com](https://www.lawnext.com). Thus, due diligence is required – lawyers must **verify all AI outputs**, especially legal research results and citations [lawnext.com](https://www.lawnext.com) [lawnext.com](https://www.lawnext.com). The opinion bluntly warns that if you ask AI for cases and "*then file them in court without even bothering to read or Shepardize them, that is stupid.*" [lawnext.com](https://www.lawnext.com) (The opinion uses more polite language, but this captures the spirit.) It highlights **bias** as well: AI may carry implicit biases from training data, so lawyers should be alert to any discriminatory or skewed content in AI output [lawnext.com](https://www.lawnext.com). The Pennsylvania/Philly opinion also advises lawyers to **communicate with clients** about AI use. Specifically, lawyers should be transparent



and “provide clear, transparent explanations” of how AI is being used in the case [lawnext.com lawnext.com](#). In some situations, obtaining *client consent* before using certain AI tools is recommended [lawnext.com lawnext.com](#) – e.g., if the tool will handle confidential information or significantly shape the legal work. The opinion lays out “**12 Points of Responsibility**” for using gen AI [lawnext.com lawnext.com](#), which include many of the above: ensure truthfulness and accuracy of AI-derived content, double-check citations, maintain confidentiality (ensure AI vendors keep data secure) [lawnext.com](#), check for conflicts (make sure use of AI doesn’t introduce any conflict of interest) [lawnext.com](#), and **transparency** with clients, courts, and colleagues about AI use and its limitations [lawnext.com](#). It also addresses **proper billing practices**: lawyers shouldn’t overcharge when AI boosts efficiency [lawnext.com](#). If AI saves time, the lawyer should not bill as if they did it manually – they may bill for the *actual* time or consider value-based fees, but padding hours violates the rule on reasonable fees [lawnext.com](#). Overall, the Pennsylvania and Philly bars take the stance that embracing AI is fine – even beneficial – as long as lawyers “*remain fully accountable for the results*,” use AI carefully, and don’t neglect any ethical duty in the process [lawnext.com lawnext.com](#).

(Sources: Joint PBA/Phila. Opinion 2024-200 summarized by Ambrogi [lawnext.com lawnext.com](#).)

#### Kentucky – Ethics Opinion KBA E-457 (March 2024)

The **Kentucky Bar Association** issued **Ethics Opinion KBA E-457, “The Ethical Use of Artificial Intelligence in the Practice of Law,”** on March 15, 2024 [cdn.ymaws.com](#). This formal opinion (finalized after a comment period in mid-2024) provides a nuanced roadmap for Kentucky lawyers. It not only answers basic questions but also offers broader insight, reflecting the work of a KBA Task Force on AI [techlawcrossroads.com](#).

**Key points: Competence:** Like other jurisdictions, Kentucky affirms that keeping abreast of technology (including AI) is a *mandatory* aspect of competence [techlawcrossroads.com techlawcrossroads.com](#). Kentucky’s Rule 1.1 Comment 6 (equivalent to ABA Comment 8) says lawyers “*should keep abreast of ... the benefits and risks associated with relevant technology.*” The opinion stresses this is not optional: “*It’s not a ‘should’; it’s a must.*”

[techlawcrossroads.com](#) Lawyers cannot ethically ignore AI’s existence or potential in law practice [techlawcrossroads.com techlawcrossroads.com](#) (implying that failing to understand how AI might improve service could itself be a lapse in competence). **Disclosure to clients:** Kentucky takes a practical stance that there is “*no duty to disclose to the client the ‘rote’ use of AI generated research,*” absent special circumstances

[techlawcrossroads.com](#). If an attorney is just using AI as a tool (like one might use Westlaw or a spell-checker), they generally need not inform the client. However, there are *important exceptions* – if the client has specifically limited use of AI, or if use of AI presents significant risk or would require client consent under the rules, then disclosure is needed [techlawcrossroads.com](#). Lawyers should discuss **risks and benefits** of AI with clients if client consent is required for its use (for example, if AI will process confidential data, informed consent may be wise) [techlawcrossroads.com](#).

**Fees:** KBA E-457 is very direct about fees and AI. If AI significantly reduces the time spent on a matter, *the lawyer may need to reduce their fees* accordingly [techlawcrossroads.com](#). A lawyer cannot charge a client as if a task took 5 hours if AI allowed it to be done in 1 hour – that would make the fee unreasonable. The opinion also says a lawyer can only charge a client for the *expense* of using AI (e.g., the cost of a paid AI service) if the client agrees to that fee in writing

[techlawcrossroads.com](#). Otherwise, passing along AI tool costs may be impermissible. In short, AI’s efficiencies should benefit clients, not become a hidden profit center. **Confidentiality:** Lawyers have a “*continuing duty to safeguard client information if they use AI,*” and must comply with all applicable court rules on AI use

[techlawcrossroads.com](#). This means vetting AI providers’ security and ensuring no confidential data is exposed. Kentucky echoes that attorneys must **understand the terms and operation** of any third-party AI system they use

[techlawcrossroads.com](#). They should know how the AI service stores and uses data. **Court rules compliance:** Notably, the opinion reminds lawyers to follow any court-imposed rules about AI (for instance, if a court requires disclosure of AI-drafted filings, the lawyer must do so) [cdn.ymaws.com](#).

**Firm policies and training:** KBA E-457 advises law firms to create informed policies on AI use and to supervise those they manage in following these policies [techlawcrossroads.com](#).

In summary, Kentucky’s opinion encourages lawyers to embrace AI’s potential but to do so carefully: stay competent with the technology, be transparent when needed, adjust fees fairly, protect confidentiality, and always maintain ultimate responsibility for the work. It concludes that Kentucky lawyers “*cannot run from or ignore AI.*” [techlawcrossroads.com](#)

(Source: KBA E-457 (2024) via TechLaw Crossroads summary [techlawcrossroads.com techlawcrossroads.com](#).)

### North Carolina – Formal Ethics Opinion 2024-1 (November 2024)

The **North Carolina State Bar** adopted **2024 Formal Ethics Opinion 1, “Use of Artificial Intelligence in a Law Practice,”** on November 1, 2024 [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). This opinion squarely addresses whether and how NC lawyers can use AI tools consistent with their ethical duties.

**Key points:** The NC State Bar gives a cautious **“Yes”** to using AI, under specific conditions: *“Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying on the AI’s work product.”* [ncbar.gov](https://www.ncbar.gov). That single sentence captures the three pillars of NC’s guidance: **competence, confidentiality, and supervision**. NC acknowledges that *nothing in the Rules explicitly prohibits AI use* [ncbar.gov](https://www.ncbar.gov), so it comes down to applying existing rules. **Competence:** Lawyers must understand the technology sufficiently to use it effectively and safely [ncbar.gov](https://www.ncbar.gov). Rule 1.1 and its Comment in NC (which, like the ABA, includes tech competence) require lawyers to know what they don’t know – if a lawyer isn’t competent with an AI tool, they must get up to speed or refrain. NC emphasizes that using AI is often the lawyer’s *own decision* but it must be made prudently, considering factors like the tool’s reliability and cost-benefit for the client [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). **Confidentiality & Security:** Rule 1.6(c) in North Carolina obligates lawyers to take reasonable efforts to prevent unauthorized disclosure of client info. So, before using any cloud-based or third-party AI, the lawyer must ensure it is *“sufficiently secure and compatible with the lawyer’s confidentiality obligations.”* [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). The opinion suggests attorneys evaluate providers like they would any vendor handling client data – e.g., examine terms of service, data storage policies, etc., similar to prior NC guidance on cloud computing [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). If the AI is *“self-learning”* (using inputs to improve itself), lawyers should be wary that client data might later resurface to others [ncbar.gov](https://www.ncbar.gov). NC stops short of mandating client consent for AI use, but it implies that if an AI tool can’t be used consistent with confidentiality, then either don’t use it or get client permission. **Supervision and Independent Judgment:** NC treats AI output like work by a nonlawyer assistant. Under Rule 5.3, lawyers must supervise the use of AI tools and *“exercise independent professional judgment in determining how (or if) to use the product of an AI tool”* for a client [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). This means a lawyer cannot blindly accept an AI’s result – they must review and verify it before relying on it. If an AI drafts a contract or brief, the lawyer is responsible for editing and ensuring it’s correct and appropriate. NC explicitly analogizes AI to both other software and to nonlawyer staff: AI is *“between”* a software tool and a nonlawyer assistant in how we think of it [ncbar.gov](https://www.ncbar.gov). Thus, the lawyer must both **know how to use the software** and **supervise its output** as if it were a junior employee’s work. **Bottom line:** NC FO 2024-1 concludes that a lawyer *may* use AI in practice – for tasks like document review, legal research, drafting, etc. – as long as the lawyer remains fully responsible for the outcome [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). The opinion purposefully doesn’t dictate when AI is appropriate or not, recognizing the technology is evolving [ncbar.gov](https://www.ncbar.gov). But it clearly states that if a lawyer **decides** to employ AI, they are *“fully responsible”* for its use and must ensure it is competent use, confidential use, and supervised use [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov).

(Source: NC 2024 FEO-1 [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov).)

### Texas – Proposed Opinion 2024-6 (Draft, November 2024)

The **State Bar of Texas Professional Ethics Committee** has circulated a **Proposed Ethics Opinion No. 2024-6** (posted for public comment on Nov. 19, 2024) regarding lawyers’ use of generative AI [texasbar.com](https://www.texasbar.com). (As of this writing, it is a draft opinion awaiting final adoption.) This Texas draft provides a “high-level overview” of ethical issues raised by AI, requested by a Bar task force on AI [texasbar.com](https://www.texasbar.com).

**Key points (draft):** The proposed Texas opinion covers familiar ground. It notes the duty of **competence (Rule 1.01)** extends to understanding relevant technology [texasbar.com](https://www.texasbar.com). Texas specifically cites its prior ethics opinions on cloud computing and metadata, which required lawyers to have a *“reasonable and current understanding”* of those technologies [texasbar.com](https://www.texasbar.com) [texasbar.com](https://www.texasbar.com). By analogy, any Texas lawyer using generative AI *“must have a reasonable and current understanding of the technology”* and its capabilities and limits [texasbar.com](https://www.texasbar.com). In practical terms, this means lawyers should educate themselves on how tools like ChatGPT actually work (e.g. that they predict text rather than retrieve vetted sources) and what their known pitfalls are [texasbar.com](https://www.texasbar.com). The draft opinion spends time describing *Mata v. Avianca* to illustrate the dangers of not understanding AI’s lack of a reliable legal database [texasbar.com](https://www.texasbar.com) [texasbar.com](https://www.texasbar.com). On **confidentiality (Rule 1.05 in Texas)**, the opinion again builds on prior guidance: lawyers must safeguard client information when using any third-party service [texasbar.com](https://www.texasbar.com) [texasbar.com](https://www.texasbar.com). It suggests precautions similar to those for cloud storage: *“acquire a general understanding of how the technology works; review (and*

*potentially renegotiate) the Terms of Service; [ensure] the provider will keep data confidential; and stay vigilant about data security.” [texasbar.com](#).* (These examples are drawn from Texas Ethics Op. 680 on cloud computing, which the AI opinion heavily references.) If an AI tool cannot be used in a way that protects confidential info, the lawyer should not use it for those purposes. The Texas draft also flags **duty to avoid frivolous submissions (Rule 3.01)** and **duty of candor to tribunal (Rule 3.03)** as directly relevant [texasbar.com](#). Using AI doesn’t excuse a lawyer from these obligations – citing fake cases or making false statements is no less an ethical violation because an AI generated them. Lawyers must thoroughly vet AI-generated legal research and content to ensure it’s grounded in real law and facts [texasbar.com](#) [texasbar.com](#). The opinion essentially says: if you choose to use AI, you must double-check its work *just as you would a junior lawyer’s memo or a nonlawyer assistant’s draft. Supervision (Rules 5.01, 5.03):* Supervising partners should have firm-wide measures so that any use of AI by their team is ethical [texasbar.com](#) [texasbar.com](#). This could mean creating policies on approved AI tools and requiring verification of AI outputs. In summary, the Texas proposed opinion doesn’t ban generative AI; it provides a “snapshot” of issues and reinforces that core duties of competence, confidentiality, candor, and supervision must guide any use of AI in practice [texasbar.com](#) [texasbar.com](#). (The committee acknowledges the AI landscape is rapidly changing, so they focused on broad principles rather than specifics that might soon be outdated [texasbar.com](#).) Once finalized, Texas’s opinion will likely align with the consensus: lawyers can harness AI’s benefits if they remain careful and accountable.

(Source: Texas Proposed Op. 2024-6 [texasbar.com](#) [texasbar.com](#).)

### Virginia State Bar – AI Guidance Update (August 2024)

In 2024 the **Virginia State Bar** released a short set of **guidelines on generative AI** as an update on its website (around August 2024) [nydailyrecord.com](#). This concise guidance stands out for its practicality and flexibility. Rather than an extensive opinion, Virginia issued overarching advice that can adapt as AI technology evolves [nydailyrecord.com](#).

**Key points:** Virginia first emphasizes that **lawyers’ basic ethical responsibilities “have not changed” due to AI**, and that generative AI presents issues “fundamentally similar” to those with other technology or with supervising people [nydailyrecord.com](#). This frames the guidance: existing rules suffice. On **confidentiality**, the Bar advises lawyers to vet how AI providers handle data just as they would with any vendor [nydailyrecord.com](#) [nydailyrecord.com](#). Legal-specific AI products (designed for lawyers, with better data security) may offer more protection, but even then attorneys “*must make reasonable efforts to assess*” the security and “*whether and under what circumstances*” confidential info could be exposed [nydailyrecord.com](#). In other words, even if using an AI tool marketed as secure for lawyers, you should confirm that it truly keeps your client’s data confidential (no sharing or training on it without consent) [nydailyrecord.com](#) [nydailyrecord.com](#). Virginia notably aligns with most jurisdictions (and diverges from a stricter ABA stance) regarding **client consent**: “*there is no per se requirement to inform a client about the use of generative AI in their matter*” [nydailyrecord.com](#). Unless something about the AI use would necessitate client disclosure (e.g., an agreement with the client, or an unusual risk like using a very public AI for sensitive info), lawyers generally need not obtain consent for routine AI use [nydailyrecord.com](#). This is consistent with the idea that using AI can be like using any software tool behind the scenes. Next, **supervision and verification**: The bar stresses that lawyers must review all AI outputs as they would work done by a junior attorney or nonlawyer assistant [nydailyrecord.com](#) [nydailyrecord.com](#). Specifically, “*verify that any citations are accurate (and real)*” and generally ensure the AI’s work product is correct [nydailyrecord.com](#). This duty extends to supervising others in the firm – if a paralegal or associate uses AI, the responsible lawyer must ensure they are doing so properly [nydailyrecord.com](#). On **fees and billing**, Virginia takes a clear stance: a lawyer may not bill a client for time *not actually spent* due to AI efficiency gains [nydailyrecord.com](#). “*A lawyer may not charge an hourly fee in excess of the time actually spent ... and may not bill for time saved by using generative AI.*” [nydailyrecord.com](#) If AI cuts a research task from 5 hours to 1, you can’t still charge 5 hours. The Bar suggests considering alternative fee arrangements to account for AI’s value, instead of hourly billing windfalls [nydailyrecord.com](#). As for passing along AI tool costs: the Bar says you can’t charge the client for your AI subscription or usage *unless* it’s a reasonable charge and permitted by the fee agreement [nydailyrecord.com](#). Finally, Virginia reminds lawyers to stay aware of any **court rules about AI**. Some courts (even outside Virginia) have begun requiring attorneys to certify that filings were checked for AI-generated falsehoods, or even prohibiting AI-drafted documents absent verification. Virginia’s guidance highlights that lawyers must comply with any such disclosure or anti-AI rules in whatever jurisdiction they are in [nydailyrecord.com](#) [nydailyrecord.com](#). Overall, the Virginia State Bar’s message is: use common sense and existing rules. Be transparent

when needed, protect confidentiality, supervise and double-check AI outputs, bill fairly, and follow any new court requirements [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com). This short-form guidance was praised for being “streamlined” and adaptable as AI tools continue to change [nydailyrecord.com](https://www.nydailyrecord.com).

(Source: Virginia State Bar AI Guidance via N.Y. Daily Record [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com).)

#### District of Columbia Bar – Ethics Opinion 388 (September 2024)

The D.C. Bar issued **Ethics Opinion 388: “Attorneys’ Use of Generative AI in Client Matters”** in 2024 (the second half of the year) [kaiserlaw.com](https://www.kaiserlaw.com). This opinion closely analyzes the ethical implications of lawyers using gen AI, using the well-known *Mata v. Avianca* incident as a teaching example [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). It then organizes guidance under specific D.C. Rules of Professional Conduct.

**Key points:** The opinion breaks its analysis into categories of duties [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com):

- **Competence (Rule 1.1):** D.C. reiterates that tech competence is part of a lawyer’s duty. Attorneys must “*keep abreast of ... practice [changes], including the benefits and risks of relevant technology.*” [kaiserlaw.com](https://www.kaiserlaw.com) Before using AI, lawyers should understand *how it works, what it does, and its potential dangers* [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). The opinion vividly quotes a description of AI as “*an omniscient, eager-to-please intern who sometimes lies to you.*” [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com) In practical terms, D.C. lawyers must know that AI output can be very convincing but incorrect. The Mata/Avianca saga – where a lawyer unknowingly relied on a tool that “**sometimes lies**” – underscores the need for knowledge and caution [dcbbar.org](https://www.dcbbar.org) [dcbbar.org](https://www.dcbbar.org).
- **Confidentiality (Rule 1.6):** D.C.’s Rule 1.6(f) specifically requires lawyers to prevent unauthorized use of client info by third-party service providers [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). This applies to AI providers. Lawyers are instructed to ask themselves: “*Will information I provide [to the AI] be visible to the AI provider or others? Will my input affect future answers for other users (potentially revealing my data)?*” [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). If using an AI tool that sends data to an external server, the lawyer must ensure that data is protected. D.C. likely would advise using privacy-protective settings or choosing tools that allow opt-outs of data sharing, or obtaining client consent if needed. Essentially, treat AI like any outside vendor under Rule 5.3/1.6: do due diligence to ensure confidentiality is preserved [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com).
- **Supervision (Rules 5.1 & 5.3):** A lawyer must supervise both other lawyers and nonlawyers in the firm regarding AI use [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). This may entail firm policies: e.g., vetting which AI tools are approved and training staff to **verify AI output** for accuracy [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). If a subordinate attorney or paralegal uses AI, the supervising attorney should reasonably ensure they are doing so in compliance with all ethical duties (and correcting any mistakes). The opinion views AI as an extension of one’s team – requiring oversight.
- **Candor to Tribunal & Fairness (Rules 3.3 and 3.4):** Simply put, a lawyer cannot make false statements to a court or submit false evidence [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). D.C. notes the existing comment to Rule 3.3 already forbids knowingly misrepresenting legal authority. Opinion 388 makes clear this *includes* presenting AI-fabricated cases or quotes as if they were real [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). Even if the lawyer didn’t intend to lie, relying on AI without checking and thereby filing fake citations could violate the duty of candor (at least negligently, if not knowingly). The lesson: **no courtroom use of AI content without verification**. Also, under fairness to opposing party (3.4), one must not use AI to manipulate evidence or discovery unfairly.
- **Fees (Rule 1.5):** The D.C. Bar echoed the consensus on billing: if you charge hourly, you “*may never charge a client for time not expended.*” [kaiserlaw.com](https://www.kaiserlaw.com) Increased efficiency through AI cannot be used as an opportunity to overcharge. They cite a 1996 D.C. opinion which said that a lawyer who is more efficient than expected (perhaps through technology or expertise) can’t then bill extra hours that weren’t worked [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). The same principle applies now: time saved by AI is the client’s benefit, not the lawyer’s windfall. So if AI drafts a contract in 1 hour whereas manual drafting would take 5, the lawyer cannot bill 5 hours – only the 1 hour actually spent (or use a flat fee structure that the client agrees on, but not lie about hours).
- **Client Files (Rule 1.16(d)):** Interestingly, D.C. Opinion 388 touches on whether AI interactions should be retained as part of the client file upon termination [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). D.C. law requires returning the “entire file” to a client, including internal notes, unless they are purely administrative. The opinion



suggests lawyers should consider saving important AI prompts or outputs used in the representation as part of the file material that may need to be provided to the client [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). For example, if an attorney used an AI tool to generate a research memo or a draft letter that was then edited and sent to a client, the initial AI-generated text might be analogous to a draft or research note. This is a new facet many haven't considered: how to handle AI-generated work product in terms of file retention.

In conclusion, D.C.'s Ethics Opinion 388 aligns with other jurisdictions while adding thoughtful details. It "*recognizes AI may eventually greatly benefit the legal industry,*" but in the meantime insists that lawyers "*must be vigilant*" [kaiserlaw.com](https://www.kaiserlaw.com). The overarching theme is captured in the NPR quote: treat AI like an intern who needs close supervision [kaiserlaw.com](https://www.kaiserlaw.com). Do not assume the AI is correct; double-check everything, maintain confidentiality, and use the tool wisely and transparently. D.C. lawyers were effectively told that generative AI is permissible to use, but only in a manner that fully preserves all ethical obligations as enumerated above [kaiserlaw.com](https://www.kaiserlaw.com).

(Sources: D.C. Ethics Op. 388 via Kaiser summary [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com).)

### Specialty Bar and Licensing Bodies

#### U.S. Patent and Trademark Office (USPTO) – Practice Guidance (2023–2024)

Beyond state bars, at least one **lawyer licensing body** has addressed AI: the **USPTO**, which regulates patent and trademark attorneys. In 2023 and 2024, the USPTO issued guidance on the use of AI by practitioners in proceedings before the Office. On April 10, 2024, the USPTO published a notice (and a **Federal Register** guidance document) concerning "**the use of AI tools by parties and practitioners**" before the USPTO [uspto.gov](https://www.uspto.gov) [uspto.gov](https://www.uspto.gov). This followed an earlier internal guidance on Feb 6, 2024 for USPTO administrative tribunals [uspto.gov](https://www.uspto.gov).

**Key points:** The USPTO made clear that existing duties in its rules (37 C.F.R. and USPTO ethics rules) "**apply regardless of how a submission is generated.**" [uspto.gov](https://www.uspto.gov) In other words, whether a patent application or brief is written by a human or with AI assistance, the attorney is fully responsible for compliance with all requirements. The guidance reminds practitioners of pertinent rules and "*helps inform ... the risks associated with AI*" while giving suggestions to mitigate them [uspto.gov](https://www.uspto.gov). For example, patent attorneys have a duty of candor and truthfulness in dealings with the Office; using AI that produces inaccurate statements could violate that duty if not corrected. USPTO Director Kathi Vidal emphasized "*the integrity of our proceedings*" must be protected and that the USPTO encourages "*safe and responsible use of AI*" to benefit efficiency [uspto.gov](https://www.uspto.gov). But critically, lawyers and agents must ensure AI is **not misused or left unchecked**. The USPTO guidance likely points to rules akin to Fed. R. Civ. P. 11: patent practitioners must make a reasonable inquiry that submissions (claims, arguments, prior art citations, etc.) are not frivolous or false, even if AI was used as a tool. It also addresses **confidentiality and data security** concerns: patent lawyers often handle sensitive technical data, so if they use AI for drafting or searching prior art, they must ensure they aren't inadvertently disclosing invention details. The USPTO suggested **mitigation steps** such as: carefully choosing AI tools (perhaps ones that run locally or have strong confidentiality promises), verifying outputs (especially legal conclusions or prior art relevance), and staying updated as laws/regulations evolve in this area [uspto.gov](https://www.uspto.gov) [uspto.gov](https://www.uspto.gov). In sum, the USPTO's stance is aligned with the bar associations': AI can expand access and efficiency, but practitioners must use it *responsibly*. They explicitly note that AI's use "*does not change*" the attorney's obligations to avoid delay, avoid unnecessary cost, and uphold the quality of submissions [uspto.gov](https://www.uspto.gov). The **patent bar** was cautioned by the USPTO, much as litigators were by the courts, that any mistakes made by AI will be treated as the practitioner's mistakes. The Office will continue to "listen to stakeholders" and may update policies as needed [uspto.gov](https://www.uspto.gov), but for now practitioners should follow this guidance and existing rules.

(Source: USPTO Director's announcement [uspto.gov](https://www.uspto.gov) [uspto.gov](https://www.uspto.gov).)

#### Other Specialty Groups

Other specialty lawyer groups and bar associations have engaged in policy discussions about AI (for example, the **American Immigration Lawyers Association** and various sections of the ABA have offered CLE courses or informal tips on AI use). While these may not be formal ethics opinions, they echo the themes above: maintain client confidentiality, verify AI output, and remember that technology doesn't diminish a lawyer's own duties.

**In summary, across national, state, and local bodies in the U.S., a clear consensus has emerged:** Lawyers may use generative AI tools in their practice, but they must do so cautiously and in full compliance with their ethical obligations. Key recommendations include obtaining client consent if confidential data will be involved [jdsupra.com](https://www.jdsupra.com) [nydailyrecord.com](https://www.nydailyrecord.com), understanding the technology's limits (no blind trust in AI) [nysba.org](https://www.nysba.org) [kaiserlaw.com](https://www.kaiserlaw.com), thoroughly vetting and supervising AI outputs [ncbar.gov](https://www.ncbar.gov) [kaiserlaw.com](https://www.kaiserlaw.com), and ensuring that AI-driven efficiency benefits the client (through accurate work and fair fees) [lawnext.com](https://www.lawnext.com) [kaiserlaw.com](https://www.kaiserlaw.com). All the formal opinions – from the ABA to state bars like California, Florida, New York, Pennsylvania, Kentucky, North Carolina, Virginia, D.C., and others – converge on the message that **the lawyer is ultimately responsible** for everything their generative AI tool does or produces. Generative AI can assist with research, drafting, and more, but it remains “*a tool that assists but does not replace legal expertise and analysis.*” [lawnext.com](https://www.lawnext.com). As the Pennsylvania opinion neatly put it, in more colloquial terms: *don't be stupid* – a lawyer cannot abdicate common sense and professional judgment to an AI [lawnext.com](https://www.lawnext.com). By following these ethics guidelines, lawyers can harness AI's benefits (greater efficiency and capability) while upholding their duties to clients, courts, and the justice system.

**Sources:** Formal ethics opinions and guidance from the ABA and numerous bar associations, including ABA Formal Op. 512 [jenkinslaw.org](https://www.jenkinslaw.org), State Bar of California guidance [jdsupra.com](https://www.jdsupra.com), Florida Bar Op. 24-1 [jdsupra.com](https://www.jdsupra.com), New Jersey Supreme Court AI Guidelines [jdsupra.com](https://www.jdsupra.com), New York City Bar Op. 2024-5 [nydailyrecord.com](https://www.nydailyrecord.com), Pennsylvania Bar & Philadelphia Bar Joint Op. [lawnext.com](https://www.lawnext.com), Kentucky Bar Op. E-457 [techlawcrossroads.com](https://www.techlawcrossroads.com), North Carolina Formal Op. 2024-1 [ncbar.gov](https://www.ncbar.gov), D.C. Bar Op. 388 [kaiserlaw.com](https://www.kaiserlaw.com), and USPTO practitioner guidance [uspto.gov](https://www.uspto.gov). Each of these sources provides detailed discussion of ethical concerns and best practices for using generative AI in law.



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Bob is a lawyer, veteran legal journalist, and award-winning blogger and podcaster. In 2011, he was named to the inaugural Fastcase 50, honoring “the law’s smartest, most courageous innovators, techies, visionaries and leaders.” Earlier in his career, he was editor-in-chief of several legal publications, including The National Law Journal, and editorial director of ALM’s Litigation Services Division.

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#### ABOUT LAW SITES

LawSites is a blog covering legal technology and innovation. It is written by Robert Ambrogi, a lawyer and journalist who has been writing and speaking about legal technology, legal practice and legal ethics for more than two decades.

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**THE NEW YORK CITY BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2024-5: ETHICAL OBLIGATIONS OF LAWYERS AND LAW FIRMS RELATING TO THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW**

**TOPIC:** The use of generative artificial intelligence by New York lawyers, law firms, legal departments, government law offices and legal assistance organizations.

**DIGEST:** This opinion provides general guidance on the use of tools that use generative artificial intelligence.

**RULES:** 1.1, 1.2(d), 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 3.1, 3.3, 5.1, 5.2, 5.3, 7.1, 7.3, 8.4

**QUESTION:** The availability of tools to assist lawyers in their practice that employ generative artificial intelligence has been dramatically expanding and continues to grow. What are the ethical issues that lawyers should consider when deciding whether to use these tools and, if the decision is made to do so, how to use them?

**OPINION:** When using generative artificial intelligence tools, a lawyer should take into account the duty of confidentiality, the obligation to avoid conflicts of interest, the duty of competence and diligence, the rules governing advertising and solicitation, the duty to comply with the law, the duty to supervise both lawyers and non-lawyers, the duty of subordinate attorneys, the duty to consult with clients, the duty of candor to tribunals, the prohibition on making non-meritorious claims and contentions, the limitations on what a lawyer may charge for fees and costs, and the prohibition on discrimination.

## **Introduction**

Generative artificial intelligence (“Generative AI”), like any technology, must be used in a manner that comports with a lawyer’s ethical obligations. General-purpose technology platforms offer AI chatbots. Legal research platforms tout “legal generative AI” that can draft, analyze documents, and provide legal citations. Even data management vendors offer Generative AI-assisted review, analytic, and visualization capabilities. This summary of currently available tools will likely soon be outdated because of the rapid evolution of Generative AI. This guidance, therefore, is general. We expect that this advice will be updated and supplemented in years to come to cover issues not yet anticipated.

This Opinion provides guidance on the ethical obligations of lawyers and law firms relating to the use of Generative AI. It follows and is consistent with the format used by the Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law released by the California State Bar’s Standing Committee on Professional Responsibility and Conduct in November 2023.<sup>1</sup> This

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<sup>1</sup> State Bar of Cal., Standing Comm. on Pro. Resp. & Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (Nov. 16, 2023) (“California Guidance”),

Opinion is in the same format as the California State Bar’s guidance and contains multiple quotations from that guidance. Like the California State Bar and other bar associations that have addressed Generative AI,<sup>2</sup> we believe that when addressing developing areas, lawyers need guardrails and not hard-and-fast restrictions or new rules that could stymie developments. By including advice specifically based on New York Rules and practice, this Opinion is intended to be helpful to the New York Bar.

Applicable Authorities	New York Guidance
<p><b>Duty of Confidentiality</b> Rule 1.6</p>	<p>Generative AI systems are able to use information that is inputted, including prompts, uploaded data, documents, and other resources, to train AI. They may also share inputted information with third parties or use it for other purposes.<sup>3</sup> Even if a system does not use or share inputted information, it may lack “reasonable or adequate security.”<sup>4</sup></p> <p>Without client consent, a lawyer must not input confidential client information into any Generative AI system that will share the inputted confidential information with third parties.<sup>5</sup> Even with consent, a lawyer should “avoid entering details that can be used to identify the client.”<sup>6</sup> Consent is not needed if no confidential client information is shared, for example through anonymization of client information. Generative AI systems that keep inputted information entirely within the firm’s own protected databases, sometimes called “closed”</p>

<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>; see also Am. Bar Ass’n, Formal Op. 512 (2024); Fla. Bar Bd. Rev. Comm. on Pro. Ethics, Op. 24-1 (2024); D.C. Bar Ethics Op. 388 (April 2024); N.J. STATE BAR ASS’N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS (2024), <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>; N.Y. STATE BAR ASS’N, REPORT & RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ARTIFICIAL INTELLIGENCE (2024), [https://www.nycbar.org/wp-content/uploads/2024/06/20221290\\_AI\\_NYS\\_Judiciary.pdf](https://www.nycbar.org/wp-content/uploads/2024/06/20221290_AI_NYS_Judiciary.pdf). (All websites last accessed on Aug. 5, 2024).

<sup>2</sup> In general, this Opinion is consistent with the ABA, California Bar, Florida Bar, District of Columbia Bar, and New Jersey Bar opinions cited in Footnote 1. However, the New York State Bar suggests adoption of certain rules to address Generative AI, which we believe is premature because of the rapid pace of technological development and change. See, e.g., N.Y. STATE BAR ASS’N, *supra*, at 53–56.

<sup>3</sup> Generative AI systems that share inputted information with third parties are sometimes called “open” systems.

<sup>4</sup> California Guidance at 2.

<sup>5</sup> Lawyers may wish to obtain advance client consent to use Generative AI that will involve sharing of client information, but, because such consent must be knowing, the client must understand the potential consequences of such information-sharing for the consent to be effective. See N.Y. State Op. 1020 ¶ 10 (a lawyer “may post and share documents using a ‘cloud’ data storage tool” that does not provide “reasonable protection to confidential client information” only where “the lawyer obtains informed consent from the client after advising the client of the relevant risks”).

<sup>6</sup> *Id.*



	<p>systems, do not present these risks. But a lawyer must not input any confidential information of the client into any Generative AI system that lacks adequate confidentiality and security protections, regardless of whether the system uses or shares inputted information, unless the client has given informed consent to the lawyer’s doing so. Even with closed systems, a lawyer must take care that confidential information is not improperly shared with other persons at or clients of the same law firm, including persons who are prohibited access to the information because of an ethical wall.<sup>7</sup></p> <p>A lawyer or law firm<sup>8</sup> should “consult with IT professionals or cybersecurity experts to the extent necessary for the lawyer or law firm to ensure that any Generative AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.”<sup>9</sup></p> <p>A lawyer should review the system’s Terms of Use. “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 use the information for its own use in any manner, including to train or improve its product,” again without informed client consent.<sup>10</sup> Terms of Use can change frequently and a lawyer’s obligation to understand the system’s use of inputs is continuing. Accordingly, lawyers should periodically monitor Terms of Use or other information to learn about any changes that might compromise confidential information.<sup>11</sup></p> <p>A law firm may wish to consider implementing policies and control procedures to regulate the use of confidential client information in Generative AI systems if the law firm is going to make use of such systems.</p>
<p><b>Conflicts of Interest</b></p>	<p>Where a Generative AI system uses client information, a law firm must ensure that the system implements any ethical screens required under the Rules. For example, if an ethical</p>

<sup>7</sup> See Am. Bar Ass’n, Formal Op. 512 at 6-7 (2024).

<sup>8</sup> Consistent with Rule 1.0(h), in this Opinion “law firm” includes a private firm as well as qualified legal assistance organizations, government law offices and corporations, and other entities’ legal departments.

<sup>9</sup> California Guidance at 2.

<sup>10</sup> *Id.*

<sup>11</sup> See N.Y. STATE BAR ASS’N, *supra*, at 58.

<p>Rule 1.7; Rule 1.8; Rule 1.9; Rule 1.10; Rule 1.11; Rule 1.12</p>	<p>screen excludes a lawyer from any information or documents with respect to a client, the lawyer must be not exposed to such information or documents through the law firm’s Generative AI systems.</p>
<p><b>Duties of Competence and Diligence</b></p> <p>Rule 1.1; Rule 1.3</p>	<p>A lawyer should be aware that currently Generative AI outputs may include historical information that is false, inaccurate, or biased.</p> <p>“A lawyer must ensure the competent use of technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.”<sup>12</sup></p> <p>“Before selecting and using a Generative AI tool, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable [T]erms of [U]se and other policies governing the use and exploitation of client data by the product.”<sup>13</sup> A lawyer may wish to consider acquiring skills through a continuing legal education course. Consultation with IT professionals or cybersecurity experts may be appropriate as well.</p> <p>Generative AI outputs may be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must ensure that the input is correct and then critically review, validate, and correct 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 [Generative AI] outputs.”<sup>14</sup></p> <p>The use of Generative AI tools without the application of trained judgment by a lawyer is inconsistent with the competent and diligent practice of law. “A lawyer’s professional judgment cannot be delegated to [G]enerative AI and remains the lawyer’s responsibility at all times. A lawyer should take steps to avoid overreliance on Generative AI to such a degree that it hinders critical attorney analysis</p>

<sup>12</sup> California Guidance at 2. There have been claims that certain Generative AI tools violate intellectual property rights of third parties. A lawyer planning to use a Generative AI tool should keep abreast of whether there are any such risks associated with the tool the lawyer plans to use.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3.

	fostered by traditional research and writing. For example, a lawyer must supplement any Generative AI-generated research with human-performed research and supplement any Generative AI-generated argument with critical, human-performed analysis and review of authorities.” <sup>15</sup>
<b>Advertising and Solicitation</b> Rule 7.1; Rule 7.3	Lawyers must not use Generative AI in a way that would circumvent their responsibilities under the Rules regarding marketing and solicitation. For example, a lawyer must not use Generative AI to make false statements, to search the internet for potential clients and send solicitations that would otherwise be prohibited under the Rules, or to pose as a real person to communicate with prospective clients.
<b>Duty to Comply with the Law</b> Rule 8.4; Rule 1.2(d)	“There are many relevant and applicable legal issues surrounding [G]enerative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns.” <sup>16</sup> A lawyer must comply with the law and cannot counsel a client to engage in, 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.
<b>Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers</b> Rule 5.1; Rule 5.2; Rule 5.3; Rule 8.4	“Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of [G]enerative AI and make reasonable efforts to ensure that the law firm adopts measures that give reasonable assurance that the law firm’s lawyers and non-lawyers’ conduct complies with their professional obligations when using [G]enerative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of [G]enerative 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.” <sup>17</sup> A subordinate lawyer should disclose to a supervisory lawyer the use of Generative AI that is not generally understood to be routinely used by lawyers. <sup>18</sup>

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Likewise, where a client provides citations to a lawyer, a lawyer must review the decisions to make sure that they are genuine and properly cited. *See United States v. Cohen*, No. 18-CR-602, 2024 WL 1193604 (S.D.N.Y. Mar. 20,

	<p>A lawyer using a Generative AI chatbot for client intake purposes must adequately supervise the chatbot.<sup>19</sup> A high degree of supervision may be required if there is a likelihood that ethical problems may arise. For example, a chatbot may fail to disclose that it is not a lawyer or may attempt or appear to provide legal advice, increasing the risk that a prospective client relationship or a lawyer–client relationship could be created.</p>
<p><b>Communication Regarding Generative AI Use</b> Rule 1.4; Rule 1.2</p>	<p>“A lawyer should evaluate ... communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with [G]enerative AI use, scope of the representation, and sophistication of the client.”<sup>20</sup></p> <p>A lawyer should consider disclosing to the client the intent to use Generative AI that is not generally understood to be routinely used by lawyers as part of the representation,<sup>21</sup> particularly as part of an explanation of the lawyer’s fees and disbursements. The disclosure will depend on circumstances including how the technology will be used, and the benefits and risks of such use. A lawyer should obtain client consent for Generative AI use if client confidences will be disclosed in connection with the use of Generative AI.</p> <p>A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of Generative AI. We note that, because Generative AI currently is used routinely by lawyers, when a lawyer receives a request from a client that Generative AI not be used at all, the lawyer should consider discussing the request with the client before agreeing to it.</p>

2024) (criticizing an attorney-defendant and his counsel for citing “three cases that do not exist” where client provided citations hallucinated by Google Bard and counsel failed to check them).

<sup>19</sup> See Fla. Bar Bd. Rev. Comm. on Pro. Ethics, *supra* (section on Oversight of Generative AI).

<sup>20</sup> California Guidance at 4.

<sup>21</sup> Note that some Generative AI is routinely used. For example, Microsoft Word employs Generative AI in its auto-complete and grammar check functions. Westlaw, Lexis, and search engines also employ Generative AI. We do not mean to suggest that an attorney needs to disclose such uses of Generative AI. For a discussion of the importance of evaluating Generative AI tools based on intended users, see N.J. STATE BAR ASS’N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS 15–19 (2024) (discussing “AI Tools Intended for the Public” and “Tools Tailored for Legal Professionals”), <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>.

<p><b>Candor to the Tribunal; and Meritorious Claims and Contentions</b></p> <p>Rule 1.2(c); Rule 3.1; Rule 3.3; Rule 1.16</p>	<p>A lawyer should recognize the risks posed by Generative AI-generated content. Generative AI tools can, and do, fabricate or “hallucinate” precedent.”<sup>22</sup> They can also create “deepfakes”—media that appear to reflect actual events but are actually doctored or manufactured.</p> <p>“A lawyer must review all [G]enerative AI outputs,” including but not limited to “analysis and citations to authority,” for accuracy before use for client purposes and submission to a court or other tribunal.<sup>23</sup> If the lawyer suspects that a client may have provided the lawyer with Generative AI-generated evidence, a lawyer may have a duty to inquire.<sup>24</sup> A lawyer must correct any errors or misleading statements made to adversaries, the public, or the court.<sup>25</sup></p> <p>“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 [G]enerative AI.”<sup>26</sup></p>
<p><b>Charging for Work Produced by Generative AI and Generative AI Costs</b></p> <p>Rule 1.5</p>	<p>“A lawyer may use [G]enerative AI to more efficiently create work product and may charge for actual time spent (<i>e.g.</i>, crafting or refining [G]enerative AI inputs and prompts, or reviewing and editing [G]enerative AI outputs).”<sup>27</sup> A lawyer must not charge hourly fees for the time that would otherwise have been spent absent the use of Generative AI.<sup>28</sup> Lawyers may wish to consider</p>

<sup>22</sup> A Stanford University study found that Generative AI chatbots from OpenAI, Inc., Google LLC, and Meta Platforms Inc. hallucinate “at least 75% of the time when answering questions about a court’s core ruling.” Isabel Gottlieb & Isaiah Poritz, *Popular AI Chatbots Found to Give Error-Ridden Legal Answers*, Bloomberg L. (Jan. 12, 2024), <https://news.bloomberglaw.com/business-and-practice/legal-errors-by-top-ai-models-alarmpingly-prevalent-study-says>. Courts are already grappling with parties’ citation to hallucinated precedents. *See generally Mata v. Avianca, Inc.*, No. 22-CV-1461, 2023 WL 4114964 (S.D.N.Y. June 22, 2023) (sanctioning attorneys for “submit[ing] non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT”); *Cohen*, 2024 WL 1193604; *see also* D.C. Bar, Ethics Op. 388 (2024) (discussing the dangers of hallucinations).

<sup>23</sup> California Guidance at 4.

<sup>24</sup> *See* N.Y. City Op. 2018-4 (discussing a lawyer’s duty to inquire when asked to assist in a transaction that the lawyer suspects may involve a crime or fraud); *see also* ABA Op. 491 (2020); Colo. Bar Ass’n Ethics Comm., Formal Op. 142 (2021). These same standards apply when a lawyer suspects that a client may have given the lawyer fabricated evidence.

<sup>25</sup> *See* Rule 3.3.

<sup>26</sup> California Guidance at 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

	<p>developing alternative fee arrangements relating to the value of their work rather than time spent.</p> <p>Costs associated with Generative AI should be disclosed in advance to clients as required by Rule 1.5(b). The costs charged should be consistent with ethical guidance on disbursements and should comply with applicable law.<sup>29</sup></p> <p>A lawyer may wish to consider appropriate use of Generative AI tools to minimize client cost as the use of Generative AI becomes more widespread.</p>
<p><b>Prohibition on Discrimination</b></p> <p>Rule 8.4</p>	<p>“Some [G]enerative AI is trained on biased [historical] information, and a lawyer should be aware of possible biases and the risks they may create when using [G]enerative AI (<i>e.g.</i>, to screen potential clients or employees).”<sup>30</sup></p>

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<sup>29</sup> See ABA Op. 93-379 (1993).

<sup>30</sup> California Guidance at 4.

## **NJSBA 2025 Family Law Retreat**

**Los Cabos, Mexico**

### **Ethics from the Movies**

#### **Master of Ceremonies (MC – played by Mike Saponara):**

Welcome to Cabo 2025 and ethics, and what we can learn about ethics from the movies.

Three illustrations for Ethics from the Movies: It's a Wonderful Life, the Wizard of Oz and The Godfather.

#### **It's a Wonderful Life**

Let's set our first movie scene from "It's a Wonderful Life", we're going to talk about the beautiful little town of Belford, New Jersey. Belford, New Jersey is one of the most idyllic towns in all of America. It has one unfortunate person living in that town, and that is Amanda Potter. Amanda Potter is a billionaire. She is an heiress and has grown her family fortune countless sums. She is obsessed with music from the 1920s. She insists that the high school only play music from the 1920s and older. For example, school dances must always play the "Charleston" on a loop and the students must sing "Buffalo Gal" every morning when they wake up. It's in this world where the Baileys exist. The Baileys had started out as a young family building an empire of their own because they had invested in cryptocurrency when no one else was. The star of the family is one of the brothers who singlehandedly freed 5 hostages. And so, the family is well acclaimed. The Baileys are definitely riding high. Well, we now come to a scene where Amanda Potter is there with her chauffeur. Oddly enough, the chauffeur's name is never known. She is only referred to as chauffeur. Let's drop in on a scene where we see Amanda Potter,

played by Amanda Trigg, her Chauffeur played by Francesca O’Cathain and Amanda Potter’s counsel, Violet Bick, played by Carolyn Daly. By the way, Violet was in the world’s oldest profession at night but then changed her profession after attending law school during the day.

**Amanda Potter:**

Chauffeur! Come here! (**with magisterial grandeur**).

**Chauffeur:**

Yes Boss (**with servants’ fervor**)

**Amanda Potter:**

Chauffeur, I am so tired of hearing about the Baileys and their successes and crypto and saving the world from hostage taking and I’ve had it with them. That Uncle Billy - George Bailey’s forgetful and absent-minded Uncle - coming around to my place, flaunting the successes of the family; he could not stop bragging; What a piece I work.

You know what? When I saw him at the Country Club, he dropped a flash drive on my lap, here take this Chauffeur and see what is on this flash drive.

**Chauffeur:**

I will boss.

**MC:**

Time has passed and the beleaguered Chauffeur returns.

**Chauffeur:**



Boss you will not believe what is on this flash drive; it's the crypto wallet for the whole entire Bailey empire. It's worth billions. In fact, it would make them worth more than you; this is worth a fortune.

**Amanda Potter:**

Be gone. Give it to me and wash my Bentley.

**Chauffer:**

Yes boss, mumbling under her breath I just washed it. Talking to herself I will get back at you Ms. Potter (**raises fist in the air**).

**MC:**

Scene change Amanda Potter is visited by her attorney, Violet Bick.

**Amanda Potter:**

Bick I never mentioned this to you, but I have been investing in crypto, here is a flash drive of my crypto wallet, open up a trust in the Cayman Islands and this is to be kept top secret. I don't want people to realize how filthy rich I am.

**Violet Bick:**

Ms. Potter of course I can do that (**with know-it-all attitude**), but I am fascinated that you have invested in crypto after you have preached to me for years that the only thing worth anything is a brick-and-mortar business, (**and then yell –**) Tradition! (**with both hands raised over the head like Tevye**).

**Amanda Potter:**

Bick that's what I like about you always asking the extra question, but what you need to know is you are my attorney, and you do what I say, now do what I tell you.

**MC:**

Meanwhile, the chauffeur was very disgruntled by all this and had posted something online, talking about the eccentricities of her boss, the crazy 1920s lady billionaire who apparently has stolen someone's crypto wallet and has given nothing to me.

The attorney, Bick, unaware of the chauffeur's posting, puts a posting of her own on a legal group chat site and questioning folks about what to do when you suspect a client has stolen a crypto wallet and wants you to create a trust in the Cayman Islands.

Meanwhile the Bailey's have gone to the press asking for the stolen flash drive to be returned especially considering all they have done for the community and the world.

**For Panel discussion:**

What is appropriate for a legal chat group, especially when facts are in the public forum that can be linked with some imagination back to your client?

What are attorneys' ethical responsibilities if their client may be asking them to do something illegal, i.e., stealing?

**MC:**

**The Wizard of Oz**

The part of Dorothy will be played by Sheryl Seiden, the part of the Wizard is played by Judge Jodi Rosenberg, and the part of the Scarecrow will be played by Jeralyn Lawrence.

Unlike any Wizard of Oz you've ever seen, this Land of Oz is in the world of Newark, New Jersey. Newark, New Jersey, where a young girl, Dorothy was abandoned by her family, they all ran to the tornado shelter, left her out to die, clearly a victim of child

abuse. She then went to law school where she suffered law student abuse, and is working now for the Scarecrow, where she suffers from law associate abuse. Due to all this abuse, Dorothy decides to have a day at the spa while her boss is being restuffed.

We're going to drop in now where Dorothy is at the spa with the Wizard. By the way, Dorothy has never been into the courtroom since she is a young attorney; also, the Wizard keeps a low profile and often hides behind drapes. Dorothy speaks to the attendant and the other patrons of the spa.

**Dorothy:**

My life is a mess (**over the top dramatic acting**) all I can think about sometimes is that horrible day when the tornado hit and my family left me out of the storm shelter. I bury myself in work, but my boss is taking advantage of me.

**MC:**

The Wizard is there enjoying the spa (**the Wizard should make frustrated facial gestures**) while Dorothy becomes a nuisance as she continues to tell this story, and she goes on and on and on. Dorothy has no idea who the Wizard is and goes on and on and on about her boss.

**Dorothy:**

I am so overwhelmed at work I really need this spa treatment; I use AI for all my work and typically make a mental note to go back and check the cites but I rarely have time. But I am sure my boss checks my work given her reputation.

**MC:**

The Wizard simply takes in the information and makes no comment (**Wizard should make knowing Facial gestures**). Frankly, she's over people talking outside of shop and

is just enjoying her day at the spa. A few weeks go by and the Scarecrow, Dorothy and the Wizard are in a courtroom. This is what happens that day.

**Wizard:**

Ms. Scarecrow, I see you have cited a NJ case of the Munchkins for the proposition that your client is entitled to a disproportionate share of the marital estate due to being height challenged, do you realize that is not a case in New Jersey but is a case from Munchkin Land, yet you cite it as a NJ case.

**Scarecrow:**

Your honor that is an oversight by my firm (**with great confidence**).

**Wizard:**

Ms. Scarecrow I find your comment regrettable, you signed the brief, yet you are attempting to blame your firm.

**Scarecrow:**

Your Honor, I specifically told my associate to check the cites (**with indignation turns to Dorothy who mouths I am so sorry boss**).

**Wizard:**

I have direct knowledge that you and your firm are using AI (**Scarecrow mouths what is AI**) and you are not checking the source material. I'm holding you and Ms. Dorothy as culpable and reporting you to the Wizard's panel of ethical review (**with self-righteous rebuke**).

**MC:**

**For Panel Discussion**

What is an attorney's responsibility when using AI? (See attached guidelines).

What is an attorney's responsibility when speaking in a public setting?

Is it reasonable for a lead attorney to rely on the work of an associate?

If an ethics charge is made when should an attorney hire an attorney? Does it matter if it is a random audit?

**MC:**

### **The Godfather**

Next, we move on to the Godfather. The Godfather's attorney (for both Godfathers), Tina Hagen, is played by Jerylyn Lawrence, Mama Corleone (Vito's wife) is played by Carolyn Daly, and Kay Adams (Michael's wife) is played by Franchesca O'Caththian. Given the families' business both Mama Carleone and Kay have had it and file for divorce. Tina asks for a sit down with Mama Carleone and Kay along with their attorneys and makes them an offer they can't refuse. Both Mama and Kay don't listen to their attorneys and directly engage with Tina.

**Tina:**

Mama Corleone and Kay, my clients have great respect for you both as the women who gave birth to their children (**act like the Godfather**) and offer you the following to end your respective marriages. Mama Corleone my client would like to know how you would like to (**dramatic pause**) die, he is very religious and could not possibly get a divorce; however, you will have a beautiful grave, and generations of the family will fondly

remember you. Kay you can have the divorce and lavish alimony, but **(long pause)** the kid stays with my client, and you will never see the child again.

**Mama Carleone:** (MC: despite her attorney telling her to be quiet, says)

Tina this is a big misunderstanding I still love Vito **(over the top hand waving and some crying)** and, and, and, **(holding back tears)** would never leave him I just would like a bank account in my own name, and to sometimes wear a dress that is not black, and I will withdrawal the divorce complaint.

**Tina:**

Mama, I suspect your suggestion is too late, but I will take it to my client.

**Mama:**

Thank you, thank you, thank you **(dramatic groveling)** Tina you are too kind.

**Tina:**

Kay what about you do you accept the offer.

**Kay:** (MC: despite her attorney telling her to be quiet Kay says:)

Wake up Tina **(very belligerently)** this isn't the 1950s I have rights, and I need to share custody with Michael, and I know also who he is, and I will tell the court.

**Tina:**

No **(with aggression)**, you wake up Kay, you wore the furs, you had the servants, you lived the high life you have just as much a risk going to court as my client. You are no innocent spouse.

**Kay:**

Tina you are a monster, and you work for a monster, I will see you in court.

**MC:** The showdown ends, and no one knows for sure what happens next.

**Panel discussion:**

What is an attorney's responsibility when their client makes unreasonable demands?  
Should they make the demand?

When does religious demands cross the line into illegal behavior and coercion? And is it appropriate for an attorney to participate in the demands based on religious beliefs?

Is the threat of exposing criminal activity ever appropriate? What about exposing that someone is not an innocent spouse?

# Attorney Ethics Random Audit Compliance Program

By Francesca O’Cathain

## The Three Stated Goals of the Audit:

1. Education
2. Deterrence
3. Detection of Misappropriation

## How Do They Pick Your Firm?

- Random computer-generated selection
- Approximately 5,400 law firms in New Jersey

## How Much Time Do You Have?

- 10 day notice. Usually one auditor for a regular sized firm. An attorney is expected to be present.

## What to Expect?

1. An initial interview about the firm’s book-keeping procedures.
2. Auditor reviews the trust and business accounts.
3. Auditor verifies that all trust account funds are safeguarded.

## What Happens After?

- Closing letter if everything is compliant
- If there are deficiencies:
  - o Minor: Letter that requires corrective action and the attorney has 45 days to demonstrate compliance.
  - o Major: Referral to the OAE



## **Requirements of R 1:21-6 – The Record Keeping Requirement**

Every law firm will have at least two bank accounts. Separate accounts are required for the following:

- Trust Account i.e. funds entrusted to the attorney's care to be deposited. Examples include settlement funds from a personal injury case or money held in a matrimonial case.
- IOLTA Trust Account i.e. interest earned on the trust account funds
- Business Account i.e. for professional services to be deposited
- Fiduciary Account e.g. maintained when the lawyer is an executor, guardian, trustee, receiver etc.

### **Trust Account**

#### **Basics:**

- All accounts/slips/checks designated "Attorney Trust Account"
- Only New Jersey attorneys can be signatories

#### **The Bank:**

- Must be with a bank approved by the Supreme Court
- Bank agrees to report to the OAE if that account has insufficient funds

#### **Legal Fee from Trust Account:**

- If the money in the trust account includes the legal fee owed to the lawyer, the lawyer can withdraw that money unless the client disputes the fee. In that case, it must remain in the trust account until the dispute is resolved.
- Retainers do not need to be kept in a trust account unless there is an explicit understanding with the client to keep them there.
- Do not electronically transfer your legal fee from the trust account

#### **No Commingling:**

- The attorney can put a minimal amount of money in the trust account to pay service charges. \$250 is the suggested amount. This is not considered commingling. Be sure to maintain a trust ledger for these funds.

#### **Monthly Reconciliations:**

- The balances in the Trust Ledger Book must be reconciled every month with the balances in the Trust Receipts Journal and Trust Disbursements Journal. Must be able to show compliance with this.

#### Electronic Transfers:

- No electronic transfers from this account to your business account – even if it is your legal fee
- Trust Account electronic transfers must be made on signed written instructions from an attorney to the bank
- The bank must provide the attorney with a document that confirms an electronic transfer

#### Trust Account Book-Keeping:

- Basic Trust Accounting System Consists of the Following:
  - o Trust Account Checkbook
  - o Trust Receipts Journal – records all deposits/credits to the trust account
  - o Trust Disbursement Journal – records all withdrawals/debits from the trust account
  - o Trust Ledger Book
    - The Trust Ledger Book must have a single page for each separate client
    - Must have a running balance of funds held for each client

The Receipts/Disbursements Journals are known as the basic books. The Ledger Books are known as the secondary books. After entries are first made in the Journals, they are then made in the Ledger Books.

- Three Way Monthly Reconciliation
  - o Step 1: Obtain “Book Balance”
    - Add up the Total Receipts Journal for the month
    - Add up the Total Disbursements Journal for the month
    - Put those totals in the “Control Sheet”
    - Get the “Book Balance” by putting in last month’s balance
    - Put these numbers in the “Reconciliation Sheet”
  - o Step 2: Obtain “Reconciled Bank Balance”
    - Put in last month’s ending balance

- Add deposits in transit
  - Subtract outstanding checks
  - The totals should be the same as the “Book Balance”
- Step 3: Obtain “Client Trust Ledger”
  - Get all open balances from the Client Trust Ledger
  - Total should be the same as Step 1 and Step 2
- Maintain current status and retain the following for 7 years
  - All deposits/withdrawals
  - Ledger books
  - Retainers and Compensation agreements
  - Statements to clients re disbursements of funds on their behalf
  - Bills to clients
  - Payments to non-employees for services
  - Originals of checkbooks
  - Proof of monthly reconciliations.
  - Any part of the clients’ file needed to understand financial transactions

Mistakes that Can Become Problems:

- All funds in the Trust account must be identifiable. An overage makes no sense and needs to be investigated. A shortage indicates a real problem and needs to be investigated because that is a potential sign of misappropriation.
- Do not open separate trust accounts for each client. With all trust money in one trust account, the client ledger card becomes very important because it will avoid the mistake of using one client’s money for another client.

Left Over Money in the Trust Account

- Designated as unidentifiable and unclaimed if there for more than 2 years
- If can’t locate after another year of diligent search, paid to the Clerk of the Superior Court with an Affidavit of Diligent Search

Other:

- There is a duty to pay promptly i.e. don’t leave money sitting in the trust account
- No ATM for this account

- Withdrawals cannot be made to “cash”
- Maintain records for 7 years

### **IOLTA – Interest on Lawyer’s Trust Account**

- An attorney cannot receive interest on trust accounts.
- Account designated “IOLTA Attorney Trust Account”
- Any bank approved by the Supreme Court to hold a trust account must offer an IOLTA account
- An attorney can open a separate interest bearing account for an individual so long as it complies with the Rules. This is rarely done because it is not necessary and not worth the potential pitfalls.

### **Business Account**

- All accounts/slips/checks designated “Attorney Business Account”, “Attorney Professional Account”, or “Attorney Office Account”
- Signatory does not have to be an attorney but probably should be e.g. can be a non-attorney office manager
- Does not have to be Supreme Court approved bank but needs to have a New Jersey branch
- Can have more than 1 business account
- Remember to never put client funds in this account
- Legal fees received must go into this account
- Payroll and business expenses can be paid from this account
- Can accumulate interest that the attorney can retain
- No Monthly Reconciliation Required
- Must maintain the following:
  - o Receipts Journal
  - o Disbursements Journal
  - o Checkbook with Running Balance
  - o Imaged Checks – No More than Two Per Page Front and Back

- Deposit Slips

## **Non-Compliance**

- Violation of
  - R.P.C. 1.15(d) and/or R.P.C. 8.1(b)

## **Conclusion:**

- Show them the money
  - Your money
  - The client's money
  - And the IOLTA money



New Jersey Courts

Independence • Integrity • Fairness • Quality Service

# Legal Ethics & Artificial Intelligence: Guidance for New Jersey Lawyers

July 24, 2024

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# Panelists

- Johanna Barba Jones, Esq., Director of the Office of Attorney Ethics
- Laks Kattalai, CIO, NJ Judiciary
- Jessica Lewis Kelly, Esq., Special Assistant to the Administrative Director
- Ryan J. Moriarty, Esq., Assistant Ethics Counsel, Office of Attorney Ethics

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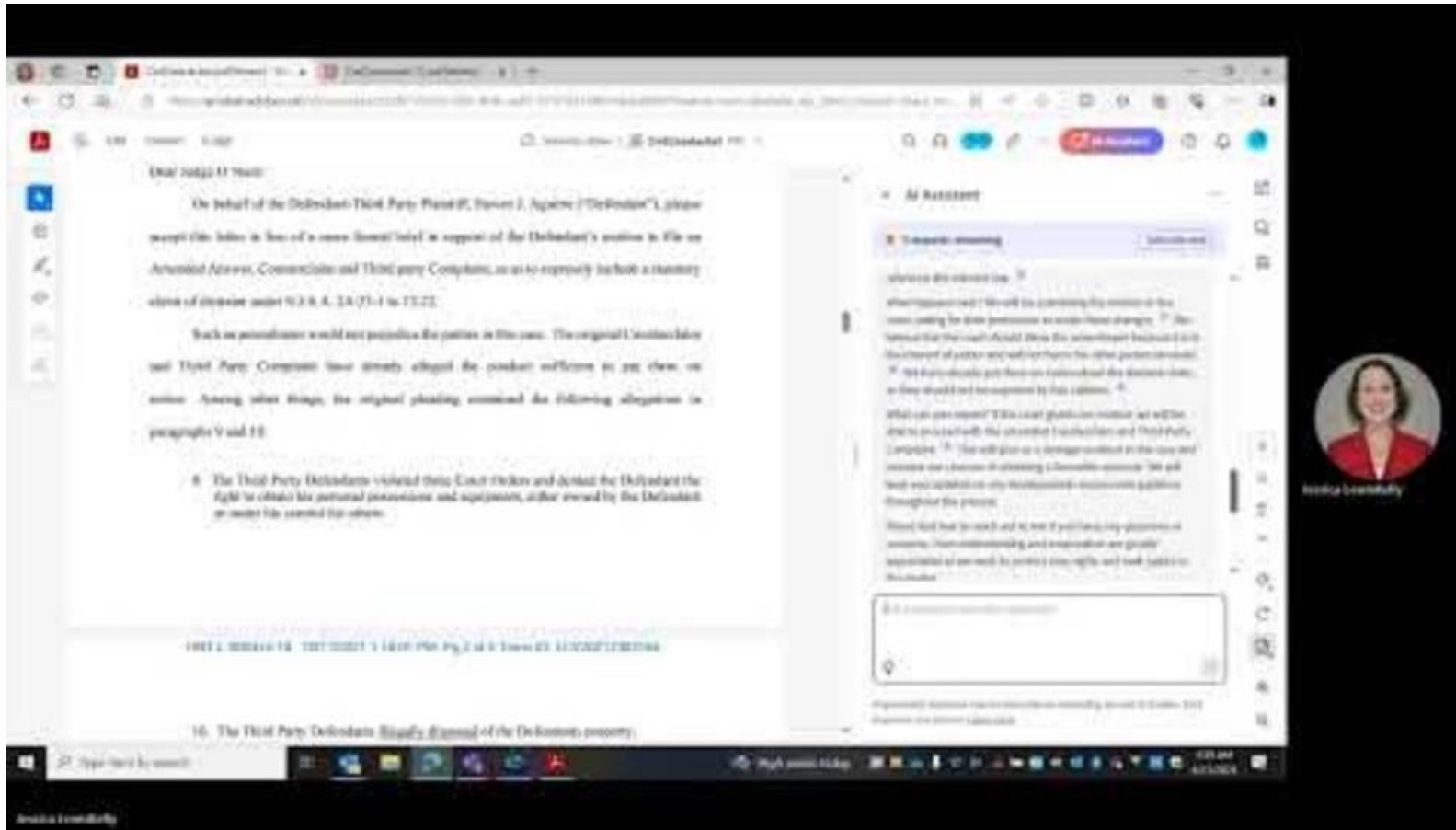
# Overview

- AI Terms & Concepts
- Uses of AI in the Law
- NJ Supreme Court Guidance on AI Use by Lawyers
- AI Ethics: Examples & Discussion



# Use of GAI by Attorneys

This [video](#) shows how the Adobe AI assistant can review public (non-confidential) pleadings in eCourts, draft an email to the client, then translate the email into Spanish.



Dear Judge O'Neill:

On behalf of the Defendant-Third Party Plaintiff, Steven J. Aguirre ("Defendant"), please accept this letter in lieu of a more formal brief in support of the Defendant's motion to file an Amended Answer, Counterclaim and Third party Complaint, so as to expressly include a statutory claim of distraint under N.J.S.A. 2A:33-1 to 33-23.

Such an amendment would not prejudice the parties in this case. The original Counterclaim and Third Party Complaint have already alleged the conduct sufficient to put them on notice. Among other things, the original pleading contained the following allegations in paragraphs 9 and 10:

9. The Third Party Defendants violated three Court Orders and denied the Defendant the right to obtain his personal possessions and equipment, either owned by the Defendant or under his control for others.

HNT-L-000414-18 10/11/2021 1:18:01 PM Pg 2 of 5 Trans ID: LCV20212363164

**AI Assistant**

Unlock full access to AI Assistant [Subscribe now](#)

Reframe this email to be from the lawyer to the client, explaining the motion and what is being requested. Write at a 7th grade level.

Subject: Important Update: Motion for Leave to File an Amended Answer, Counterclaim, and Third Party Complaint <sup>1</sup>

Dear [Client's Name],

I hope this email finds you well. I wanted to provide you with an important update regarding your case against Investor's Holding Fund, LLC. <sup>2</sup> We are preparing to file a motion on your behalf, seeking permission from the court to amend your Answer, Counterclaim, and Third Party Complaint. <sup>3</sup>

What does this mean? Well, an amendment is like making changes or additions to your original response to the lawsuit. <sup>4</sup> In this case, we want to include a new claim called "distrain" under a specific New Jersey law. This claim relates to the unlawful taking or disposal of your personal property by the Plaintiff and Third Party

Ask a question about this document

AI-generated responses may be inaccurate or misleading. Be sure to double-check responses and sources. [Learn more](#)

Dear Judge O'Neill:

On behalf of the Defendant-Third Party Plaintiff, Steven J. Aguirre ("Defendant"), please accept this letter in lieu of a more formal brief in support of the Defendant's motion to file an Amended Answer, Counterclaim and Third party Complaint, so as to expressly include a statutory claim of distraint under N.J.S.A. 2A:33-1 to 33-23.

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- 9. The Third Party Defendants violated three Court Orders and denied the Defendant the right to obtain his personal possessions and equipment, either owned by the Defendant or under his control for others.

**AI Assistant**

3 requests remaining [Subscribe now](#)

Translate the above email into Spanish. Include a statement at the beginning that the translation is being done with technology to save time so it might not be perfect.

Subject: Actualización Importante: Solicitud de Permiso para Presentar una Respuesta Enmendada, Contrademanda y Demanda de Terceros

Estimado/a [Nombre del Cliente],

Espero que este correo electrónico le encuentre bien. Quería brindarle una actualización importante sobre su caso contra Investor's Holding Fund, LLC. Nos estamos preparando para presentar una solicitud en su nombre, buscando permiso del tribunal para enmendar su Respuesta, Contrademanda y Demanda de Terceros.

Quiero mencionar que esta traducción se está realizando con tecnología para ahorrar tiempo, por lo que puede que no sea



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# Use of GAI by Attorneys

This [video](#) shows how ChatGPT4o voice mode can be used to practice an oral Q&A (with the example being the Rules Hearing before the New Jersey Supreme Court).



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# Artificial Intelligence (AI) & Generative Artificial Intelligence (GAI) Terms & Concepts

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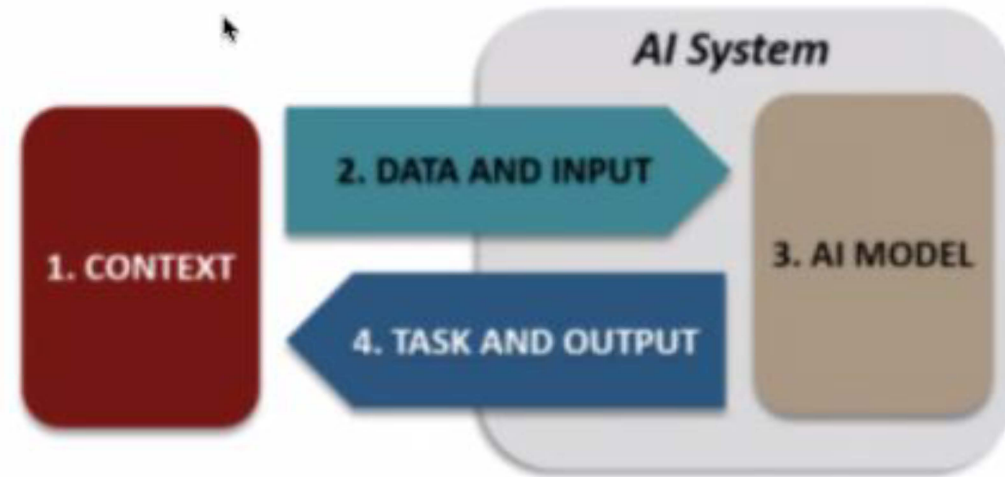
# Terms & Concepts

- **Artificial Intelligence** includes an array of technologies that perform functions based on simple, rule-based systems to complex, self-learning algorithms. Examples include recommendations of products or services based on prior use history (e.g., Netflix or Amazon).
- **Generative AI** (Gen AI or GAI) refers to Large Language Models (LLM) that generate text, images, and other content based on review of prior information in the dataset.

## — Components of AI Systems & Stages of the AI Lifecycle

An **AI system** is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that [can] influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.

- OECD, 2023



Plan & design

Collect & process data

Build & use model

Verify & validate

Deploy

Operate and monitor

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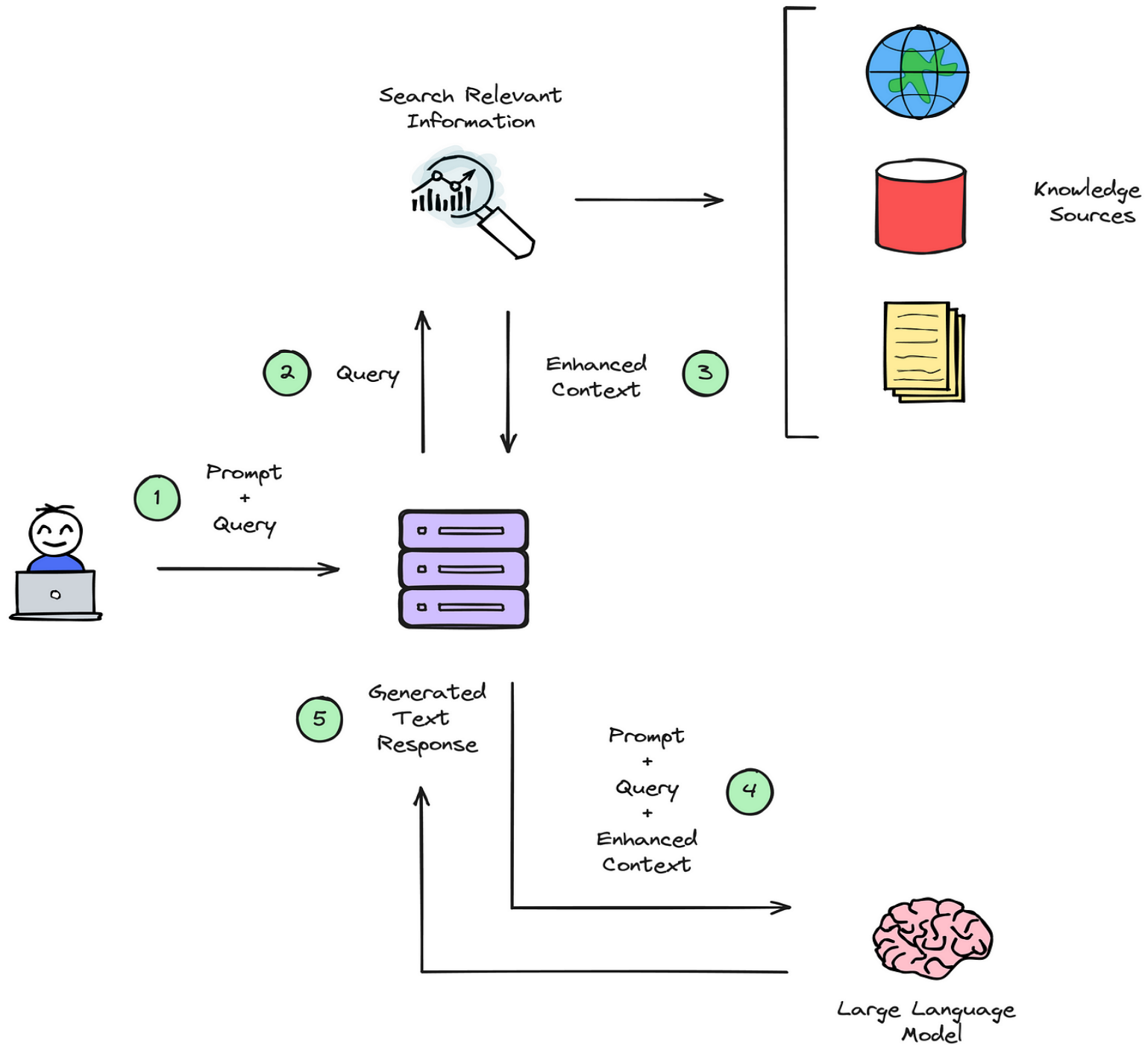
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# Terms & Concepts

- **Hallucinations (or confabulations)** refer to instances in which an AI model generates content that is incorrect or nonsensical due to limitations in the model's understanding, biases in the dataset, or errors in the processing pipeline.
- **Retrieval Augmented Generation (RAG)** involves forcing the AI to develop answers based on real datasets as opposed to open, contradictory datasets. This method can prevent hallucinations.



# Retrieval Augmented Generation



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# Terms & Concepts

- **Transparency:** the openness of an AI system, meaning the extent to which its design, data, and decision-making operations are made known to stakeholders
- **Explainability:** the ability of an AI system to provide understandable reasons for its decisions/outputs

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# Terms & Concepts

- **Interpretability:** the capacity to discern the data points and logic that led to an AI system's decision (e.g., high interpretability means that the internal mechanisms of an AI system can be meaningfully analyzed and related to its outputs)
- Transparency + Explainability + Interpretability → more trustworthy AI

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# Uses of AI in the Law

# GAI Benefits



- Enhanced efficiency and productivity
- Improved risk assessment and decision-making
- Cost savings and resource optimization
- Task automation and workflow improvement

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# GAI Risks

- Data privacy and security
- Ethical considerations and biases
- Inaccuracies and reliability concerns
- Intellectual property issues
- Job displacement/evolution and industry adjustments
- Dependency and loss of critical thinking
- Overall regulation and enforcement



# Current Uses of GAI for Legal Tasks

- **Document review / litigation support**
  - eDiscovery, deposition summarization, review and analysis
- **Contract review**
  - Summary of key terms, conflicting clauses, policy compliance



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# Current Uses of GAI for Legal Tasks

- **Drafting**
  - First responses, motions, contracts
- **Knowledge Management**
  - Templates and form databases
  - Resource organization and retrieval
- **Research**
  - Non-hallucinating legal resources: CaseText, Reuters



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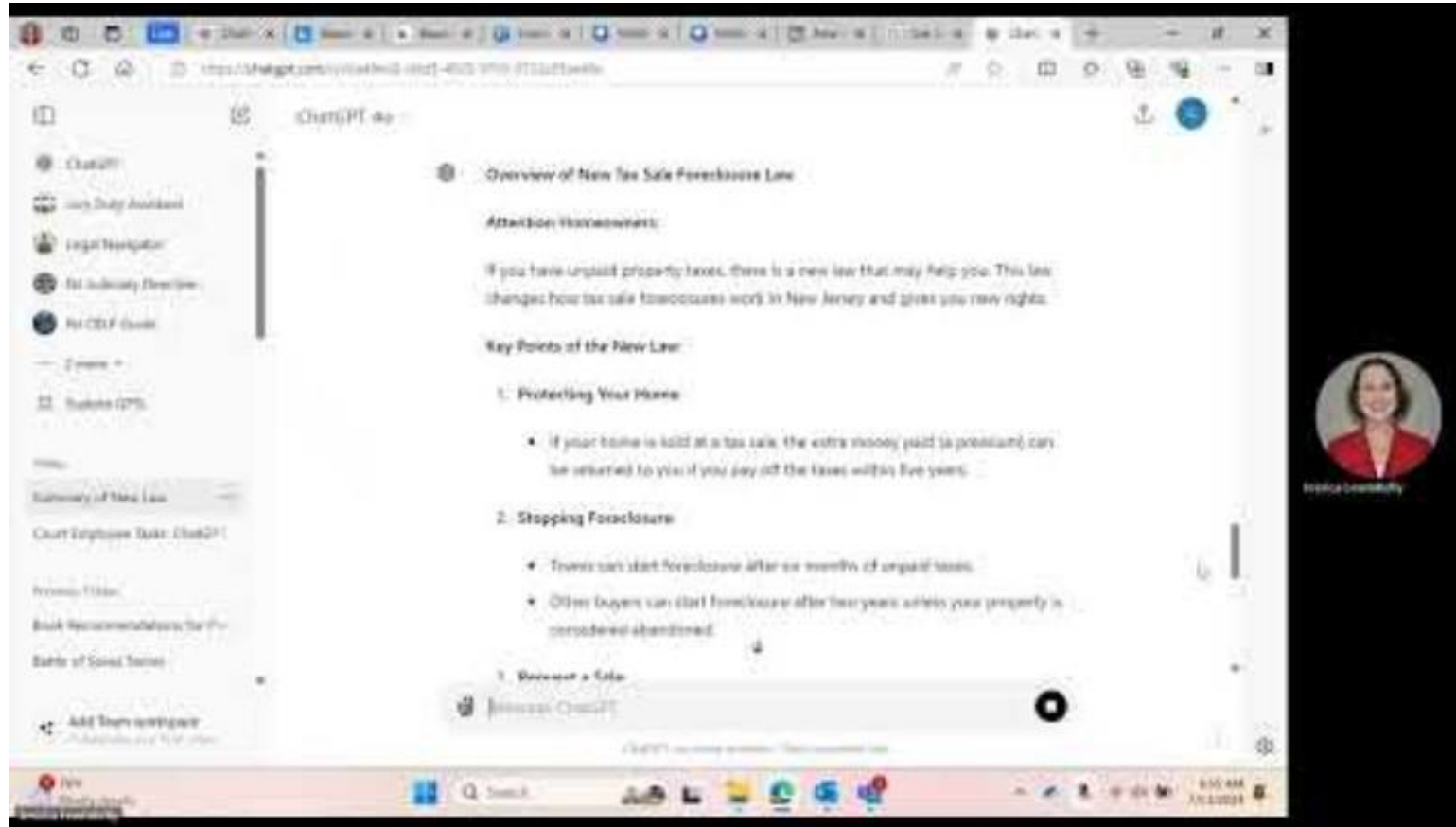
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# Current Uses of GAI for Legal Tasks

- **Training**
  - Preparation of slides, illustrations, and examples
- **Non-Legal Presentations**
  - Intra-office communications, speeches
- **Office Management**
  - Scheduling, etc.

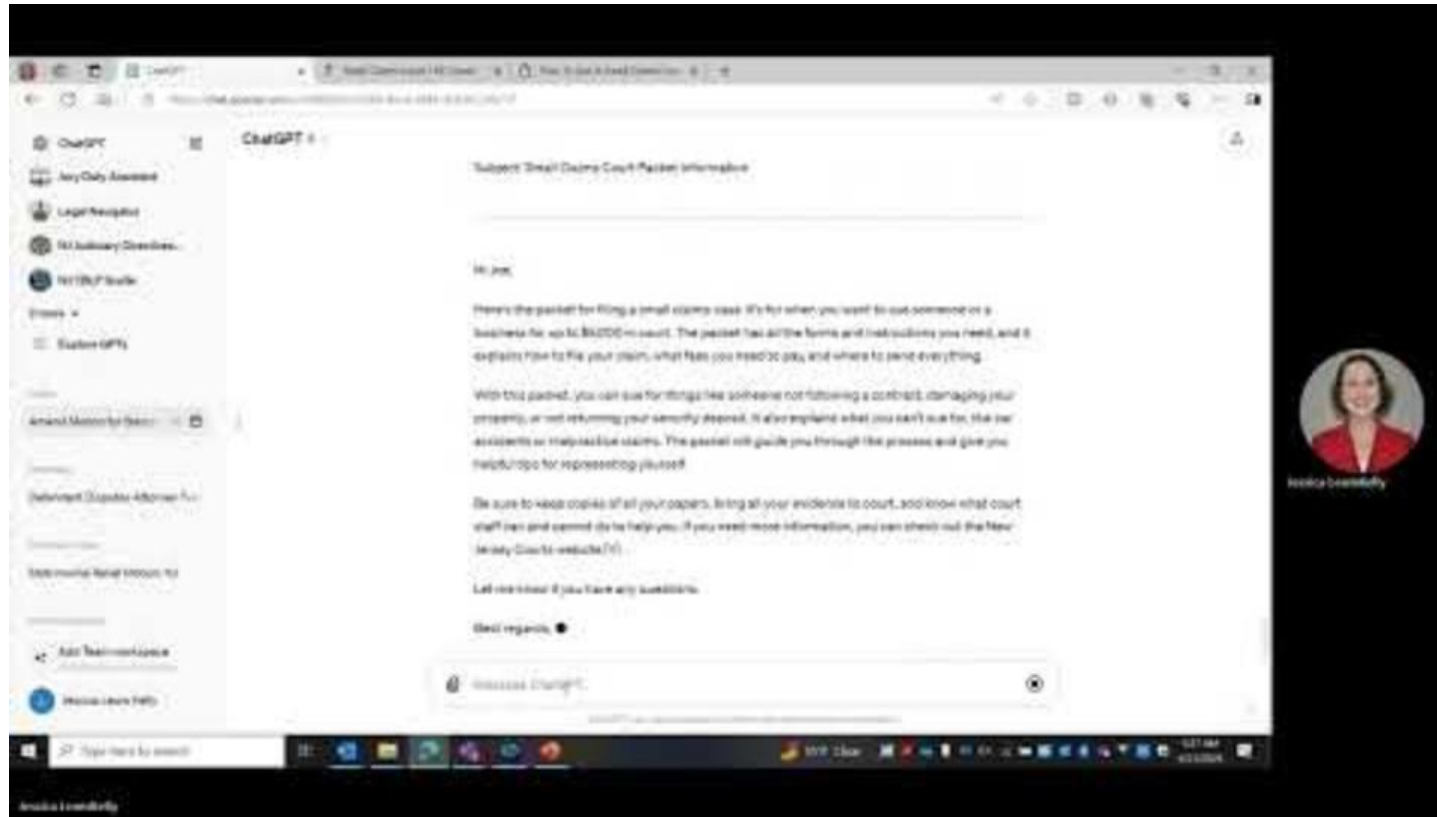
# Use of GAI by Attorneys

In this [video](#), AI summarizes the provisions of the new tax sale foreclosure law, first in detail and then in simple terms for members of the public who might be affected by the law.



# Use of GAI by Legal Staff

In this [video](#), ChatGPT4 summarizes a Judiciary self-help packet and drafts an explanatory email to a self-represented court user, with information for the ombudsman.



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# NJ Supreme Court Guidelines for Lawyers

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# Supreme Court Action – January 2024

- [Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers](#)
- Issued January 25, 2024, effective immediately
- Detailed overview of ethical considerations
- No immediate amendments to any RPCs
- Questions and comments, including as to specific AI use cases: [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov)

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# Supreme Court Action – January 2024

- **Accuracy and truthfulness**, RPCs 3.1, 4.1(a)(1), and 8.4(c)
- Lawyers must check their case citations (of course)
  - And must ensure that an AI-suggested argument has merit and is not frivolous

# Supreme Court Action – January 2024

- **Honesty, candor, and communication**
  - RPC 3.3 (candor to the tribunal)
  - RPCs 1.2(d), 1.4(d), 3.4(b)

AI is not an excuse for false representations and does not enable misleading manipulation of evidence by a lawyer or client





# Supreme Court Action – January 2024

- **Confidentiality**
  - RPC 1.6. Lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosure...
  - A lawyer is responsible to ensure the security of an AI system before entering any non-public client information





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# Supreme Court Action – January 2024

- **Prevention of Misconduct, Including Discrimination**
  - Again, lawyers remain responsible to ensure accuracy of communications with clients and the court, RPCs 8.4(c), (d), and (g)
- **Oversight, RPCs 5.1, 5.2, 5.3**
  - Ethical responsibilities extend to lawyers and nonlawyer staff, including as to use of AI

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# Supreme Court Action – January 2024

- These preliminary guidelines are intended to assist lawyers in complying with the **existing RPCs, which remain unchanged by the availability and use of AI.**

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# AI Ethics

## Examples & Discussion

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# Hypothetical – AI for Client Intake

- A prospective client contacts you to discuss representation in a DWI matter. You don't do a lot of municipal work but are aware that there were some recent changes in this area.
  - Could you use GAI to get a quick update on DWI law in New Jersey?

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# Hypothetical – AI for Client Intake

- Sure. You're just gathering information.



## ChatGPT

Searched 6 sites

In New Jersey, recent changes to DWI (Driving While Intoxicated) law have introduced significant amendments, particularly regarding the handling of plea bargains and the implementation of ignition interlock devices. As of early 2024, the New Jersey Supreme Court has allowed plea bargaining in DWI cases, overturning a longstanding rule that prohibited such negotiations in these matters. This change aims to provide more flexibility in the judicial process and potentially lead to quicker resolutions in DWI cases ([The Bianchi Law Group](#)) ([Monmouth Defense Blog](#)).

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# Hypothetical – AI for Client Q&A

- After an initial meeting, the client retains you. It's a first offense, BAC 0.19. The client asks what options are likely.
  - Could you use GAI to get an initial answer?

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# Hypothetical – AI for Client Q&A

- Yes, as long as you protect confidentiality and check your work.

JL You

My client has no prior DWIs. The blood alcohol (BAC) was 0.19. Is my client eligible for a plea?

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# Hypothetical – AI for Client Q&A



## ChatGPT

Yes, your client is eligible for a plea bargain. Recent changes in New Jersey DWI law now allow plea bargaining for DWI cases, even for those with higher blood alcohol concentrations (BAC), like your client's BAC of 0.19. This is a significant shift from previous regulations where plea bargaining in DWI cases was generally prohibited ([The Bianchi Law Group](#)) ([Monmouth Defense Blog](#)).

However, given the high BAC level, it's important to prepare for stringent conditions that might be part of any plea agreement. This could include a longer period for which an ignition interlock device must be installed and possibly other penalties. It's crucial to discuss these potential outcomes with your client and negotiate the best possible terms within the new legal framework.





**You**

provide a hyperlink to New Jersey Supreme Court information on DWI plea bargaining. search only njcourts.gov



**ChatGPT**

Searched 3 sites

The New Jersey Supreme Court has recently authorized plea bargaining in DWI cases, allowing for more flexibility in handling these charges, even for cases with higher BAC levels such as your client's 0.19. This change is significant as it deviates from the previous stringent rules that prohibited plea deals in DWI cases. Now, attorneys can negotiate plea agreements that might involve reduced penalties or alternative sentencing options under certain circumstances. This is detailed in the court's guidelines and recent amendments to N.J.S.A. 39:4-50, reflecting a shift in policy to allow for judicial discretion in plea bargaining within the DWI context.

For specific guidelines and details directly from the New Jersey Courts on plea bargaining in DWI cases, you can refer to the official notice [here](#).

JL

Write an email to a client in a NJ municipal court matter. The client is charge with DWI. BAC 0.19. Looking for a plea bargain. Explain at a 6th grade level the likely options and penalties.

Dear [Client's name],

I am writing to update you on the options for resolving your DWI charge in municipal court. Because New Jersey law prohibits plea bargaining of DWI charges, our options are limited. However, I want to explain the likely outcomes and penalties you are facing.

For a first DWI offense with a BAC of 0.19, the mandatory penalties would include:

- Up to 30 days in jail
- License suspension of 7-12 months

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# NJ Courts Use of AI

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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI

## Statement of Principles

### **Independence**

- AI systems will be designed and deployed in a manner that respects and maintains the independence of the Judiciary...
  - AI will never be used to replace the autonomy of judges...

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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI

## Integrity

- AI technologies will be rigorously assessed
  - The Judiciary ... will engage in ongoing oversight to ensure that AI technologies are Transparent, Explainable, Accurate, Reliable, and Secure.

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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI



## Fairness

- AI will be used to support equity for all parties to the case, to maximize access to the courts, and to reduce unnecessary delays in case disposition...



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# Statement of Principles for the NJ Judiciary's Ongoing Use of AI, Including Gen AI

## Quality Service

- Expanded Judiciary use of AI aims to improve effectiveness and consistency in court services...
  - AI technologies will be used in ways that maintain confidentiality and that safeguard the security of Judiciary systems and the data contained in those systems.

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# Resources & Next Steps



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# AI Resources for NJ Attorneys

Notice to the Bar, “Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence By New Jersey Lawyers”

(January 24, 2024) (viewable at:

<https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf?cb=aac0e368>).

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# AI Resources for NJ Attorneys

New Jersey State Bar Association, Task Force on Artificial Intelligence (AI) and the Law: Report, Requests, Recommendations, and Findings (May 2024) (viewable at: <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>)

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# Specific Questions or Suggestions

Legal questions about prospective use of artificial intelligence?

Call the Attorney Ethics Hotline @ (609) 815-2924.

Suggestions for issues to be considered by the NJ Supreme Court Committee on AI?

Email [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov)

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# Takeaway #1

Use of generative AI for legal work remains limited – but attorney feedback suggests it will expand.

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# Takeaway #2

Now is a great time to become familiar with the basics of generative AI, even if you opt not to use it for legal work.

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# Takeaway #3

The Judiciary welcomes questions and suggestions about AI training and resources.

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# Questions & Discussion



# **Task Force on Artificial Intelligence (AI) and the Law: Report, Requests, Recommendations, and Findings**

**May 2024**

## **Co-Chairs**

**Steven J. Eisenstein  
Rebecca L. Rakoski  
Dr. Robert Spangler**

## **Task Force Members:**

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John Allen  
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Raymond M. Brown  
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# **NJSBA Task Force on Artificial Intelligence and the Law: Official Report, Recommendations, and Findings**

## **Executive Summary:**

This report includes the collaborative efforts and conclusions of the New Jersey State Bar Association's 27-member Task Force on Artificial Intelligence and the Law. As such, it addresses fundamental considerations and provides practical, actionable guidance for attorneys and legal professionals to use AI while maximizing its benefits safely and ethically. Critical areas explored include understanding AI's benefits, recognizing potential risks, selecting appropriate AI tools, ensuring data protection and effectively training staff.

This report is designed to serve as a practical resource. The conclusions and recommendations herein emphasize the importance of prioritizing AI education, establishing baseline procedures and guidelines, and collaborating with data privacy, cybersecurity, and AI professionals as needed. Given the complexity of the topic and the resources necessary for attorneys to safely use AI, interim measures such as adopting temporary guidelines are recommended until a comprehensive AI policy can be developed and implemented. These priorities and recommendations are essential to ensure the responsible integration of AI in legal practice and adherence to ethical and legal standards.

Finally, this report highlights several important social justice concerns related to the use of AI, including the importance of transparency in AI software algorithms, bias mitigation, and equitable access to AI tools. The Task Force concluded that legal AI tools should be reviewed for fairness and accessibility, particularly tools designed for individuals from marginalized or vulnerable communities. Understanding the risks and benefits of AI as related to social justice is crucial to maintaining a just and inclusive legal system that benefits all members of society.

## **Introduction and Background**

The NJSBA Task Force on AI and the Law is comprised of 27 attorneys and industry experts. It was established in late 2023 with the objectives of examining the impact of AI on the legal profession and providing practical guidance to attorneys and legal professionals. The Task Force, co-chaired by Steven Eisenstein, Rebecca Rakoski and Dr. Robert Spangler, aimed to provide attorneys and legal professionals with the tools, education, guidance and resources needed to safely and ethically navigate and benefit from the growing use of AI in the legal field.

The Task Force was organized into four workgroups, each dedicated to addressing specific facets of AI's interaction with the legal domain. These workgroups (Artificial Intelligence and Social Justice Concerns, Artificial Intelligence Products and Services, Education and CLE Programming, Ethics and Regulatory Issues) were asked to deliver findings and/or recommendations tailored to the needs of New Jersey's legal community.

Each workgroup operated independently, conducting thorough research, analysis and deliberation. Workgroup findings were reported back to the entire Task Force in group meetings. This report represents the culmination of these efforts.

### **Focus of the Report**

A central tenet of this Task Force was to avoid duplicating the existing efforts of other state and regional AI task forces and committees. Instead, it sought to build on the insights and expertise of these groups by contributing practical information and recommendations tailored to the specific needs of New Jersey's legal community.

Similarly, in crafting this report, the Task Force acknowledged the dynamic nature of the field and the continuous evolution of AI technologies. As such, the recommendations presented here are designed to remain relevant and to be adapted in line with future developments. This report is intended to serve as the initial installment in a series of statements, guidance documents, videos and educational resources that will be updated as needed and focused on the intersection of AI and the law.

## **Summary of Requests, Findings, and Recommendations**

The following primary requests, findings and recommendations underscore the importance of education, ethical considerations and responsible implementation of AI tools in the legal profession.

### **Requests for the NJSBA Board of Trustees:**

1. The NJSBA should continue to provide diverse educational opportunities for attorneys on AI selection and use, as well as the impact of AI on the practice of law.
2. The NJSBA should establish a permanent group dedicated to AI, the evolving technological landscape and its application to the legal profession.

### **Recommendation for further discussion:**

1. It is recommended to propose that the New Jersey MCLE Board require attorneys to earn one CLE credit every two years in technology-related legal subjects. Specifically, given the ethics and social justice issues inherent in using AI in the practice of law, the Task Force recommends that one of the five required ethics credits for CLE compliance be technology related.

### **Findings:**

1. Legal professionals must understand that education, knowledge and guidance are necessary to operate AI tools safely and ethically in a legal setting.
2. When assessing AI tools and services, it is crucial to categorize them according to their intended users and recipients. Tools designed for the public, as opposed to legal professionals, should not be used for tasks considered "the practice of law."
3. When evaluating AI tools and services, it is essential to identify and document how data, especially client data, is transmitted, used and stored by the AI to ensure its confidentiality. This information should guide the assessment of whether a particular AI tool is suitable for its intended use.
4. All law firms should adopt an organizational AI policy with a risk assessment framework (sample template provided in Appendix 2).
5. The Rules Governing the Courts of New Jersey, the New Jersey Rules of Evidence and the Rules of Professional Conduct are sufficiently flexible to address considerations relating to AI.

## **Additional Findings and Recommendations:**

This report acknowledges the ever-evolving nature of AI and offers initial guidance, rather than definitive policies. Subsequent tools and recommendations will be provided as the technology progresses, with a continued emphasis on practicality. The following additional findings and recommendations support this mission:

### **Additional recommendations for further discussion:**

1. The Task Force recommends the creation of a monthly or bi-monthly AI email newsletter distributed by the NJSBA. This newsletter would feature curated articles, case studies, instructional videos and updates on AI-related topics relevant to the legal profession. Additionally, it could include highlights from recent court decisions involving AI, interviews with experts in the field and announcements about upcoming AI-related events and conferences.
2. The Task Force proposes the establishment of an AI hub on the NJSBA website. This hub would provide access to various resources, including educational videos, toolkits, best practice guides and FAQs.
3. The Task Force recommends the publication of a comprehensive compendium of AI-related legislation, rules and other legal materials. Compiled by Hon. Ronald J. Hedges (Ret.) and published by the NJSBA, this compendium would serve as a valuable resource for legal professionals seeking to navigate the complex legal landscape surrounding AI. Updated regularly, the compendium would be available as both an e-book and a PDF on the NJSBA website, providing legal professionals with easy access to the latest information on AI-related legal frameworks. A draft of this compendium has been submitted to the Task Force for review and consideration.

### **Additional findings:**

1. The practice of law is poised for substantial transformation due to AI. While the full extent of this transformation remains to be seen, attorneys must keep abreast of and adapt to evolving technological landscapes and embrace opportunities for innovation and specialization in emerging AI-related legal domains.
2. The bench, bar and public must be able to easily determine when AI or generative AI is used in a legal matter. It is equally important to understand how to use AI correctly in light of applicable laws and rules. The Task Force will continue to monitor this and will provide subsequent recommendations.
3. When developing or implementing AI systems, collaboration with data privacy experts, cybersecurity professionals and/or AI professionals is highly recommended to ensure responsible integration and adherence to ethical and legal standards.
4. As technology evolves, and with cloud computing and AI becoming increasingly integral to legal practice, lawyers may lose additional control over data privacy and security. Consequently, some of the responsibility for protecting sensitive information may need to shift from law firms to their technology providers, potentially enhancing data protection as these providers are often better equipped to manage sophisticated privacy and cybersecurity challenges.
5. Although considerable advances have occurred that improve access to technology for all demographic and socio-economic groups, ongoing focus is required to ensure that all

individuals have access to the technology and tools – including AI – that will allow them to understand and pursue available legal rights and remedies.

6. Guidelines and rules for the use of AI by both pro se litigants and attorneys should prioritize and ensure general awareness and appreciation of the limitations and risks of the use of AI and promote equitable access to AI tools and technologies.
7. Partnerships and collaborative networks should be established with a broad spectrum of legal entities, advocacy groups, social justice organizations and policymakers to promote fair, unbiased and ethical deployment of AI as a resource to be available and applied in appropriate civil and criminal matters. Such collective endeavors would enhance AI development and application in legal matters with a particular sensitivity toward justice, equality and ethical considerations.
8. A structured and reliable framework for ongoing dialogue, review and scrutiny of AI use by courts, legal service organizations and the bar must be established and maintained to ensure appropriate access and implementation of AI for all demographics – in particular underserved, marginalized and at-risk communities. This entails tracking the evolution of AI and actively assessing the direct and ancillary effects on various demographic groups. Continuous monitoring and evaluation will enable the legal profession to proactively address potential disparities and strategies to mitigate any adverse impacts.

## Understanding Artificial Intelligence: The Basics

Attorneys must comprehensively understand the risks, benefits and core principles of AI.

AI refers to technology that enables machines to mimic human intelligence (National Institute of Standards and Technology, 2024). AI plays a crucial role in enhancing user experiences and streamlining tasks in various applications, such as:

1. Video conferencing tools that use AI algorithms for background noise cancellation (Li & Liu, 2012) and automatic transcription.
2. Virtual assistants from companies like Apple, Google, Amazon, and Microsoft that use AI to understand and respond to spoken or written user commands.
3. AI-powered tools like Suggested Replies in Outlook and Outlook Mobile that use machine learning to suggest responses based on the context of the email.\* (Kannan et al., 2016).

*\*While not the case for all AI tools, Suggested Replies in Outlook and Outlook Mobile can help users save time and effort while maintaining privacy.*

It is critical to acknowledge that not all AI is created equal. Generative AI, for instance, goes beyond basic data processing and interaction by generating new content – including text, images, videos and more – from a potentially vast array of sources (Lv, 2023). Generative AI tools increase efficiency in the practice of law, but may also pose significant risks, including our ability to distinguish between real and fabricated data and data privacy and ethical issues. Accordingly, verifying accuracy and understanding sources provided by AI is critical. Furthermore, attorneys must familiarize themselves with the concept of "hallucinations" in AI. Hallucinations arise when AI systems produce outputs that appear plausible but lack factual basis, often presenting the content with an air of authority, complicating their detection. (MIT Sloan Teaching & Learning Technologies, 2024). These inaccuracies can have significant practical and ethical implications, especially in legal contexts where accuracy and reliability are paramount. Therefore, attorneys must exercise caution when relying on AI-generated content and diligently verify its validity to ensure sound decision-making and uphold the integrity of the legal process.

## **Ethics and Regulatory Issues Work Group: Impact on the Practice of Law**

### **Work Group Members:**

Hon. Ronald J. Hedges (Ret.)\*, Seth Abrams, Christopher J. Asakiewicz, Trina L. Glass, Robert B. Hille\*, Michael Paglione

*Note: \* Indicates Co-Chair*

The Ethics and Regulatory Issues Work Group of the Task Force studied AI and its potential implications for the law and the legal system. After a series of meetings and comprehensive research, the following conclusions were drawn:

- The current state of the law, including the Rules Governing the Courts of New Jersey, the NJRE and the RPCs, are sufficiently flexible to address considerations relating to AI.
- As with any technology, AI use in legal matters should be scrutinized for compliance with relevant laws and regulations.
- The increasing use of AI and generative AI technologies by attorneys and legal professionals could significantly disrupt the industry's traditional hourly billing model. Significant use of these technologies may conflict with current billing practices in light of ABA Model Rule 1.5(a)(1) (American Bar Association, 2024).

### **Focus of Our Examination**

The work group's examination began with a thorough exploration of the nature of AI, investigating its potential as a legal tool and considering both its responsible use and potential misuse by legal professionals and the public. The work group next assessed how such use or abuse could affect the legal profession, legal practice and the integrity of the law. Additionally, the work group examined the potential impact on the administration of justice and evaluated whether existing legal frameworks required revision to effectively address emerging and future concerns presented by AI.

The examination focused on the following key areas:

1. **Preservation of Legal Obligations:** A significant consideration centered on the responsible use of AI tools while upholding confidentiality obligations, privilege protections and intellectual property rights, as maintaining these legal safeguards ensures the integrity of legal proceedings and protects the rights of all parties involved.
2. **Identification of AI Usage:** Another critical consideration involved the potential need to clearly identify instances where AI, particularly generative AI, is employed. This extends to understanding the nature of AI-generated output – including how it was produced – and metadata analysis, which is integral to the court's gatekeeping function and ensures transparency in the legal process.
3. **Ensuring Integrity and Reliability:** There was a clear consensus on the importance of ensuring the integrity and reliability of AI-generated products. This encompasses accountability measures to prevent misuse, detection of fabricated evidence (such as deep fakes) and adherence to established evidentiary standards outlined in the New Jersey



Rules of Evidence (NJRE), particularly concerning the definition of original evidence (see NJRE 1002 and 1003).

### **Examples of Law Examined by the Working Group**

The examination included a review of the relevant RPCs and an analysis of *Baxt v. Liloia*, 155 N.J. 190 (NJ 1998). The following RPCs can establish a standard in legal malpractice cases.

1. 1.0(a), (c), (f), (i), (j), (k), (o), (p)
2. 1.4
3. 1.6 and comment (Note proficiency requirement in (f))
4. 1.16(d)
5. 3.1 (fake authorities from AI)
6. 3.3 (see 3.1)
7. 3.4 (see 3.1)
8. 4.1 (see 3.1)
9. 4.4(b) and *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (NJ 2010)
10. 5.1, 5.2 and 5.3

Of particular significance are the following RPCs to consider when dealing with any technology: RPC 1.0(p) (defining metadata), RPC 1.6 (pertaining to client confidentiality duties and the obligation to stay abreast of technological advancements, in conjunction with RPC 1.0(i), (j), and (k) defining reasonableness), RPC 4.4(b) (addressing confidentiality duties to third parties) and RPC 5.3 (establishing liability for vendor breaches). These RPCs encompass various technological obligations and considerations.

Additionally, depending on the circumstances, NJRE 101(a)(3), 101(b)(3), 801(e), 901, 1001, 1004 and 1006 may also be implicated, along with NJ Court Rules 4:10, 4:25-7 and -8, and 3:13.

## The Emergence of AI and its Practical Impact on the Practice of Law

This Task Force has observed a significant increase in the past 12 months in the availability of AI and GAI tools designed for both consumers and the legal profession. Before using these tools, it is imperative that legal practitioners:

1. Thoroughly scrutinize the claims made by AI providers regarding the capabilities and security of their tools.
2. Remain cognizant of the critical areas where AI is likely to have the most significant initial impact on legal practice.
3. Differentiate between AI tools designed for the public and those designed for the practice of law.

The Task Force has also identified several key areas where we believe AI may to emerge and substantially influence the practice of law in the near future:

- 1. Document drafting:** Generative AI-powered tools may streamline the document drafting process by automating repetitive tasks like contract generation and legal document preparation, giving lawyers more time to focus on complex strategy, research and client relationships.
- 2. Research:** AI may facilitate faster and more comprehensive legal research by analyzing vast amounts of case law, statutes and other legal documents. Moreover, AI-driven data analytics tools may uncover insights and trends that would elude manual review, potentially enhancing the quality and depth of legal analysis.
- 3. Correspondence:** AI-powered communication tools, such as email drafting for non-legal matters and/or automation platforms, may enable attorneys to manage client communications more efficiently. These tools are designed to provide timely responses, schedule appointments and draft and summarize routine correspondence, freeing up valuable time for higher-value tasks.
- 4. General case preparation:** AI and Generative AI technologies may eventually offer valuable support in case preparation, from predictive analytics for case outcomes to organizing and summarizing voluminous evidence. By automating tasks like evidence management and deposition analysis, attorneys can focus on developing persuasive legal strategies and advocating for their clients more effectively.
- 5. Misuse of AI to fabricate evidence and data:** The potential misuse of AI to fabricate documents, data and other materials raises significant concerns, particularly regarding the authenticity of evidence. This issue extends to conspiracy theorists and others, highlighting the importance of adhering to evidence rules such as Rules 803, 14, 15, and 18. Lawyers must play a crucial role to safeguard against the proliferation of counterfeit evidence and falsified documents. Lawyers should also consider disclaimers and representations to protect against the inadvertent violation of the Rules of Professional Conduct.

**6. AI as a discovery tool:** AI may streamline legal discovery by significantly enhancing efficiency. It may enable the rapid analysis of extensive datasets encompassing various forms of data such as documents, video, audio, photos and more. Through advanced algorithms and machine learning, AI may streamline the review of diverse data types, potentially saving substantial time and resources for legal teams. Ultimately, the use of AI-driven discovery may facilitate thorough and effective preparation for litigation or regulatory compliance.

**7. AI trial preparation tools:**

AI trial preparation tools, including those for jury selection, promise to transform legal strategies. Using advanced algorithms and machine learning, these tools will analyze data to aid in developing comprehensive trial strategies. By efficiently assessing potential jurors' backgrounds and biases, AI may optimize jury selection for favorable outcomes, enhancing legal representation and decision-making during litigation. However, it is essential to consider the impact of any bias in AI tools when creating and using them.

**8. AI integration with case management software:**

Integrating case management software with AI and generative AI capabilities might turn these programs into virtual assistants, potentially streamlining tasks like document generation and workflow optimization. Simplifying document management and enhancing workflow efficiency could help legal practitioners navigate their caseloads more effectively. Additionally, AI and generative AI features empower users to extract valuable insights from extensive datasets, facilitating informed decision-making and expediting case resolution. This innovative synergy might ensure superior client service delivery, heightened productivity and reduced errors in legal operations.

**9. AI integration with practice management software:** Much like previous examples, integrating AI with practice management software could streamline scheduling, billing and routine administrative tasks while providing actionable insights. Empowering legal professionals with data-driven analysis would also likely enhance decision-making and client service delivery.

**10. AI trial presentation tools:** While futuristic, the use of AI at trial may assist in presenting evidence to judges and juries in an informative and effective manner. It could significantly enhance the courtroom presentation of evidence, resulting in greater jury involvement and understanding of the issues presented.

**Substituted Judgment**

Significant concern arises when attorneys rely on AI to replace their professional judgment. For instance, while AI can be employed to efficiently analyze extensive surveillance footage and extract key moments, attorneys maintain an ethical duty to personally review the footage. The legal community must grapple with the critical question of distinguishing between processes that enhance human performance and those that supplant it.

Similarly, another crucial issue is determining whether the ethical rules apply solely to the final product submitted to the court or extend to the numerous intermediate steps leading to that final product.

### **Rise of New Areas of Practice**

The widespread availability of AI and AGI is a transformative event that will potentially reshape the legal landscape, much like the internet revolutionized communication and commerce. As AI becomes increasingly sophisticated and ubiquitous, new legal practice areas will emerge to address critical issues such as bias, transparency, accountability and fairness in AI decision-making. Lawyers specializing in these fields will be instrumental in guiding the responsible deployment of AI technologies and ensuring compliance with evolving legal and regulatory frameworks.

Furthermore, as AI increasingly permeates various aspects of society, legal frameworks must adapt to address emerging challenges and opportunities. This may entail the enactment of new legislation, the revision of existing regulations and the establishment of ethical guidelines for AI usage across industries.

While the full extent of AI's impact remains to be seen, attorneys must keep abreast of and adapt to evolving technological landscapes and embrace opportunities for innovation and specialization in emerging AI-related legal domains.

# **Artificial Intelligence in Legal Products and Services: Practical Guidance and Key Insights**

## **Work Group Members:**

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This section aims to offer practical, actionable guidance for legal professionals seeking to integrate or who have integrated AI tools and services into their practices. It combines extensive research, including interviews with stakeholders across the AI and legal industries, with lived experience and AI expertise to provide a nuanced understanding of AI's role and its challenges.

AI tools, particularly those facing the public like ChatGPT, Bing, Gemini and Claude, are scrutinized for their suitability in legal matters. Accordingly, the Task Force recommends against their use for specific legal tasks due to potential ethical, privacy and security implications. Instead, it categorizes GAI tools and recommends a set of easy-to-follow questions to assist legal professionals in making informed decisions about employing AI in their practice. This guidance will be updated as technology advances.

Finally, this section emphasizes the need for a foundational framework to guide practitioners in evaluating AI technologies and ensure the upholding of ethical standards and privacy concerns.

## **State of Artificial Intelligence in the Legal Profession**

The rapid advancement of AI technology has fostered the development of many new tools in the legal industry, from upgrades and integration into existing software to novel innovations. Legal professionals are inundated with marketing materials touting the benefits of these AI solutions, including claims of significant time and cost savings. However, the need for established safety and data privacy standards, coupled with the absence of objective evaluation criteria, makes it difficult for practitioners to assess the effectiveness of these tools.

Concerns about security, privacy and regulatory compliance further complicate the adoption of AI in legal practice. Furthermore, the rise of generative AI introduces additional intricacies. This technology can produce novel content, such as textual compositions, imagery or sound, by identifying and applying patterns extracted from extensive data compilations encompassing a considerable segment of the internet, necessitating a continuous process of adaptation and assessment of any established guidelines.

Despite these challenges, this report provides a foundational framework through the use of easy-to-follow questions to help guide legal professionals in understanding, evaluating and determining whether to employ a given AI technology in a legal setting. This framework will continue to evolve as the technology and applications mature.

## **Our Research**

The findings presented in this section of the report result from extensive research, including interviews with AI technology providers, legal industry experts, AI specialists and legal practitioners. The insights from these interviews provide a nuanced understanding of the current landscape and the challenges legal professionals face in adopting AI. By combining input from

various companies and industry experts, the report aims to offer actionable recommendations and strategic insights for navigating the evolving terrain of AI in the legal profession.

Over 50 companies were evaluated, including vendors specializing in eDiscovery, law firm management, cybersecurity and data privacy, legal research, legal writing and contract drafting.

### **Integration of Artificial Intelligence in Law Firms and Legal Practice**

When evaluating GAI tools, it's crucial to classify them into specific categories based on their intended users. Distinguishing between tools that are specifically designed for the public and those designed for the practice of law will help to avoid potentially significant issues with respect to data privacy, ethics and other concerns.

#### **A. AI Tools Intended for the Public:**

##### **Guidance:**

Lawyers should only use AI tools designed for the practice of law, as opposed to those designed for the public when using client data, generating documents or conducting research (when using any AI, have a plan to prevent sharing or storing sensitive information). However, public tools can be useful to spark creativity and as an aid when structuring ideas for an email, letter or more, provided no client information is shared with them and any information they produce is comprehensively reviewed for accuracy. Examples of public AI tools generally unsuitable for sensitive or private information include, but are not limited to, ChatGPT, Gemini and Claude.

##### **Key Considerations:**

As with all essential tools, education, knowledge and guidance are needed to operate AI tools intended for the public safely.

AI tools intended for the public gather data from the internet and various other sources (Vial et al., 2021), often without citation. Unlike focused and vetted professional AI tools, which are designed for specific use cases in the legal profession and rely on carefully curated, highly accurate and factually proven sources and data, AI tools intended for the public generate content and provide potential insights on a wide range of topics drawn from all available sources, typically with minimal or no data protection or confidentiality. Their use for any matter that could be considered "the practice of law" should be restricted, and any other use requires careful consideration due to potential privacy, security and ethical concerns.

While there are risks associated with their use, the complete prohibition of legal practice AI tools or AI tools intended for the public in a legal practice may not be advisable. For example, public-facing AI may offer inspiration for simple, non-legal tasks. Additionally, the ongoing integration of AI into everyday tools underscores the inevitability of its presence in legal workflows. A blanket prohibition might inadvertently encourage unsanctioned or inappropriate use of AI tools intended for the public on personal devices.

## **B. Tools Tailored for Legal Professionals:**

### **Guidance:**

An expanding array of industry-specific AI tools tailored to the unique requirements of legal professionals is emerging. Many well-established legal software providers have either introduced or anticipate introducing and integrating AI or GAI features into their software. While these tools may offer enhanced privacy controls compared to AI tools intended for the public, evaluating their safety and capabilities remains challenging due to the absence of standardized regulations governing their development and implementation, but is essential to ensure compliance with the Rules of Professional Conduct.

### **Key Considerations:**

As legal AI becomes more prevalent, law firms and attorneys must evaluate its privacy, security and ethical implications. The absence of standardized regulations governing AI and GAI, coupled with the American Bar Association's amendment in 2012 to its Model Rules of Professional Conduct Rule 1.1 to include technological competence (Simons, 2018), underscores the need for a proactive approach to understanding and evaluating these tools' potential risks and benefits.

When considering the adoption of legal-specific AI tools, it's essential to scrutinize the vendor's handling of data, security measures and compliance with relevant legal and ethical standards. Additionally, understanding the tool's intended use, risks, limitations and potential biases is vital to ensuring its appropriate use and upholding the integrity of the work produced using the AI tools.

To assist legal professionals in this endeavor, this Task Force has compiled a practical **AI in Legal Products and Services Selection Criteria**. These criteria include questions and standards that can be used to evaluate whether a given AI tool is suitable for use.

## AI in Legal Products and Services Selection Criteria

### How to Use This Selection Criteria

This selection criteria provides a framework for evaluating AI products and services tailored for the legal profession. It offers questions, considerations and evaluation criteria to assist legal professionals in making informed decisions when assessing AI tools.

*Note: This selection criteria is not for use with public-facing AI tools like ChatGPT, Gemini, Copilot, Claude or similar platforms.*

### Software Reputation and Footprint: Moral and Ethical Alignment

When assessing legal AI tools, consider the provider's reputation, longevity and ownership. A company's track record reflects its reliability, stability and commitment to ethics.

Before committing to a new AI product or service, it may also be beneficial to thoroughly review the provider's ownership structure and identify potential conflicts of interest (particularly when evaluating newer companies). Understanding the ownership and leadership of the software provider can help to ensure that the AI tools you choose are compatible with the values and priorities of your legal practice.

These questions may be useful when evaluating the suitability of new AI tools and services.

Q. Does the company have a proven track record of providing reliable, secure and compliant solutions specifically tailored to the legal sector?

Q. Are there any case studies, testimonials or references from other legal professionals who have successfully used the tool? Reaching out to colleagues or requesting references from the provider can yield valuable insights.

Q. If the company is relatively unknown, who are its owners, and are there any potential ethical concerns related to the ownership structure? Researching the company's website, press releases and financial disclosures can help uncover this information.

### Key Considerations in Selecting an AI Vendor

- a. **Type of technology:** Understanding whether general AI or GAI has been used is critical in evaluating and avoiding potential risks.
- b. **Problem the AI is solving for:** Consider whether an AI product you are evaluating is designed to simplify an existing task. If not, it may complicate your practice and add an extra layer instead of improving efficiency. Before adopting an AI solution, evaluate if it aligns with your needs and can integrate into your current processes to provide benefits rather than challenges.
- c. **Data sources:** Gaining an understanding of the quality and source of the data used by AI systems is crucial for evaluating their potential reliability and performance. Equally important is understanding whether user prompts and/or



user-supplied data will be included in the AI system's training data, as this can lead to unintentional and unexpected confidentiality and ethics issues.

- d. **Privacy standards:** Evaluating vendors' data collection and ownership standards, privacy protocols and cybersecurity safeguards is essential for ensuring client confidentiality and regulatory compliance.
- e. **Cybersecurity measures:** It is important to assess the cybersecurity measures implemented by the vendor to maintain data integrity and avoid or minimize the risks posed by cyber threats.
- f. **Bias recognition:** Recognizing and mitigating bias within AI algorithms contributes to upholding fairness and equity in legal processes.
- g. **Integration, training and support:** Examining a vendor's provisions for integration, training and ongoing support can streamline implementation and enhance the user experience.
- h. **Data localization:** Consideration of the jurisdictional location of data and AI engines ensures compliance with regulatory frameworks and data sovereignty principles.
- i. **Updates and monitoring:** Examining the frequency of product updates, adherence to bias auditing, issue monitoring, technical and ethical standards, responsiveness to problems, update criteria and user notification methods offers insight into a company's dedication to your safety and success. Infrequent updates without an established cadence may be cause for concern.
- j. **Differences among software options:** Are there pricing plans offering differing levels of data access? If so, do the less expensive versions of the software rely on outdated data or datasets that need to be updated more frequently?

### **Danger Areas and Pitfalls**

Data privacy laws and regulations, much like AI, are continuously evolving. Several states, including New Jersey, have passed comprehensive data privacy legislation. However, the implementation of these laws is progressing at varying rates across different states. These privacy laws and regulations require an organization to understand and disclose to data subjects (individuals whose personal data is collected, processed, stored or otherwise used by organizations) the nature of the data collected, the legal basis for the collection and the rights a data subject has regarding their data.

AI systems are trained on data, so their use may be impacted by data privacy laws and regulations, particularly for organizations with international operations. International regulations, such as the European Union's General Data Protection Regulation (GDPR) (Voss & Houser, 2019) and the proposed EU AI Act, must be understood to ensure compliance and avoid potential financial and legal consequences.

### **Transparency and Accuracy in GAI Usage**

When using GAI, it is important to ask if its use is transparent to users when generating the data they engage with. Transparency helps legal professionals identify potential ethical risks and understand the content's nature, allowing them to make informed decisions about its reliability and relevance to their needs.

Furthermore, it is beneficial to ascertain if there is a straightforward process for users to provide feedback on errors or inconsistencies in AI-generated content. Understanding the vendor's prioritization of user feedback, their review and reporting processes, and who is responsible for monitoring and acting upon feedback offers insights into the company's integrity.

## **Artificial Intelligence Education for the Legal Profession**

### **Work Group Members:**

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Addressing the knowledge gap among attorneys regarding AI is critical. This section outlines a plan for educating the New Jersey legal community, including the NJSBA's AI Task Force's collaborative efforts with the New Jersey Supreme Court Committee on Artificial Intelligence to develop a dynamic curriculum and monitor advancements in AI.

A robust array of programs proposed for integration into the NJSBA's educational schedule for 2024 can be found at NJSBA.com. The programs will help ensure legal professionals are equipped to navigate the evolving AI landscape effectively.

### **Recommendations:**

#### **1. Development and Implementation of an Adaptable AI Curriculum:**

The NJSBA should continue the development and implementation of a comprehensive AI curriculum that addresses foundational concepts and emerging trends in AI technology. This curriculum should be adaptable, allowing for updates and revisions as new developments arise. Collaboration with experts from academia, industry and the legal profession should be sought to ensure the curriculum remains current and relevant.

#### **2. Proposal for a Monthly or Bi-Monthly AI Email Newsletter:**

The Task Force recommends the creation of a monthly or bi-monthly AI email newsletter distributed by the NJSBA. This newsletter would feature curated articles, case studies, instructional videos and updates on AI-related topics relevant to the legal profession.

Additionally, it could include highlights from recent court decisions involving AI, interviews with experts in the field and announcements about upcoming AI-related events and conferences.

#### **3. Creation of an AI Hub on NJSBA.com:**

The Task Force proposes the establishment of an AI hub on the NJSBA website. This hub would provide access to various resources, including educational videos, toolkits, best practice guides and FAQs.

#### **4. Publication of a Compendium of AI Legislation, Rules, and More:**

The Task Force recommends the publication of a comprehensive compendium of AI-related legislation, rules and other legal materials. Compiled by Judge Hedges and published by the NJSBA, this compendium would serve as a valuable resource for legal professionals seeking to navigate the complex legal landscape surrounding AI. Updated regularly, the compendium would be available as both an e-book and PDF on the NJSBA website, providing legal professionals with easy access to the latest information on AI-related legal frameworks. A draft of this compendium has been submitted to the Task Force for review and consideration.

**5. Proposed MCLE Requirement Revision:** The Task Force recommends requesting that the New Jersey MCLE Board consider amending the MCLE requirements to require attorneys to earn one CLE credit in technology-related subjects every two years. Given the ethical and social justice implications of technology in the legal system (such as safeguarding client data and understanding the potential risks associated with AI and GAI), we propose changing the current ethics and diversity requirement to "Ethics, Diversity, and Technology" and making the new one-hour credit requirement part of that mandate.

### **Next Steps**

The Task Force is committed to taking proactive measures to ensure ongoing education and adaptation to the evolving landscape of AI in the legal profession. Continuous monitoring of AI developments will be conducted, with regular updates provided to Task Force members and the broader legal community using the AI newsletter and AI hub on NJSBA.com. This will involve staying abreast of emerging technologies, regulatory changes and notable AI case law. Additionally, the Task Force will remain flexible, adjusting schedules and topics to address emerging trends and challenges.

The Task Force also recognizes the importance of interdisciplinary collaboration in navigating the complex intersection of AI and the law. To this end, efforts will be made to engage with allied professionals such as CPAs, cybersecurity experts, data privacy professionals and law enforcement. This collaboration will facilitate knowledge sharing, best practice development and the identification of potential areas for joint action.

By staying vigilant, fostering collaboration and engaging with stakeholders across various sectors, the Task Force aims to ensure that the legal community is well-equipped to navigate the opportunities and challenges presented by AI in the years to come.

## Artificial Intelligence and Social Justice Concerns

### Work Group Members:

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Integrating AI into the legal system offers benefits but requires vigilance. The vast data processing and potential for inaccurate correlations demand:

1. Rigorous monitoring and evaluation to prevent misuse and unintended consequences.
2. Transparency regarding the data powering AI systems, especially those with legal implications.
3. Clear insight into the replicability of AI-generated results to maintain accountability and foster trust among legal professionals and the public.

### Public Use of AI and Unauthorized Practice of Law (UPL)

In an era where AI is increasingly integrated into daily life, the public – especially those unable to afford professional legal services and used to using AI for other purposes – might turn to publicly available AI tools for legal guidance. This trend could inadvertently expose individuals to legal risks without the safeguards provided by legal professionals. Additionally, AI's ability to produce seemingly authoritative and precise responses may lead laypersons to misconstrue its capabilities and outputs as infallible, fostering a false sense of legal security.

While this scenario remains speculative, it's crucial to recognize it as a potential future outcome requiring proactive consideration. To address this, we must collaborate with those regulating the practice of law to enhance public awareness of the limitations and risks associated with relying on AI for legal advice. Similarly, it may be necessary to implement stricter guidelines and regulatory frameworks for AI-generated legal content while ensuring the accessibility of affordable legal services. Above all, as these technologies evolve, continuous monitoring, discussion and collaboration are essential.

### Addressing Risks, Including At-Risk Populations

AI's rapid data processing capability offers efficiency and innovation opportunities but also harbors significant risks related to bias and discrimination (Chen et al., 2024). For instance, the case of Amazon discontinuing its AI recruitment tool due to gender bias underscores the necessity for ongoing AI system monitoring to ensure adherence to ethical guidelines and avoidance of perpetuating existing inequalities. Specifically, the bias stemmed from the tool being trained on a dataset predominantly comprising men's resumes, leading it to favor male candidates (Andrews & Bucher, 2022). This example emphasizes the dangers of unchecked AI in decision-making processes.

The legal industry should examine the lessons learned from the challenges faced by other sectors when developing and implementing AI to avoid repeating similar mistakes and to proactively address potential issues, including:

1. **Racial bias:** AI can exhibit bias or discriminatory behavior if it's trained on biased data or designed with biased algorithms. This can happen due to: use of historical training

data; biased labels or annotations in the data; algorithmic biases, feedback loops that perpetuate bias, lack of diversity in development teams and lack of transparency in algorithmic development (Blount, 2024).

2. **Economic inequality through automated decisions:** In financial sectors, AI-driven decisions such as loan approvals and credit scoring can perpetuate economic disparities, potentially sidelining those from disadvantaged backgrounds (Addy et al., 2024). A similar bias in legal decision-making AI could negatively impact vulnerable populations.
3. **Health care disparities:** AI in health care risks worsening existing disparities (Hastings, 2024) and raises concerns regarding how similar disparities could, without proper intervention, occur within the legal system.
4. **Privacy and surveillance:** The use of surveillance technologies, including facial recognition, may pose significant risks various communities (Swaminathan & Danks, 2024), emphasizing the need for responsible AI that respects privacy rights and provides accountability.
5. **Predictive policing:** Predictive policing relies on historical crime data and may amplify prejudice by disproportionately targeting minority communities and exacerbating systemic biases.

This approach can create a feedback loop where increased police presence in certain neighborhoods leads to more arrests and higher reported crime rates, reinforcing the perception that these areas are more prone to crime. This, in turn, leads to further over-policing and surveillance. Algorithms may disproportionately target minority communities due to the data they are trained on, often overlooking the underlying social and economic factors that contribute to criminal behavior.

Addressing the racial biases inherent in predictive policing requires careful consideration of the data used, increased transparency and accountability in algorithmic decision-making and a broader effort to address systemic inequalities within the criminal justice system.

6. **Forensic science:** Forensic science increasingly relies on software, including AI, for data analysis, probability calculations, model training and quality assurance. This reliance on "black box" software can be problematic, as it blurs the line between human judgment and machine judgment. Attorneys must be mindful of potential challenges to the admissibility of evidence and the credentials of experts who rely on AI in their analyses.

These examples emphasize the necessity for a nuanced approach to mitigate the risks associated with AI, particularly in the context of social justice concerns. They underscore the importance of integrating fairness and bias mitigation techniques into the development of legal AI products. Engaging a diverse range of professionals in designing, implementing and reviewing AI systems is crucial to ensuring equitable and responsible outcomes for society. Furthermore, it is imperative to draw lessons from past integrations of AI and related technologies to avoid repeating mistakes and to foster positive societal impacts.

## **AI and Access to Justice**

While much has been said about the potential pitfalls associated with AI, it also has the potential to help many people. For example, AI may improve access to justice by making legal services more efficient and available. However, this potential is contingent upon equitable access to AI tools and technologies, which requires reliable access to the internet, a rudimentary understanding of technology and the ability to navigate AI-driven systems.

Unequal access to high-speed internet, especially in rural and underserved urban areas, hinders the fair adoption of AI. Providing universal high-speed internet access enables vulnerable communities to benefit from AI-powered legal aid and support services. However, it is crucial to address the social inequalities that contribute to this digital divide, such as disparities in technological capital and resources (Comi et al., 2024). Bridging this gap is essential for ensuring that the benefits of AI in the legal system are accessible to all, regardless of their socioeconomic background or geographic location.

Moreover, there may come a time when providing legal aid and support for vulnerable communities in New Jersey leverages AI in a manner that addresses systemic inequities rather than exacerbating them. Upholding ethical guidelines and ensuring fairness in AI applications are imperative steps toward achieving access to justice for all residents of New Jersey. Policymakers, legal professionals and technology experts in New Jersey must collaborate and develop strategies that prioritize equitable access to AI tools and technologies, address digital disparities and uphold ethical standards to ensure that AI contributes positively to the pursuit of justice in the state.

## **Next Steps and Recommendations**

To effectively navigate the complexities presented by the integration of AI within a legal practice and to capitalize on its potential to foster social justice, the following strategic initiatives are recommended:

1. Although considerable advances have occurred that improve access to technology for all demographic and socio-economic groups, ongoing focus is required to ensure that all individuals have access to the technology and tools – including AI – that will allow them to understand and pursue available legal rights and remedies.
2. Guidelines and rules for the use of AI by both pro se litigants and attorneys should prioritize and ensure general awareness and appreciation of the limitations and risks of the use of AI and promote equitable access to AI tools and technologies.
3. Partnerships and collaborative networks should be established with a broad spectrum of legal entities, advocacy groups, social justice organizations and policymakers to promote fair, unbiased and ethical deployment of AI as a resource to be available and applied in appropriate civil and criminal matters. Such collective endeavors would enhance AI development and application in legal matters with a particular sensitivity toward justice, equality and ethical considerations.
4. A structured and reliable framework for ongoing dialogue, review and scrutiny of AI use by courts, legal service organizations and the bar must be established and maintained to

ensure appropriate access and implementation of AI for all demographics – in particular underserved, marginalized and at-risk communities. This entails tracking the evolution of AI and actively assessing the direct and ancillary effects on various demographic groups. Continuous monitoring and evaluation will enable the legal profession to proactively address potential disparities and strategies to mitigate any adverse impacts.

With time, consideration and open dialogue, the legal profession can help steer the course of AI integration to maximize its benefits while mitigating its risks. This proactive and inclusive approach ensures that the advancement of AI technologies in our industry aligns with the overarching principles of equity, justice and ethical responsibility, reinforcing the commitment to upholding the dignity and rights of all people.



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## **Appendix 1:**

### **Essential Factors for Selecting AI Products and Formulating an AI Policy in Legal Firms: A Starting Point**

This guidance provides initial discussion items law firms and/or legal professionals can use to navigate integrating AI tools into their practices.

From understanding the risks and advantages of AI to selecting appropriate tools, ensuring data protection and training staff, each aspect is designed to help legal professionals address vital factors that must be considered. When undertaking substantial AI projects, it is advisable to consult with data privacy and AI experts throughout the integration process. Simultaneously, it is of utmost importance to maintain detailed records of any interactions involving AI, GAI and client data.

#### **Disclaimer**

This guidance is designed to initiate conversations and serve as a starting point for law firms considering the integration of AI into their practices. It is not intended to replace a comprehensive AI policy. By addressing the key questions and considerations outlined in this guidance, law firms can take proactive steps toward using AI in alignment with ethical and legal considerations.

#### **Key Considerations**

1. **Understanding AI risks:** Alongside its advantages, AI presents potential risks such as data privacy concerns and ethical dilemmas. Conducting a thorough risk assessment is crucial for identifying and mitigating these risks.

Here are some key questions to consider, and if possible, ask the AI software provider when starting a risk assessment for AI:

1. What are the potential risks associated with the AI system, such as data privacy breaches, bias or unintended consequences?
2. How is the AI system trained, and what data sources are used? Are there any potential biases or limitations in the training data?
3. If the system is specifically designed to work with sensitive data of any kind, what measures are in place to ensure the security and privacy of the data used by the AI system?
4. How are the AI system's decisions or outputs validated and monitored for accuracy and fairness?
5. What are the potential legal and ethical implications of the AI system's actions or decisions?
6. What is the plan for addressing and mitigating any identified risks or unintended consequences?
7. How will transparency and replicability be monitored and maintained?

8. What is the process for involving stakeholders, such as AI experts, legal professionals and ethical advisers in the risk assessment and management process?

These questions can help organizations identify, evaluate and mitigate some of the potential risks when implementing AI systems.

**2. Leverage AI's advantages and choose the right tools:** Before investing in an AI tool, thoroughly investigate its capabilities to determine whether it can deliver the desired benefits, such as increased efficiency and cost savings, in a responsible and secure manner. With the exponential growth of AI tools tailored to the legal sector, it is essential to select tools aligned with your firm's needs and use cases.

Establishing key performance indicators (KPIs) can help gauge the effectiveness of AI tools in improving legal services. Given the wide range of choices available, retaining a trusted technology adviser can significantly assist in navigating the increasingly complex landscape of AI product options, especially for those in traditionally non-technical professions.

**3. Ensure data protection:** To address data protection and privacy concerns, establish clear policies for data usage with AI tools. Keep up to date with changing data protection laws and verify that both you and your AI software or service providers adhere to industry-standard best practices for data privacy and security.

The National Institute of Standards and Technology (NIST) provides a valuable resource, the NIST Privacy Framework, for organizations looking to establish robust data privacy standards. This comprehensive tool offers a structured approach to identifying, evaluating, and addressing privacy risks, along with recommendations for implementing effective controls and protective measures. By adopting the guidelines outlined in the NIST Privacy Framework, organizations can align their data privacy practices with industry standards and best practices (“Getting Started | NIST,” 2021).

More information about NIST’s Privacy Framework is available at <https://www.nist.gov/privacy-framework/getting-started-0>

**4. Train your staff:** Regular training sessions should cover technical aspects and ethical considerations of using AI tools. Law firm staff should be well-versed in data protection guidelines.

**5. Manage integrating AI with existing systems:** It is essential to collaborate with data privacy and AI professionals as necessary during the integration process of AI tools with existing systems. Additionally, it is crucial to document any interactions between AI, GAI and client data, specifying the tools used and the data involved.

**6. Stay current with technology:** Law firms must stay updated on advancements in technology in two ways – first, through maintaining subscriptions to relevant publications or by attending industry conferences, and second, through software updates that fix bugs, privacy and security issues and more.

**7. Attribute AI content when necessary:** Law firms should establish and follow clear guidelines on attributing content generated or inspired by AI. Providing staff with a framework for acknowledgment can streamline this process.

**8. Monitor AI for bias and errors:** Law firms must adopt and adhere to regular fact-checking and bias review procedures to ensure the accuracy and integrity of AI-generated content. It is vital for law firms to report any identified bias or errors to the AI software or service provider(s) immediately.

**9. Consider the impact of AI:** Evaluate how AI may affect the financial aspects of law practice, and if necessary, consider adapting billing models to align with client expectations regarding AI's ability to streamline tasks that were previously time-consuming. *Note: Ensure that any changes to billing models are clearly communicated to clients prior to engagement.*

**10. Know your legal obligations:** Using the guidance provided in this report, as well as educational materials and information published by the NJSBA, the Administrative Office of the Courts (AOC), and other trusted legal sources, ensure that you thoroughly understand the legal and ethical obligations you must consider or adhere to when incorporating AI or GAI into your legal practice.

## **Appendix 2:**

### **Sample Artificial Intelligence and Generative Artificial Intelligence Use Policy**

#### **1. Purpose**

This policy establishes guidelines for the ethical, responsible, and efficient use of Artificial Intelligence (AI) and Generative Artificial Intelligence (GAI) technologies within the law firm. It aims to ensure compliance with legal and ethical standards, safeguard client confidentiality and uphold the highest level of professional conduct while harnessing the benefits of AI and GAI tools.

#### **2. Scope**

This policy applies to all individuals who currently use or plan to use AI and GAI tools to support the practice of law, including employees, partners, associates, contractors, vendors, finance and accounting professionals, billing companies and law firm staff members.

Note: To comply with RPC 1.1, attorneys must reasonably understand the technology they use, including its risks and proper usage. They must also diligently protect confidentiality and privilege. When considering AI tools and services, attorneys should only use credible vendors that provide adequate safeguards to fulfill their professional responsibilities under the RPCs.

#### **3. Definitions**

3.1. Artificial Intelligence (AI): Computer systems simulate human intelligence processes, including learning, reasoning, and self-correction (“Artificial Intelligence | NIST,” 2024).

3.2. Generative Artificial Intelligence (GAI): A subset of AI focused on creating new content, such as text, images, or audio, based on patterns learned from training data (“Artificial Intelligence | NIST,” 2024).

#### **4. Approval and Oversight**

4.1. Any use of AI or GAI tools must receive approval from the firm's designated AI Oversight Committee before implementation.

4.2. The AI Oversight Committee is responsible for evaluating each AI or GAI tool's potential benefits, risks, and ethical implications and determining its suitability for firm-wide use.

4.3. The AI Oversight Committee conducts regular audits and assessments of AI and GAI tools to ensure ongoing compliance with this policy and relevant laws and regulations.

4.4 List the Firm’s AI Oversight Committee members here:

#### **5. Ethical and Legal Compliance**

5.1. All usage of AI and GAI tools must adhere to applicable laws, regulations and professional ethical standards, including the Rules of Professional Conduct (RPCs) governing client confidentiality, data protection and intellectual property.

5.2. AI and GAI tools shall not be used to engage in or promote discriminatory, biased or unethical practices.

5.3. The firm shall maintain transparency with clients when using AI and GAI tools on their matters and obtain informed consent when necessary.

5.4. Only GAI or AI tools designed explicitly for legal matters and with sufficient client data protection should be used for specific legal issues. No public-purposed AI tools should be used for specific legal matters, and no client or other sensitive or regulated data should be shared with public-purposed AI tools.

## **6. Data Protection and Confidentiality**

6.1. Any data used for training or operating AI and GAI tools must be appropriately secured and protected by the firm's data protection policies and relevant laws and regulations.

6.2. Strict access controls require only authorized personnel to use AI and GAI tools and access associated data. While ensuring this does not happen in today's remote work environment is complex, a strict compliance model and proper use of standard security technology like VPNs will provide incentives for correct usage and consequences for policy violation.

6.3. Necessary technical and organizational measures are implemented to prevent unauthorized disclosure or exposure of confidential client information through AI and GAI tools.

## **7. Human Oversight and Review**

7.1. All outputs generated by or with the assistance of AI and GAI tools must undergo review and validation by qualified human professionals before use in any legal matter (every review is cataloged for audit purposes).

7.2. AI and GAI tools augment and support human expertise, but do not replace it. Human professionals must make all final decisions and judgments.

7.3. Clear protocols are established for escalating issues or concerns related to AI and GAI tool outputs to the appropriate supervisory authority.

## **8. Training and Education**

8.1. All personnel using AI and GAI tools must receive comprehensive training on their proper use, limitations and potential risks before using them for any firm matter or activity.

8.2. Ongoing education and resources are provided to ensure personnel stay informed about AI and GAI technologies' developments and best practices in the legal profession.

## **9. Intellectual Property and Ownership:**

9.1. The firm respects third parties' intellectual property rights in developing, training and using AI and GAI tools.

9.2. AI or GAI models, algorithms or outputs developed using the firm's resources or data are considered the firm's intellectual property unless otherwise agreed upon.

## **10. Monitoring and Review**

10.1. The AI Oversight Committee continuously monitors AI and GAI tools' use and performance to identify potential issues, biases or errors.

10.2. The AI Oversight Committee regularly reviews and updates this policy to ensure continued relevance and effectiveness amid evolving technologies, legal standards and ethical norms.

10.3. Audits of work products created with GAI or AI are regularly performed to ensure accuracy, and the human review record is checked as part of this process.

## **11. Enforcement and Reporting**

11.1. Violations of this policy may result in disciplinary action, including termination of employment or position in the firm, regardless of what the level of that position may be.

11.2. All personnel must report suspected policy violations or concerns regarding the usage of AI and GAI tools to the AI Oversight Committee or firm management.

## **12. Acceptance**

As AI becomes more common, it will become increasingly important to understand its place in an expanded system of practice. It is important to note that this technology may change significantly and often. As such, it is the shared responsibility of all employees to maintain an understanding of the latest developments, risks and best use cases AI can provide.

By implementing an AI and GAI use policy, the law firm underscores its commitment to the ethical, responsible and compliant use of these technologies while using their potential to enhance the quality and efficiency of legal services provided to clients.



## **Appendix 3:**

### **Questions for Vendors When Selecting AI Products and Services**

What training is available to understand the technology better and avoid dangerous areas/pitfalls?

*Key considerations: Inquire about comprehensive training and support that covers technical issues, ethical considerations and best practices for applying AI in a legal context.*

Are there any case studies, testimonials or references from other legal professionals who have successfully used the tool?

*Key considerations: Reach out to colleagues or request references from the provider to gain valuable insights into the tool's effectiveness and user experiences.*

How do you monitor accuracy and detect potential issues?

*Key considerations: Understand the vendor's quality control measures, such as audits, testing and monitoring for errors or biases. Inquire about their process for addressing and resolving identified issues.*

Who is this software intended for: solo practitioners, small law firms, mid-size firms, large firms?

*Key considerations: Ensure the vendor's offering aligns with your legal practice's size and needs and can scale according to your growth plans.*

What are your recommended best practices for using this tool and adhering to the Rules of Professional Conduct (RPCs)?

*Key considerations: Seek guidance on using the AI tool in compliance with RPCs, including maintaining client confidentiality, ensuring proper supervision and avoiding conflicts of interest.*

How do we place appropriate data privacy and security disclosures in our retainer agreements and other documents to ensure clients understand and can be satisfied by the safeguards and protocols put in place when using your product?

*Key considerations: When discussing data privacy and security with an AI vendor, ensure they address the following:*

- 1. Data ownership, access, protection measures and compliance with laws and regulations*
- 2. Data breach notification, remediation, retention and deletion policies*
- 3. Subcontractor management and employee training practices*
- 4. Termination procedures and data handling post-termination*

*Addressing these points helps protect your data and meet your organization's privacy and security requirements.*

Does the company have a proven track record of providing reliable, secure and compliant solutions specifically tailored to the legal sector?

*Key considerations: Request any information the company will provide to assess its commitment to providing reliable and compliant solutions for the legal industry.*

Are there any other client disclosures required of attorneys beyond the retainer?

*Key considerations: Determine if additional disclosures or notifications are needed when using the AI tool, such as informing clients about AI usage, obtaining consent or explaining limitations and risks.*

If the company is relatively unknown, it may be helpful to know who the owners are and if there are any potential ethical concerns related to the ownership structure.

*Key considerations: Research the company's website, press releases and financial disclosures to uncover information about the owners and identify any potential ethical concerns.*

## Appendix 4

### Key Terms to Know

Understanding key terms in AI is essential for attorneys navigating the complex landscape of technology in the legal sphere. While the following terms represent critical concepts, it is important to note that this list is not exhaustive. Nonetheless, familiarity with these terms will empower legal professionals to engage with AI-related issues and make informed decisions effectively.

The key terms below have been referenced from NIST's Glossary, which can be found here: [https://airc.nist.gov/AI\\_RMF\\_Knowledge\\_Base/Glossary](https://airc.nist.gov/AI_RMF_Knowledge_Base/Glossary)

- 1. Artificial intelligence (AI):** Intelligent systems that mimic the human mind, such as solving complex problems, reasoning and problem-solving, often used in legal research, document analysis, and predictive analytics.
- 2. Machine learning:** A subset of AI that enables systems to learn from data and improve performance over time without being explicitly programmed, used for tasks like case prediction and contract analysis in legal practice.
- 3. Deep learning:** Advanced machine learning technique using neural networks with multiple layers to learn patterns and representations from data, applied in tasks like natural language processing (NLP) for contract review and sentiment analysis.
- 4. Natural language processing (NLP):** AI technology enables computers to understand, interpret and generate human language, which is critical for tasks like automated document summarization and legal document classification.
- 5. Bias:** Systematic errors or inaccuracies introduced by AI algorithms or data that result in unfair outcomes, requiring legal professionals to assess and mitigate bias in AI systems used for decision-making.
- 6. Transparency:** The degree to which AI systems' decisions, data usage and operations are understandable and explainable, which is crucial for ensuring accountability and regulatory compliance in legal contexts.
- 7. Replicability:** The ability to reproduce AI experiments or results to validate findings and ensure reliability is essential for establishing AI applications' credibility in legal research and analysis.
- 8. Large language model (LLM):** AI-powered software designed to manage and organize legal documents, streamline workflows and improve legal document review and production efficiency.
- 9. Algorithm:** A step-by-step procedure or rules for solving a problem or accomplishing a task. AI often uses it to process data and make decisions, and its legal applications include predictive modeling and risk assessment.
- 10. Bias auditing:** The process of systematically evaluating and identifying biases in AI systems, including data collection, model development and decision outputs, to ensure fairness and equity in legal applications and decision-making processes.

## NOTICE TO THE BAR

### LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS

Artificial intelligence (AI) includes a variety of rapidly evolving technologies with significant capabilities as well as significant risks. In furtherance of its responsibility to uphold the highest level of professionalism among lawyers, the New Jersey Supreme Court seeks to balance the benefits of innovation while safeguarding against the potential harms of misuse. To that end, the Court here provides preliminary guidelines on the use of AI to support lawyers who practice in New Jersey and the clients who depend on those lawyers.

#### Supreme Court Committee on AI and the Courts

The Supreme Court Committee on Artificial Intelligence and the Courts, which includes private and public lawyers, as well as judges, Judiciary leaders, technologists, and experts in academia and media, recommended these initial guidelines to support lawyers in continuing to comply with the existing Rules of Professional Conduct (RPCs) and the Rules of Court.

The attached preliminary guidelines are intended to inform and assist lawyers in navigating their ethical responsibilities in light of the current and anticipated effects of AI -- in particular generative AI -- on legal practice.

#### Questions and Suggestions

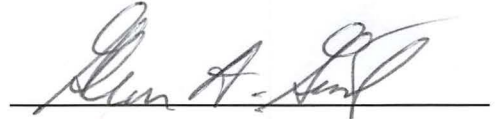
Lawyers with specific questions about their own prospective conduct related to the use of AI should continue to seek direction from the Attorney Ethics Hotline at (609) 815-2924 or in writing to [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov). As always, the identity of lawyers who pose such specific questions will remain confidential. However, the issues raised by such inquiries may inform the development of future, more detailed guidance regarding the ethical use of AI in the practice of law.

While these interim guidelines are effective immediately, the Supreme Court also invites comments and questions on the use of AI in legal practice, including suggestions of potential use cases for lawyers and the courts.

Questions regarding this notice should be directed to the Office of the Administrative Director of the Courts at (609) 376-3000. Written inquiries and any comments on the preliminary guidelines should be submitted via email to [Comments.Mailbox@njcourts.gov](mailto:Comments.Mailbox@njcourts.gov).



Stuart Rabner  
Chief Justice



Glenn A. Grant, J.A.D.  
Acting Administrative Director

Dated: January 24, 2024

## PRELIMINARY GUIDELINES ON NEW JERSEY LAWYERS' USE OF ARTIFICIAL INTELLIGENCE

Artificial intelligence (AI) refers to a machine-based system that can make predictions, recommendations, or decisions. AI systems use machine and human-based inputs to perceive environments, abstract such perceptions into models through automated analysis, and use model inference to formulate options. While various forms of AI have been widely used for years, the advent of generative artificial intelligence (Gen AI) -- a subset of AI in which machine-based systems create text or images based on predictive models derived from training with large datasets -- has elevated interest in and use of AI in legal and other professions. These preliminary guidelines refer generally to AI with the understanding that certain provisions relate primarily to generative AI. The ongoing integration of AI into other technologies suggests that its use soon will be unavoidable, including for lawyers. While AI potentially has many benefits, it also presents ethical concerns. For instance, AI can “hallucinate” and generate convincing, but false, information. These circumstances necessitate interim guidance on the ethical use of AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks.

### Artificial Intelligence Does Not Change Lawyers' Duties

Lawyers in some jurisdictions improperly relied on Gen AI to generate content, which in some cases resulted in the submission to courts of briefs containing references to fake case law (which those lawyers did not check before or after submission). At the other end of the spectrum, reputable resources including LexisNexis and Westlaw promise to improve the quality of legal practice through the integration of AI to provide faster, more reliable legal research and writing assistance. Larger law firms are continuing to develop in-house AI systems while vendors are marketing AI-facilitated contract review and administrative support to smaller firms and solo practitioners. In this complex and evolving landscape, lawyers must decide whether and to what extent AI can be used so as to maintain compliance with ethical standards without falling behind their colleagues.

The core ethical responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet. AI

tools must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of legal practice. While AI does not change the fundamental duties of legal professionals, lawyers must be aware of new applications and potential challenges in the discharge of such responsibilities. 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. This notice highlights particular RPCs that may be implicated by the use of AI, with the understanding that such references are not intended to be exhaustive.

### Accuracy and Truthfulness

A lawyer has a duty to be accurate and truthful. RPC 3.1 provides that a lawyer may not “assert or controvert an issue . . . unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous . . . .” RPC 4.1(a)(1) prohibits a lawyer from making a false statement of material fact or law. And RPC 8.4(c) states that it is misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Because AI can generate false information, a lawyer has an ethical duty to check and verify all information generated by AI to ensure that it is accurate. Failure to do so may result in violations of the RPCs.

### Honesty, Candor, and Communication

RPC 3.3 requires a lawyer to uphold candor to the tribunal, including by not knowingly making “a false statement of material fact or law . . . .” or offering “evidence that the lawyer knows to be false . . . .” RPC 3.3(a)(1); RPC 3.3(a)(4). A lawyer who uses AI in the preparation of legal pleadings, arguments, or evidence remains responsible to ensure the validity of those submissions. While the RPCs do not require a lawyer to disclose the use of AI, such use does not provide an excuse for the submission of false, fake, or misleading content. The RPCs prohibit a lawyer from using AI to manipulate or create evidence and prohibit a lawyer from allowing a client to use AI to manipulate or create evidence. See, e.g., RPC 1.2(d); RPC 1.4(d); RPC 3.4(b).

RPC 1.2 provides that a lawyer must “abide by a client’s decisions concerning the scope and objectives of representation . . . and as required by

RPC 1.4 shall consult with the client about the means to pursue them.” RPC 1.4(b), in turn, provides that a lawyer must promptly comply with a client’s reasonable requests for information, and RPC 1.4(c) provides that a lawyer must provide sufficient explanation for a client to make informed decisions regarding the representation. Those RPCs do not impose an affirmative obligation on lawyers to tell clients every time that they use AI. However, if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer’s use of AI. As to client interactions, a lawyer can use AI to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . . .” consistent with RPC 1.4, but the lawyer must continue to oversee such communications to ensure accuracy.

### Confidentiality

RPC 1.6 provides that “[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . .” To uphold this core duty, a lawyer must not only avoid intentional disclosure of confidential information but must also “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client.” RPC 1.6(f). Today, the market is replete with an array of AI tools, including some specifically designed for lawyers, as well as others in development for use by law firms. A lawyer is responsible to ensure the security of an AI system before entering any non-public client information.

### Prevention of Misconduct, Including Discrimination

A lawyer must not engage in misconduct, including “conduct involving dishonesty, fraud, deceit or misrepresentation;” “conduct that is prejudicial to the administration of justice;” and “conduct involving discrimination . . . .” RPC 8.4(c); 8.4(d); 8.4(g). Those duties are addressed in part by the ongoing requirements to ensure accuracy (and avoid falsification) of communications with clients and the court.



## Oversight

Law firms and lawyers are responsible for overseeing other lawyers and nonlawyer staff, as well as law students and interns, as they may be held responsible for ethical violations by those individuals. See, e.g., RPC 5.1 (Responsibilities of Partners, Supervisory Lawyers, and Law Firms); RPC 5.2 (Responsibilities of a Subordinate Lawyer); RPC 5.3 (Responsibilities Regarding Nonlawyer Assistance). This requirement extends to ensuring the ethical use of AI by other lawyers and nonlawyer staff.

## Conclusion

These preliminary guidelines are intended to assist lawyers in complying with the existing RPCs, which remain unchanged by the availability and use of AI. The references to specific RPCs are intended for illustration and not as an exhaustive list. For instance, the use of AI likely will affect lawyer billing practices and advertising. See, e.g., RPC 1.5 (Fees); RPC 7.2 (Advertising). Those and other specific applications can be addressed in future guidelines if and as needed.

## **NOTICE TO THE BAR**

### **ARTIFICIAL INTELLIGENCE – (1) SUMMARY OF RESPONSES TO JUDICIARY SURVEY OF NEW JERSEY ATTORNEYS; (2) PLANS FOR NO-COST CONTINUING LEGAL EDUCATION PROGRAMS**

As authorized by the Supreme Court, the Judiciary in April 2024 surveyed New Jersey attorneys regarding their knowledge, perception, and use of artificial intelligence (specifically generative artificial intelligence), in both personal and professional contexts. Based on the responses to the survey, the Judiciary plans to conduct a series of virtual continuing legal education courses on AI and generative AI that will be available to attorneys at no cost.

#### **Survey Response Summary**

More than 6,400 attorneys completed the survey, sharing areas of interest and concern, as well as preferences for education and training. In addition, responding attorneys also offered more than 1,800 narrative comments, which illustrated a broad spectrum of views and attitudes about generative AI technologies. The quantitative and qualitative data collected through the survey provide valuable insights about the current and potential future uses of generative AI in the practice of law in New Jersey. Additionally, the information gathered through this comprehensive outreach will inform the ongoing work of the Supreme Court Committee on Artificial Intelligence in the Courts.

Of the attorneys who completed the survey:

- More than half have been engaged in the practice of law for 20+ years.
- The most prevalent concerns about generative AI involved accuracy, ethical considerations, and lack of regulation.
- More than 60% indicated that they know “a little” about how generative AI works. Less than 20% of survey respondents reported having more than a little understanding of the functionality or application of generative AI.
- Only 14.5% of respondents stated that they currently use generative AI technologies in their legal practice.

- Nearly 80% of respondents have received no training on the use of generative AI in legal work.
  - Of those attorneys who have received training on AI, more than 80% indicated that such training increased their understanding of generative AI and what types of products generative AI can produce in the legal profession.
- Many attorneys reported a lack of available training on generative AI. Survey respondents expressed a preference for virtual training programs, followed by in-person workshops and AI-focused legal conferences.


### Upcoming CLE Programs on Generative AI

Most survey respondents reported only a little knowledge and understanding of how generative AI technologies work and the legal products they can produce. Further, many survey respondents expressed wide-ranging practical and ethical concerns about these new technologies. To enhance attorneys' understanding of AI and to mitigate against potential missteps, the Judiciary will develop and present a series of CLE programs regarding AI at no cost to attendees. The first program to be presented will be an overview of ethical considerations related to the use of generative AI, as follows:

- **July 24, 2024 from 12 – 2:00 p.m.**, Artificial Intelligence Fundamentals and the Ethics of AI Use by Lawyers (via live Zoom webinar (which meets the "live instruction" requirements of BCLE Reg. 103:1(n)). Advance registration is required and can be completed at this [link](#). This program will offer 2.0 credits in ethics/professionalism.

Details about this initial course and future programs will be posted on the Judiciary's website [njcourts.gov](http://njcourts.gov).

Questions about this notice or the Supreme Court Committee on Artificial Intelligence and the Courts may be directed by email to [Court-Use-of-AI.mbx@njcourts.gov](mailto:Court-Use-of-AI.mbx@njcourts.gov).

  
\_\_\_\_\_  
Hon. Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts

Dated: June 11, 2024

Home / Daily News / No. 42 law firm by head count could face...

TECHNOLOGY

## No. 42 law firm by head count could face sanctions over fake case citations generated by AI

BY DEBRA CASSENS WEISS ([HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/4/](https://www.abajournal.com/authors/4/))

FEBRUARY 10, 2025, 10:30 AM CST



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**Updated:** Lawyers from plaintiffs law firm Morgan & Morgan are facing possible sanctions for a motion that cited eight nonexistent cases, at least some of which were apparently generated by artificial intelligence.

In a Feb. 6 order

([https://storage.courtlistener.com/recap/gov.uscourts.wyd.64014/gov.uscourts.wyd.64014.156.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.wyd.64014/gov.uscourts.wyd.64014.156.0_1.pdf)), U.S. District Judge Kelly H. Rankin of the District of Wyoming told lawyers from Morgan & Morgan and the Goody Law Group to provide copies of the cited cases, and if they can't, to show cause why they shouldn't be sanctioned.

Law360

(<https://www.law360.com/articles/2295236>)

*Lawyers from plaintiffs law firm Morgan & Morgan are facing possible sanctions for a motion that cited eight nonexistent cases, at least some of which were apparently generated by artificial intelligence. (Image from Shutterstock)*

and Original Jurisdiction (<https://davidlat.substack.com/p/morgan-and-morgan-order-to-show-cause-for-chatgpt-fail-in-wadsworth-v-walmart>) have coverage.

The cases cited by the court had been “hallucinated” by an internal AI platform and were not legitimate, the firms said in a Feb. 10 response ([https://www.abajournal.com/files/Feb\\_10\\_response\\_Wadsworth.pdf](https://www.abajournal.com/files/Feb_10_response_Wadsworth.pdf)) to the show-cause order.

“This matter comes with great embarrassment and has prompted discussion and action regarding the training, implementation and future use of artificial intelligence within our firm,” the response said. “This serves as a cautionary tale for our firm and all firms, as we enter this new age of artificial intelligence.”

The law firms’ brief had cited nine cases, but Rankin could locate only one of them. Some of the citations did lead to cases under different names.

The lawyers’ motion also included a description of the governing legal standard that was “peculiar,” Rankin said. The motion correctly cited a federal rule of evidence but then went on to say “Wyoming caselaw reinforces these principles.” To support the assertion about Wyoming caselaw, the motion cited fake federal district court cases.

“Notwithstanding this slight inconsistency, experienced litigators like plaintiffs’ counsel should know that this court is a federal court, and therefore federal procedural law governs evidentiary issues,” Rankin wrote.

Morgan & Morgan is ranked No. 42 in the United States based on firm head count, according to Original Jurisdiction, which cited figures from the American Lawyer. The Goody Law Group appears to be a small firm based in California.

“Moral of the story: Lawyers at large firms can misuse ChatGPT as well as anyone,” wrote Above the Law founder David Lat at Original Jurisdiction.



The case involves a hoverboard sold by Walmart that allegedly exploded and caught fire, according to Law360.

The lawyers who signed the now-withdrawn motion with the alleged fake cites were Rudwin Ayala and T. Michael Morgan of Morgan & Morgan and Taly Goody of the Goody Law Group.

They did not immediately respond to ABA Journal emails seeking comment. Morgan and Goody did not respond to Journal voicemails. A person who answered a call at Morgan & Morgan could not locate Ayala in the directory.

The communications director for Morgan & Morgan emailed the Journal a copy of the show-cause response after it was filed.

*Updated Feb. 12 at 8:50 a.m. to report on the response to the show-cause order.*

A	B	C	D	E	F	G	H	I	J	M
<b>WHY YOU'RE NOT LOSING WEIGHT</b>										
<b>WAKE UP TIME</b>	6 AM		7 AM		8 AM					
<b>DAILY MEALS</b>	1	2	3	4						
<b>HOURS OF SLEEP</b>										
<b>AGE</b>	18-25	26-35	36-55		56+					
<b>DAILY WATER INTAKE</b>										
<b>YOUR BMI</b>	40+	30+		25-30		20-25				
<b>FASTING SCHEDULE</b>	16:8	12:12	14:10		18:6					
<b>TAKE THE TEST</b>										

*Write a letter to the editor, share a story tip or update, or report an error.*

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 511R

May 8, 2024

## Confidentiality Obligations of Lawyers Posting to Listservs\*

*Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.*

### Introduction

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.<sup>1</sup> Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with individuals outside their law firms by other media and in other settings, including when lawyers discuss their work at in-person gatherings.<sup>2</sup>

### Relevant Principles Regarding the Duty of Confidentiality

Subject to exceptions not applicable here,<sup>3</sup> ABA Model Rule of Professional Conduct 1.6(a) provides that: "A lawyer shall not reveal information relating to the representation of a client

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\*Listerv® is a registered trademark. When the word "listservs" is used in this opinion, it is intended to describe and apply to any electronic-based discussion group and/or email community.

<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023.

<sup>2</sup> See ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 480 (2018) for a discussion of other forms of lawyer public commentary including blogs, writings, and educational presentations.

<sup>3</sup> This opinion does not discuss the exceptions to the confidentiality obligation provided for in paragraph (b) because we cannot envision a recurring situation in which any of the exceptions are likely to authorize disclosures of information relating to a representation on a lawyer's listserv.

unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”<sup>4</sup> Comment 3 explains that Rule 1.6 protects “all information relating to the representation, whatever its source” and is not limited to communications protected by attorney-client privilege.<sup>5</sup> A lawyer may not reveal even publicly available information, such as transcripts of proceedings in which the lawyer represented a client. As noted in ABA Formal Opinion 04-433 (2004), “the protection afforded by Model Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.” Among the information that is generally considered to be information relating to the representation is the identity of a lawyer’s clients.<sup>6</sup>

Because Rule 1.6 restricts communications that “could reasonably lead to the discovery of” information relating to the representation,<sup>7</sup> lawyers are generally restricted from disclosing such information even if the information is anonymized, hypothetical, or in abstracted form, if it is reasonably likely that someone learning the information might then or later ascertain the client’s identity or the situation involved.<sup>8</sup> Comment 4 explains, that without client consent, Rule 1.6 prohibits:

disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

The breadth of Rule 1.6 was emphasized in ABA Formal Opinion 496 (2021), which cautioned lawyers about responding to online criticism: Lawyers “who choose to respond online must not disclose information that relates to a client matter *or that could reasonably lead to the discovery of confidential information by another.*” (Emphasis added).

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<sup>4</sup> Comment 2 to Model Rule 1.6(a) emphasizes that a “fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”

<sup>5</sup> The attorney-client privilege is an evidentiary rule applicable to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence about a client. The duty of client-lawyer confidentiality is not limited to those circumstances, nor is it limited to matters communicated in confidence by the client. MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. [3].

<sup>6</sup> Comment 2 to Rule 7.2, for example, notes that in lawyer advertising, client consent is required before naming regularly represented clients. *See also* Wis. Formal Op. EF-17-02 (2017) (lawyer may not disclose current or former client’s identity without informed consent; not relevant that representation is matter of public record or case is long closed); Ill. State Bar Ass’n Advisory Op. 12-03 (2012) (lawyer must obtain informed consent before disclosing client names to professional networking group); Ill. State Bar Ass’n Advisory Op. 12-15 (2012) (lawyer may take part in an online discussion group if no information relating to the representation is disclosed and there is no risk that the client could be identified); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133-134 (10<sup>th</sup> ed. 2023).

<sup>7</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [4].

<sup>8</sup> *See, e.g.*, Colo. Bar Ass’n Formal Op. 138 (2019) (“Consultations using hypotheticals do not implicate [Rule] 1.6 provided that the hypotheticals do not create a ‘reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.’”).



Lawyers may disclose information relating to the representation with the client's informed consent. "Informed consent" is defined in Rule 1.0(e) to denote "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." Comments 6 and 7 to Rule 1.0 advise that the necessary communication will ordinarily require the lawyer to confer with the client and explain the advantages and disadvantages of the proposed course of conduct. And obtaining consent will usually require a client's affirmative response; a lawyer generally may not assume consent from a client's silence.<sup>9</sup>

Additionally, Rule 1.6(a) permits a lawyer to reveal information relating to the representation of a client if "the disclosure is impliedly authorized in order to carry out the representation."<sup>10</sup> Comment 5 to Rule 1.6 explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." Conversely, lawyers are generally not authorized to disclose information relating to the representation to lawyers outside the firm, including lawyers from whom the engaged lawyers seeks assistance.

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<sup>9</sup> Lawyers who anticipate using listservs for the benefit of the representation may seek to obtain the client's informed consent at the outset of the representation, such as by explaining the lawyer's intention and memorializing the client's advance consent in the lawyer's engagement agreement. Rule 1.0(e) provides that for a client's consent to be "informed," the lawyer must "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Therefore, the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved. It may not always be possible to provide sufficient detail until considering an actual post.

<sup>10</sup> Comment 5 to Rule 1.6 explains that a lawyer is impliedly authorized to make disclosures "when appropriate in carrying out the representation." In many situations, by authorizing the lawyer to carry out the representation, or to carry out some aspect of the representation, the client impliedly authorizes the lawyer to disclose information relating to the representation, to the extent helpful to the client, for the purpose of achieving the client's objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [5] ("In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation."). For example, when a client authorizes a lawyer to conduct settlement negotiations or transactional negotiations, the client impliedly authorizes the lawyer to disclose information relating to the representation insofar as the lawyer reasonably believes that doing so will advance the client's interests. What is impliedly authorized will depend "upon the particular circumstances of the representation." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 135. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (lawyer experiencing data breach may reveal information relating to representation to law enforcement if lawyer reasonably believes disclosure is impliedly authorized, will advance client's interests, and will not adversely affect client's material interests); N.C. Formal Op. 2015-5 (2015) ("[p]roviding a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation" and impliedly authorized); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 61 (3d ed. 2001) (A lawyer is impliedly authorized to disclose information that "will advance the interests of the client in the representation."). In at least one situation, the Rules themselves impliedly authorize the disclosure, even without the client's implicit approval. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [8] ("When taking protective action" on behalf of a client with diminished capacity pursuant to MODEL RULES OF PROF'L CONDUCT R. 1.14(b), "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.").

Rather, as a general matter, lawyers must obtain the client's informed consent before engaging lawyers in the representation other than lawyers in their firm.<sup>11</sup>

### Seeking Advice or Assistance from a Listserv Discussion Group

ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411.

Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, a lawyer must have the client's informed consent to post a

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<sup>11</sup> Comment 6 to Rule 1.1 states that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent..."

hypothetical to a listserv if, under the circumstances, the posted question could “reasonably lead to the discovery of” information relating to the representation because there is a “reasonable likelihood” that the reader will be able to ascertain the identity of the client or the situation involved. Although this opinion focuses on lawyers’ efforts to obtain information from other lawyers for the benefit of a legal representation, the obligation to avoid disclosing information relating to a representation applies equally when lawyers post on listservs for other purposes, such as to reply to requests for help, to develop their practices by networking, or simply to regale their professional colleagues with “war stories.”<sup>12</sup>

Not all inquiries to a listserv designed to elicit information helpful to a representation will disclose information relating to the representation. In some situations, because of the nature of the lawyer’s practice, the relevant client or the situation involved will never become known, and therefore the lawyer’s anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer’s clientele. In circumstances such as these, a lawyer may post general questions or hypotheticals because there is no reasonable possibility that any listserv member, or anyone else with whom the post may be shared, could identify the specific client or matter.<sup>13</sup>

Illustratively, the authors of Oregon Bar Opinion 2011-184 explained that “[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client” do not require client consent under Rule 1.6. Careful lawyers will often be able to use listservs to ask fellow practitioners for cases and articles on topics, for

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<sup>12</sup> Lawyers should keep in mind that the confidentiality obligation continues after the representation ends. *See* Rule 1.9(c)(2) (“A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.”). This restriction on the disclosure of information relating to a former representation applies even if the information is generally known. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 479 (2017) (discussing the “generally known” exception to the use of confidential information adversely to a former client allowed under Rule 1.9(c)(1) and distinguishing it from the broader prohibition against disclosure of that information). Unlike the counterpart provision (Disciplinary Rule 4-101) of the earlier Code of Professional Responsibility, Rule 1.6 does not permit disclosure of non-privileged information relating to a representation or former representation if its disclosure would not embarrass or harm a client and the client has not specifically asked the lawyer not to disclose it. Consequently, lawyers may not tell “war stories” about a former representation without the former client’s consent if the former client or situation can be identified. As we have noted in the past, the restriction imposed by Rule 1.6 may have First Amendment implications, but the constitutional right to freedom of speech has historically been interpreted consistently with lawyers’ confidentiality obligations to clients. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 480 (2018) (commenting on First Amendment considerations when lawyers act in representative capacities).

<sup>13</sup> For example, a general question requesting case law on whether a warrantless search of a garbage bin outside a residence violates the Fourth Amendment is less likely to allow a reader to infer the client’s identity than a hypothetical revealing the precise facts of a specific search. But if there is a reasonable likelihood that readers can correctly infer the client’s identity, then even the general question discloses information relating to the representation, requiring informed consent. For example, a reader could infer that a lawyer who posts a question to a listserv about the constitutionality of searches of garbage bins located outside of a residence is representing a client whose garbage bin was searched, evidence was found, the lawyer would like to move to suppress the evidence, and the lawyer is unsure of all the relevant case law. Regardless of whether the implicit disclosure of this “information relating the representation” is prejudicial to the client, Rule 1.6 provides that if the client’s identity could be ascertained, it is the client’s decision whether to disclose this sort of information broadly via a listserv to assist the lawyer in conducting useful legal research.

forms and checklists, and for information on how various jurisdictions address a court-connected concern without enabling other lawyers to identify the lawyer's client or the situation involved. Posting this sort of inquiry on a listserv, to the extent possible without disclosing information relating to the representation, may have advantages over a lawyer-to-lawyer consultation precisely because it is broadly disseminated. Maryland State Bar Association Ethics Opinion 2015-03 described peer-to-peer lawyer listservs as a "powerful tool" providing "the opportunity for a lawyer to test his or her understanding of legal principles and to clarify the best way to proceed in unique situations."

The more unusual the situation, however, the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6. Oregon Bar Opinion 2011-184 makes the point. Matters "[w]hen the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named," are among those in which "the lawyer must first obtain the client's informed consent for the disclosures."

Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."<sup>14</sup> Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.<sup>15</sup>

Finally, it bears emphasizing that lawyer listservs serve a useful function in educating lawyers without regard to any particular representation. Lawyers use listservs to update one another about newly published decisions and articles or to share recommendations for helpful contractors or fellow practitioners. Comment 8 to Rule 1.1 advises lawyers to "keep abreast of changes in the law and its practice," and lawyer listservs can help in doing so. These uses, unrelated to any particular representation, would not require a lawyer to secure the informed consent of a client. A lawyer must, however, remain aware of the possible risks to confidentiality involved in any posts to a listserv. Even a general question about the law, such as a request for cases on a specific topic, may in some circumstances permit other users to identify the client or the situation

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<sup>14</sup> Md. State Bar Ass'n Ethics Comm. Op. 2015-3 (2015).

<sup>15</sup> When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media. A lawyer should also be mindful of any possible risks to the attorney-client privilege if the posting references otherwise privileged communications with the client. Whether informed consent requires further disclosures will depend on specific facts.

involved. Therefore, before any post, a lawyer must ensure that the lawyer's post will not jeopardize compliance with the lawyer's obligations under Rule 1.6.

### **Conclusion**

Rule 1.6 prohibits a lawyer from posting comments or questions relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's posts will disclose information relating to the representation that would allow a reader then or later to recognize or infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's consent if the lawyer's contributions will not disclose information relating to a client representation.

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# ARTIFICIAL INTELLIGENCE DISCOVERY & ADMISSIBILITY CASE LAW AND OTHER RESOURCES

**By: Ronald J. Hedges**

**January 2024**



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## INTRODUCTION

I began this collection to assemble information on artificial intelligence (“AI”). Unsurprisingly, content grew and continues to grow as AI and generative artificial intelligence (“GAI”) have become mainstream and subjects of interest to many actors, including elected officials and regulators. I hope to update the collection on a regular basis, but the reader should appreciate that new AI- and GAI-related material appears daily.

The reader might also wish to look at compendiums of case law, etc., I have compiled on electronically stored information (“ESI”) in criminal investigations and proceedings which are hosted by the Massachusetts Attorney General’s Office and are available at <https://www.mass.gov/service-details/understanding-electronic-information-in-criminal-investigations-and-actions>.

With the above in mind, let’s start with some basic definitions (from Donahue):

**‘Artificial Intelligence’** is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data, and translating languages. AI mimics certain operations of the human mind.

**‘Machine learning’** is an application of AI in which computers use algorithms (rules) embodied in software to learn from data and adapt with experience.

A **‘neural network’** is a computer that classifies information – putting things into ‘buckets based on their characteristics.

And, with regard to the governance of AI, see “Key Terms for AI Governance,” *IAPP AI Governance Center* (June 2023), <https://iapp.org/resources/article/key-terms-for-ai-governance/>

For a preview of what might be coming in 2024, see D. Coldewey, “8 Predictions for AI in 2024,” *TechCrunch* (Dec. 19, 2023), <https://techcrunch.com/2023/12/19/8-predictions-for-ai-in-2024/>



Please remember that this collection is not intended to be comprehensive. Rather, it is an overview of complex – and fast-evolving -- technology and how law and society attempt to deal with that technology. **NB: Everything in “color” has been added since the last edition was released in September of 2023.**

Also, I have attempted to create sections or “buckets” of materials. Materials may fit into more than one bucket but are not cited more than once. Moreover, each section begins with case law or statutes and regulations, which are followed by relevant articles, although there are sections consisting solely of articles. **And bear in mind that, although most links lead to free article, some may be behind paywalls.**

One final note: Some may recall difficulties that rural and disadvantaged populations had with, among other things, finding secure and consistent Internet access during the pandemic. As we adopt AI and GAI (and anything else), we should bear those populations in mind. See, for example, M. Muro, *et al.*, “Building AI Cities: How to Spread the Benefits of Emerging Technology Across More of America,” *Brookings* (July 20, 2023), <https://www.brookings.edu/articles/building-ai-cities-how-to-spread-the-benefits-of-an-emerging-technology-across-more-of-america/> and M. Reynolds, “How Do Virtual Hearings Affect People on the Wrong Side of the Digital Divide?” *ABA J.* (Dec. 14, 2023), <https://www.abajournal.com/web/article/how-do-virtual-hearings-affect-people-on-the-wrong-side-of-the-digital-divide#:~:text=Practice%20Technology-,How%20do%20virtual%20hearings%20affect%20people%20on,side%20of%20the%20digital%20divide%3F&text=%E2%80%9CYou%20can%20imagine%20how%20horrible,counsel%20at%20Next%20Century%20Cities.>

There are also proposals to amend the Federal Rules of Evidence (or other evidence rules) to address “machine-generated” evidence. See, in this regard:

- A. Roth, “Proposal to the Advisory Committee on Rules of Evidence: Rule Changes to Address Machine-Generated Proof Beyond Authentication,” in Advisory Committee on Evidence Rules at 80 and Tabs 2A and 2B at (Oct. 27, 2023). Tab 2B is a “Proposed Modification of Current Rule 901(b)(9) to Address Authentication Regarding Artificial Intelligence” submitted by Paul W. Grimm and Maura R. Grossman,” [https://www.uscourts.gov/sites/default/files/2023-10\\_evidence\\_rules\\_agenda\\_book\\_final\\_10-5.pdf](https://www.uscourts.gov/sites/default/files/2023-10_evidence_rules_agenda_book_final_10-5.pdf)

- S. Martinson, “Law Scholars Propose Court Rule Tweak Aimed at Deepfakes,” *Law360* (Oct. 13, 2023), <https://www.law360.com/pulse/articles/1732270/law-scholars-propose-court-rule-tweak-aimed-at-deepfakes>

Comments, criticisms, and proposed additions are welcome. Please send to me at [r\\_hedges@live.com](mailto:r_hedges@live.com).

## **AI-RELATED CASE LAW**

There is limited case law on AI and GAI. However, as the representative decisions below indicate, expect to see courts address, among other things, discovery and admissibility issues.

Note that the Federal Judicial Center, the education arm of the Federal Judiciary, has published J.E. Baker, *et al.*, *An Introduction to Artificial Intelligence for Federal Judges*, in February of 2023. It is available at

[https://www.fjc.gov/sites/default/files/materials/47/An\\_Introduction\\_to\\_Artificial\\_Intelligence\\_for\\_Federal\\_Judges.pdf?utm\\_source=thebrainyacts.beehiiv.com&utm\\_medium=newsletter&utm\\_campaign=122-so-damn-convincing](https://www.fjc.gov/sites/default/files/materials/47/An_Introduction_to_Artificial_Intelligence_for_Federal_Judges.pdf?utm_source=thebrainyacts.beehiiv.com&utm_medium=newsletter&utm_campaign=122-so-damn-convincing)

And see “Artificial Intelligence and the Courts: Materials for Judges,” a project of the American Association for the Advancement of Science. These materials are “primarily individual papers, prepared by experts in the relevant field, and finalized through a process that ensures both the technical accuracy of the content and its utility for judges,” and are available at <https://www.aaas.org/ai2/projects/law/judicialpapers>

### ***Congoo, LLC v. Revcontent LLC*, Civil Action No. 16-401 (MAS), 2017 WL 3584205 (D.N.J. Aug. 10, 2017)**

In this action for, among other things, unfair competition, plaintiff sought discovery of defendants’ source code used to create the content of allegedly false and misleading advertising. The court denied plaintiff’s motion to compel:

In order for the production of source code to be compelled, Plaintiff must prove that it is relevant and necessary to the action. The relevancy and necessity requirements must be met, regardless of whether a Discovery Confidentiality Order exists. Courts have held that when source code is requested not only must it be relevant and necessary to the prosecution or defense of the case but when alternatives are available, a court will not be justified in ordering disclosure.

The majority of cases cited by Plaintiff are distinguishable in that they are patent cases in which production of the source code was necessary to prove infringement claims. The Court finds that unlike in a patent case alleging infringement, Plaintiff does not need to review the actual code because its interest is in the specific functionalities of the software, not the underlying code. \*\*\*

In this case, Plaintiff alleges that the Defendants have employed ‘false and misleading representations in advertising to generate greater income from their Ads and those of Defendants’ Advertisers in order to offer its services at more attractive rates than Plaintiff can offer, and to take Plaintiff’s business, erode Plaintiff’s market share and damage Plaintiff’s goodwill in association with Plaintiff’s native advertising business.’ The focus here is *what* Defendants are doing, that is, whether they are creating ads or influencing the creation or content of the ads. The Court is not convinced that an understanding of the Defendants’ influence on or creation of the ads requires production of the technology, i.e., the source code, utilized by the Defendants. Rather, the Court is persuaded that through witness testimony an understanding of the functionality of the software algorithm as it relates to issues in this case, e.g., selection of higher paying Content Recommendations, can be adequately addressed.

Assuming, however, that the source code is relevant, the Court finds that its highly confidential nature is such that it cannot be adequately safeguarded by a Discovery Confidentiality Order and therefore outweighs the need for production. The proprietary nature of Defendants’ source code is outlined in the declaration of Revcontent’s Chief Product Officer \*\*\*.

A weighing of the competing interests: an ability to elicit facts for a full assessment of the claims and defenses, on the one hand, and protecting trade secrets, on the other, must be made with full consideration of factors, including availability of other means of proof and dangers of disclosure. Given the proprietary nature of Defendants’ source code, which is not in dispute, and the irreparable harm that could occur if it is produced, the Court finds that production of the source code is not warranted, especially in light of Defendants’ representation that ‘the present discovery dispute concerns only several discrete functions of [Defendants’] technology.’ Moreover, weighing the competing interests, the existing Discovery Confidentiality Order is insufficient to justify production of Defendant Revcontent’s highly protected trade secret.

The Court finds that Plaintiff has not met its burden of demonstrating that production of the source code is relevant and necessary. The Court further finds that the information provided by Defendants regarding the source code and the additional information that Defendants are willing to provide regarding the functionality of the source code is sufficient and that production of the actual source code is not necessary for an adequate assessment of the claims and defenses in this case. Specifically, Defendants have provided a Declaration from Defendants’ Chief Product Officer in which he explains the functionality of Defendants’ technology. Defendants have also provided a proposed stipulation as to the source code which describes how the technology determines which native ads will be displayed in the Revcontent widget from the pool of available native ads. The Court notes that Plaintiff can also depose the employees involved in the creation of the ads in order to prove its false and misleading advertising claims. \*\*\*. [citations and footnote omitted].

***In re Google RTB Consumer Privacy Litig., Case No. 21-cv-02155-YGR (VKD)***  
**(N.D. Ca. Nov. 2, 2022)**

The plaintiffs in this class action sought to compel the defendant to produce documents related to its “automated data selection process” used to select data for distribution to third-party participants in auctions. The court addressed certain disputes as follows:

During the hearing, Google suggested that it does not necessarily have documents that show all of the details of the automated data selection process that plaintiffs say they require. In that case, plaintiffs may of course use other means to obtain the discovery they need, including deposing any witnesses whose testimony may be necessary to provide a more complete understanding of the process or to identify relevant sources of information about the process. If this deposition testimony is important for class certification briefing, the Court expects the parties to cooperate in promptly scheduling such depositions. \*\*\*.

RFP [Request for Production] 96 asks for documents sufficient to show ‘the architecture of the software program(s)’ that comprise the automated data selection process. Google says that this is highly sensitive information and that production of such detailed technical information is unnecessary for plaintiffs to understand how data is distributed through the RTB auction. \*\*\*. Plaintiffs argue that Google has not shown that the architecture of the software underlying the data selection process is sensitive or trade secret, but even if it is, the protective order affords adequate protection. \*\*\*.

The Court is skeptical that discovery of the architecture-level details of Google's software is relevant and proportional to the needs of the case, particularly in view of Google's representation at the hearing that it has no objection to producing (and did not withhold from its prior production) internal design documents that reveal how the automated data selection

process operates. \*\*\*. Absent a more specific showing of need for information about the architecture of Google's software, the Court agrees that production of design documents, including schematics, showing how the automated data selection process operates should be sufficient.

***In re JUUL Labs, Inc., Marketing, Sales Practices, and Prod. Liability Litig., Case No. 19-md-02913, 2023 WL 6205473 (N.D. Ca. Sept. 19, 2023)***

The district court granted final approval to a proposed class action settlement. In doing so, it overruled objections to the Claims Administrator's rejection of claims submitted by ClaimClam, a third-party "claims aggregator:"

Class Counsel directed the Settlement Administrator (Epiq) to reject the 'tens of thousands' of claims submitted 'en masse' by ClaimClam. \*\*\*. Class Counsel argues that participation claims aggregators like ClaimClam in class action claims administration can generally create confusion. Specific to this case, Class Counsel point to evidence that the information provided by ClaimClam to Class Members about the JLI Class Settlement and claims process was incorrect or potentially misleading. \*\*\*.

The Settlement Administrator appropriately rejected the ClaimClam submissions. The method and contents of the notices given to class members — including the explanation of the case and instructions on how to participate, opt-out, or object — were all approved by the Court \*\*\*. The Court also approved the appointment of Epiq as the Claims Administrator based on representations of Epiq's qualifications and experience and an outline of administrative and communication services to be provided to class members, under the supervision of Class Counsel and ultimately the Court. The Court takes these steps to ensure that class members' due process rights are fully protected. Allowing en masse submissions by claims aggregators like ClaimClam raises real risks that Class Members will not receive accurate information regarding the scope of the class and the claims process. Allowing a third-party to submit hundreds or thousands of aggregated claims also hinders the ability of the Court-appointed Claims Administrator to communicate directly with claimants and conduct required follow up to identify fraudulent claims or verify the accuracy of claims and to resolve claim disputes (e.g., confirm hours worked in wage and hour suits, or the amount of product purchased in consumer suits).

***Liapes v. Facebook, Inc., A164880 (Ca. Ct. App. 1<sup>st</sup> App. Dist. Div. 3 Sept. 21, 2022)***

Samantha Liapes filed a class action against Facebook, Inc. (Facebook, now known as Meta Platforms, Inc.), alleging it does not provide women and older people equal access to insurance ads on its online platform in violation of the Unruh Civil Rights Act and Civil Code section 51.5 — both of which prohibit businesses from discriminating against people with

protected characteristics, such as gender and age. \*\*\*. Liapes alleged Facebook requires all advertisers to choose the age and gender of its users who will receive ads, and companies offering insurance products routinely tell it to not send their ads to women or older people. She further alleged Facebook's ad-delivery algorithm, the system that determines which users will receive ads, discriminates against women and older people by relying heavily on the two key data points of age and gender. As a result, Liapes alleged, women and older people were excluded from receiving insurance ads.

The trial court sustained Facebook's demurrer, deciding Liapes did not plead sufficient facts to support her discrimination claims. It concluded Facebook's tools are neutral on their face and simply have a disproportionate impact on a protected class, rather than intentionally discriminating. The court further concluded Facebook was immune under section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230 (section 230)), which applies to interactive computer service providers acting as a 'publisher or speaker' of content provided by others. Liapes appealed. We review de novo the ruling on the demurrer. \*\*\*. Liberally construing the complaint and drawing all reasonable inferences in favor of Liapes's claims, we conclude the complaint alleges facts sufficient to state a cause of action and reverse. \*\*\*.

\*\*\*

Facebook's Lookalike Audience tool and ad-delivery algorithm underscore its role as a content developer. According to the complaint, Facebook uses its internal data and analysis to determine what specific people will receive ads. The algorithm relies heavily on age and gender to determine which users will actually receive any given ad. This occurs even if an advertiser did not expressly exclude certain genders or older people. The algorithm then sends or excludes users from viewing ads based on protected characteristics such as age and gender. Because the algorithm ascertains data about a user and then targets ads based on the users' characteristics, the algorithm renders Facebook more akin to a content developer. \*\*\*. Facebook is not entitled to section 230 immunity for the claims here.

Disputing this conclusion, Facebook argues its ad tools are neutral because third parties, not Facebook, create the allegedly illegal content. True, providing neutral tools to users to make illegal or unlawful searches does not constitute 'development' for immunity purposes. \*\*\*. But the system must do 'absolutely nothing to enhance' the unlawful message at issue 'beyond the words offered by the user.' \*\*\*. For example, 'a housing website that allows users to specify whether they will or will not receive emails by means of user-defined criteria might help some users exclude email from other users of a particular race or sex.' \*\*\*. 'However, that website would be immune, so long as it does not require the use of discriminatory criteria.' \*\*\*. Here, Liapes alleged Facebook 'does not merely provide a framework that could be utilized for proper or improper purposes.' \*\*\*. Rather, Facebook, after requiring users to disclose protected characteristics of age and gender, relied on 'unlawful criteria' and developed an ad

targeting and delivery system ‘directly related to the alleged illegality — a system that makes it more difficult for individuals with certain protected characteristics to find or access insurance ads on Facebook. \*\*\*. That third-party advertisers are the content providers does not preclude Facebook ‘from also being an information content provider by helping ‘develop’ at least ‘in part’ the information’ at issue here, contrary to Facebook’s assertions. \*\*\*. [footnote and citations omitted].

***I/M/O Madison Sq. Garden Entertainment Corp. v. NY State Liq. Auth., 2023 NY Slip Op 06090 (App. Div. 1<sup>st</sup> Dept. Nov. 28, 2023)***

In the hybrid article 78 proceeding, petitioners failed to establish a clear legal right to a writ of prohibition based on the allegation that SLA exceeded its authority by investigating and charging them under the Alcoholic Beverages Control Law and regulations promulgated thereunder \*\*\*. We reject petitioners' contention that SLA lacks authority to revoke their special on-premises licenses based on the allegation that, among other things, their venues — Madison Square Garden, the Beacon Theater, and Radio City Music Hall — ‘cease[d] to be operated as a bona fide premises within the contemplation of the license issued for such premises, in the judgment of the Authority,’ on the grounds that a policy excluding certain attorneys bringing actions against any of their affiliates renders the venues no longer open to the general public \*\*\*.

***Modern Font Applications v. Alaska Airlines, Case No. 2:19-cv-00561-DBB-CMR (D. Utah Feb. 3, 2021), interlocutory appeal dismissed, No. 2021-1838 (Fed. Cir. Dec. 29, 2022)***

The district court issued a protective order pursuant to which the defendant designated source code. The plaintiff sought modification to allow its in-house counsel access. The court upheld the designation, finding that the source code contained trade secrets and that inadvertent disclosure would be harmful. The court also denied the plaintiff’s request for modification:

Here, Plaintiff argues that even if its in-house counsel is a competitive decisionmaker, his specialized knowledge, the risk of financial hardship to Plaintiff, and the ability to mitigate the risk of disclosure through an amended protective order establish good cause to allow access \*\*\*. Defendant responds that Plaintiff has access to competent outside counsel and has otherwise failed to show good cause to amend the protective order \*\*\*. The court acknowledges that Plaintiff's in-house counsel has specialized knowledge as a software engineer and institutional knowledge regarding the Patent-in-Suit. However, the fact that Plaintiff has competent outside counsel and could hire outside experts reduces the risk of



prejudice to Plaintiff. Even if reliance on outside counsel and experts causes some financial hardship, the normal burdens of patent litigation are insufficient to outweigh the significant risk of inadvertent disclosure of confidential information in this case. Further, amending the protective order would be insufficient to mitigate this risk because, as explained above, this heightened risk remains even with the existence of a protective order. \*\*\*. The court has carefully balanced the conflicting interests in this case and concludes that the risk of inadvertent disclosure outweighs the risk of prejudice to Plaintiff. The court therefore declines to modify the standard protective order or the confidentiality designations therein. [citations omitted].

***People v. Wakefield*, 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019), affirmed, No. 2022-02771 (N.Y. Ct. App. Apr. 26, 2022)**

From the Third Department decision:

Defendant was subsequently charged in a multicount indictment in connection with the victim's death. Law enforcement collected a buccal swab from defendant to compare his DNA to that found at the crime scene. The data was eventually sent to Cybergenetics, a private company that used a software program called TrueAllele Casework System, for further testing. The DNA analysis by TrueAllele revealed, to a high degree of probability, that defendant's DNA was found on the amplifier cord, on parts of the victim's T-shirt and on the victim's forearm. \*\*\*. At the *Frye* hearing, Supreme Court heard the testimony of Mark Perlin, the founder, chief scientist and chief executive officer of Cybergenetics, among others. Following the *Frye* hearing, the court rendered a decision concluding that TrueAllele was generally accepted within the relevant scientific community. \*\*\* Perlin also testified that TrueAllele is designed to have a certain degree of artificial intelligence to make additional inferences as more information becomes available. Perlin explained that, after objectively generating all genotype possibilities, TrueAllele answers the question of "how much more the suspect matches the evidence [than] a random person would," and the answer takes the form of a likelihood ratio. \*\*\*

Supreme Court found that 'there [was] a plethora of evidence in favor of [TrueAllele], *and there [was] no significant evidence to the contrary.*' In view of the evidence adduced at the *Frye* hearing, we find that the court's ruling was proper.

As described in the affirmance by the Court of Appeals:

He argued that the report generated by TrueAllele was testimonial, Prior to trial, defendant moved for disclosure of the source code in order 'to meaningfully exercise his that the computer program was the functional equivalent of a laboratory analyst and that the source code was the witness that must be produced to satisfy his right to confrontation. He claimed that Perlin's 'surrogate' trial testimony without disclosure of the source code was inadequate— 'the TrueAllele Casework System source code itself,

and not Dr. Perlin, is the declarant with whom [defendant] has a right to be confronted.’ The court denied the motion, finding that the source code was not a witness or testimonial in nature, and that defendant would have the opportunity to confront and cross-examine Dr. Perlin-the analyst and the developer of the software.

Defendant again raised his confrontation argument prior to Dr. Perlin’s trial testimony, asserting that the TrueAllele Casework System was the witness and that he needed the source code to effectively cross-examine that witness. When the court questioned how one cross-examines a computer program, defendant represented that, once his experts had the opportunity to review the source code, he would then pose questions to Dr. Perlin based on the experts’ review. The court denied the request, stating that the issue defense counsel raised was a discovery issue and that defendant’s ability to cross-examine Dr. Perlin, the developer of the source code, satisfied his right to confrontation.

\*\*\*

We must address whether the trial court abused its discretion in determining that TrueAllele ‘is not novel but instead is ‘generally accepted’ under the Frye standard.’

\*\*\*

Here, the evidence presented at the Frye hearing established that the relevant scientific community generally accepted TrueAllele’s DNA interpretation process and that the continuous probabilistic genotyping approach is more efficacious than human review of the same data using the stochastic threshold. It was undisputed that the foundational mathematical principles (MCMC and Bayes’ theorem) are widely accepted in the scientific community. It was also undisputed that the relevant scientific community was fully represented by those persons and agencies who weighed in on the approach. Although the continuous probabilistic approach was not used in the majority of forensic crime laboratories at the time of the hearing, the methodology has been generally accepted in the relevant scientific community based on the empirical evidence of its validity, as demonstrated by multiple validation studies, including collaborative studies, peer-reviewed publications in scientific journals and its use in other jurisdictions. The empirical studies demonstrated TrueAllele’s reliability, by deriving reproducible and accurate results from the interpretation of known DNA samples.

Defendant and the concurrence raise the legitimate concern that the technology at issue is proprietary and the developer of the software is involved in many of the validation studies. This skepticism, however, must be tempered by the import of the empirical evidence of reliability demonstrated here and the acceptance of the methodology by the relevant scientific community. [citations and footnote omitted].

***Rodgers v. Christie*, 795 Fed. Appx. 878 (3d Cir. 2020)**

This was an appeal from the dismissal of a products liability action brought under the New Jersey Products Liability Act (NJPLA) against the entity responsible for the development of the “Public Safety Assessment (PSA), a multifactor risk estimation model that forms part of the state’s pretrial release system.” The plaintiff’s son had been murdered by a man who had been granted pretrial release. The Court of Appeals held that the PSA was not a “product” and affirmed:

The NJPLA imposes strict liability on manufacturers or sellers of certain defective ‘product[s].’ But the Act does not define that term. To fill the gap, the District Court looked to the Third Restatement of Torts, which defines ‘product’ as ‘tangible personal property distributed commercially for use or consumption’ or any ‘[o]ther item[]’ whose ‘context of \*\*\* distribution and use is sufficiently analogous to [that] of tangible personal property.’ It had good reason to do so, as New Jersey courts often look to the Third Restatement in deciding issues related to the state’s products liability regime. And on appeal, both parties agree the Third Restatement’s definition is the appropriate one. We therefore assume that to give rise to an NJPLA action, the ‘product’ at issue must fall within section 19 of the Third Restatement.

\*\*\*

The PSA does not fit within that definition for two reasons. First, as the District Court concluded, it is not distributed commercially. Rather, it was designed as an objective, standardized, and \*\*\* empirical risk assessment instrument’ to be used by pretrial services programs like New Jersey’s. Rodgers makes no effort to challenge this conclusion in her briefing and has thus forfeited the issue. Second, the PSA is neither ‘tangible personal property’ nor remotely ‘analogous to’ it. As Rodgers’ complaint recognizes, it is an ‘algorithm’ or ‘formula’ using various factors to estimate a defendant’s risk of absconding or endangering the community. As the District Court recognized, ‘information, guidance, ideas, and recommendations’ are not ‘product[s]’ under the Third Restatement, both as a definitional matter and because extending strict liability to the distribution of ideas would raise serious First Amendment concerns. Rodgers’s only response is that the PSA’s defects ‘undermine[] New Jersey’s pretrial release system, making it ‘not reasonably fit, suitable or safe’ for its intended use. But the NJPLA applies only to defective *products*, not to anything that causes harm or fails to achieve its purpose. [citations and footnote omitted].

***State v. Ghigliotti*, 463 N.J. Super. 355 (App. Div. 2020)**

At issue in this interlocutory appeal was whether the trial court had erred in directing that a *Frye* hearing be conducted to determine the scientific reliability of

proposed expert testimony on the positive identification of a bullet fragment recovered from a murder victim. The Appellate Division affirmed:

An application of the Frye test at an evidentiary hearing was necessary in this case because BULLETRAX is a new, untested device, operated by Matchpoint, a novel software product. As the trial court found, 'BULLETRAX is a highly automated technology that does not merely photograph the bullet's surface, as suggested by the State, but instead digitally recreates the entire surface area.' The parties did not provide the court with any judicial opinions or authoritative scientific and legal writings demonstrating the reliability of this machine.

In addition, neither Sandford [the State's expert witness] nor Boyle [a salesman with the business that offered the technology] were experts in the science behind the BULLETRAX system and, therefore, were unable to address whether it provided reliable images. In that regard, both witnesses conceded that BULLETRAX created some degree of distortion when it 'stitched together' the images of the bullet fragment and the test bullets that Sandford used to reach his conclusions. The trial court also correctly found that, for many of these same reasons, 'the reliability of Matchpoint' was '[e]qually unproven at this time.'

Under these circumstances, we affirm the trial court's determination that a Frye hearing was necessary to protect defendant's due process rights and ensure that the images produced by BULLETRAX were sufficiently reliable to be admissible under N.J.R.E. 702.

The appellate court also addressed the trial court's order that, among other things, the State provide to defendant algorithms used by the technology in advance of the *Frye* hearing:

The trial court ordered the State to produce the BULLETRAX and Matchpoint algorithms based solely upon defense counsel's request. While it is certainly possible that this information might be needed by defendant's experts to evaluate the reliability of the new technology, the defense did not present a certification from an expert in support of this claim for disclosure. Thus, there is currently nothing concrete in the record to support the court's conclusion that granting defendant 'the opportunity to review the algorithms and elicit testimony concerning' BULLETRAX is necessary 'in order to completely explore and test the integrity of the images it produces.'

Under these circumstances, defendant is required to make a more definitive showing of his need for this material to provide the court with a rational basis to order the State to attempt to produce it. *In that regard, the trial court was aware that the algorithms are proprietary information within UEFT's, rather than the State's, sole possession. While the court was open to issuing a protective order to attempt to overcome UEFT's reluctance to disclose this information to the State, the parties did not submit suggested language to the court to assist it in attempting to craft and issue such an order.*

Therefore, we vacate the court's order directing the turnover of the algorithms, and remand the discovery issues to the court for further consideration. The court must promptly conduct a case management conference with the parties to determine the most efficient way to proceed to identify the types of information that must be shared by them in advance of the Frye hearing. Resolution of discovery issues must be made after a N.J.R.E. 104 hearing to ensure the development of a proper, reviewable record that supports the court's ultimate decision. [emphasis added].

***State v. Loomis*, 371 Wis.2d 235, 881 N.W.2d 749 (2016), cert. denied, 137 S. Ct. 2290 (2017)**

The defendant was convicted of various offenses arising out of a drive-by shooting. His presentence report included an evidence-based risk assessment that indicated a high risk of recidivism. On appeal, the defendant argued that consideration of the risk assessment by the sentencing judge violated his right to due process. The Supreme Court rejected the argument. However, it imposed conditions on the use of risk assessments.

***State v. Morrill*, No. A-1-CA-36490, 2019 WL 3765586 (N.M. App. July 24, 2019)**

Defendant asks this Court to 'find that the attestations made by a computer program constitute 'statements,' whether attributable to an artificial intelligence software or the software developer who implicitly offers the program's conclusions as their own.' (Emphasis omitted.) Based on that contention, Defendant further argues that the automated conclusions from Roundup and Forensic Toolkit constitute inadmissible hearsay statements that are not admissible under the business record exception. In so arguing, Defendant acknowledges that such a holding would diverge from the plain language of our hearsay rule's relevant definitions that reference statements of a 'person.' \*\*\* Based on the following, we conclude the district court correctly determined that the computer generated evidence produced by Roundup and Forensic Toolkit was not hearsay. Agent Peña testified that his computer runs Roundup twenty-four hours a day, seven days a week and automatically attempts to make connections with and downloads from IP addresses that are suspected to be sharing child pornography. As it does so, Roundup logs every action it takes. Detective Hartsock testified that Forensic Toolkit organizes information stored on seized electronic devices into various categories including graphics, videos, word documents, and internet history. Because the software programs make the relevant assertions, without any intervention or modification by a person using the software, we conclude that the assertions are not statements by a person governed by our hearsay rules.

***State v. Pickett*, 466 N.J. Super. 270 (App. Div. 2021), motions to expand record, for leave to appeal, and for stay denied, *State v. Pickett*, 246 N.J. 48 (2021)**

In this case of first impression addressing the proliferation of forensic evidentiary technology in criminal prosecutions, we must determine whether defendant is entitled to trade secrets of a private company for the sole purpose of challenging at a Frye hearing the reliability of the science underlying novel DNA analysis software and expert testimony. At the hearing, the State produced an expert who relied on his company's complex probabilistic genotyping software program to testify that defendant's DNA was present, thereby connecting defendant to a murder and other crimes. Before cross-examination of the expert, the judge denied defendant access to the trade secrets, which include the software's source code and related documentation.

This is the first appeal in New Jersey addressing the science underlying the proffered testimony by the State's expert, who designed, utilized, and relied upon TrueAllele, the program at issue. TrueAllele is technology not yet used or tested in New Jersey; it is designed to address intricate interpretational challenges of testing low levels or complex mixtures of DNA. TrueAllele's computer software utilizes and implements an elaborate mathematical model to estimate the statistical probability that a particular individual's DNA is consistent with data from a given sample, as compared with genetic material from another, unrelated individual from the broader relevant population. For this reason, TrueAllele, and other probabilistic genotyping software, marks a profound shift in DNA forensics.

TrueAllele's software integrates multiple scientific disciplines. At issue here—in determining the reliability of TrueAllele—is whether defendant is entitled to the trade secrets to cross-examine the State's expert at the Frye hearing to challenge whether his testimony has gained general acceptance within the computer science community, which is one of the disciplines. The defense expert's access to the proprietary information is directly relevant to that question and would allow that expert to independently test whether the evidentiary software operates as intended. Without that opportunity, defendant is relegated to blindly accepting the company's assertions as to its reliability. And importantly, the judge would be unable to reach an informed reliability determination at the Frye hearing as part of his gatekeeping function.

Hiding the source code is not the answer. The solution is producing it under a protective order. Doing so safeguards the company's intellectual property rights and defendant's constitutional liberty interest alike. Intellectual property law aims to prevent business competitors from stealing confidential commercial information in the marketplace; it was never meant to justify concealing relevant information from parties to a criminal prosecution in the context of a Frye hearing. [footnote omitted].

***State v. Saylor, 2019 Ohio 1025 (Ct. App. 2019) (concurring opinion of Froelich, J.)***

{¶ 49} Saylor is a 27-year-old heroin addict, who the court commented has ‘no adult record [\* \* \* and] has led a law-abiding life for a significant number of years’; his juvenile record, according to the prosecutor, was ‘virtually nothing.’ The prosecutor requested an aggregate sentence of five to seven years, and defense counsel requested a three-year sentence. The trial court sentenced Saylor to 12 1/2 years in prison. Although it found Saylor to be indigent and did not impose the mandatory fine, the court imposed a \$500 fine and assessed attorney fees and costs; the court also specifically disapproved a Risk Reduction sentence or placement in the Intensive Program Prison (IPP).

{¶ 50} I have previously voiced my concerns about the almost unfettered discretion available to a sentencing court when the current case law apparently does not permit a review for abuse of discretion. *State v. Roberts*, 2d Dist. Clark No. 2017-CA-98, 2018-Ohio-4885, ¶ 42-45, (Froelich, J., dissenting). However, in this case, the trial court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12, the individual sentences were within the statutory ranges, and the court’s consecutive sentencing findings, including the course-of-conduct finding under R.C. 2929.14(C)(4)(b), were supported by the record.

{¶ 51} As for the trial court’s consideration of ORAS, the ‘algorithmization’ of sentencing is perhaps a good-faith attempt to remove unbridled discretion – and its inherent biases – from sentencing. Compare *State v. Lawson*, 2018-Ohio-1532, 111 N.E.3d 98, ¶ 20-21 (2d Dist.) (Froelich, J., concurring). However, ‘recidivism risk modeling still involves human choices about what characteristics and factors should be assessed, what hierarchy governs their application, and what relative weight should be ascribed to each.’ Hillman, *The Use of Artificial Intelligence in Gauging the Risk of Recidivism*, 58 *The Judges Journal* 40 (2019).

{¶ 52} The court’s statement that the ‘moderate’ score was ‘awfully high,’ given the lack of criminal history, could imply that the court believed there must be other factors reflected in the score that increased Saylor’s probable recidivism. There is nothing on this record to refute or confirm the relevance of Saylor’s ORAS score or any ORAS score. Certainly, the law of averages is not the law. The trial court’s comment further suggested that its own assessment of Saylor’s risk of recidivism differed from the ORAS score. The decision of the trial court is not clearly and convincingly unsupported by the record, regardless of any weight potentially given to the ORAS score by the trial court. Therefore, on this record, I find no basis for reversal.

***State v. Stuebe*, No. 249 Ariz. 127, 1 CA-CR 19-0032 (AZ Ct. App. Div. 1. June 30, 2020)**

The defendant was convicted of burglary and possession of burglary tools. On appeal, he challenged the admissibility of an email and attached videos generated by an automated surveillance system. The Arizona Court of Appeals affirmed. First, the court addressed whether the system was a “person” for hearsay purposes:

¶9 In general, hearsay evidence is inadmissible unless an exception applies. Ariz. R. Evid. 801, 802. Hearsay is ‘a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.’ Ariz. R. Evid. 801(c). A ‘statement’ is a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.’ Ariz. R. Evid. 801(a). A ‘declarant’ is ‘the person who made the statement.’ Ariz. R. Evid. 801(b).

¶10 Because the rule against hearsay applies to ‘a person’s statements and ‘the person who made the statement,’ Ariz. R. Evid. 801(a) and (b), we must determine whether a machine that generates information may qualify as a ‘person’ under the Rules. The Rules do not define ‘person.’ See Ariz. R. Evid. 101. Therefore, we may interpret the word according to its common definition. A.R.S. § 1-213 (2002) (‘Words and phrases shall be construed according to the common and approved use of the language.’); *State v. Wise*, 137 Ariz. 468, 470 n.3 (1983) (stating that unless the legislature expressly defines a statutory term, courts give the word its plain and ordinary meaning, which may be taken from the dictionary). \*\*\*

¶11 \*\*\* Neither statute supports the proposition that a machine can legally be considered a ‘person.’ Additionally, because ‘Arizona’s evidentiary rules were modeled on the federal rules[,]’ we may consider federal precedent to interpret them. *State v. Winegardner*, 243 Ariz. 482, 485, ¶ 8 (2018). The federal circuit courts have repeatedly held that a ‘person’ referenced in the rules of evidence does not include a ‘machine’ or ‘machine-produced’ content. See *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015) (‘[W]e join other circuits that have held that machine statements aren’t hearsay.’) (collecting federal circuit court cases); *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (holding that for hearsay purposes ‘raw data generated by the machines were not the statements of technicians’ who operated the machines); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (holding that neither header nor date and time information automatically generated by a facsimile machine was hearsay because they were not statements made by a person).

¶12 Applied to the facts here, the motion-activated security camera automatically recorded the video after a sensor was triggered. The automated security system then produced an email and immediately sent it to the property manager. No ‘person’ was



involved in the creation or dissemination of either. The email only contained the date, time, client ID, serial number, camera location code, and language that read ‘Automated message – please do not reply to this address.’ Because the email and video were ‘machine produced,’ they were not made by a ‘person’ and are not hearsay.

¶13 Machine-produced statements may present other evidentiary concerns. See *Washington*, 498 F.3d at 231 (noting that concerns about machine-generated statements should be ‘addressed through the process of authentication not by hearsay or Confrontation Clause analysis’). At trial, the court denied Stuebe’s authentication objection to the video, see *Ariz. R. Evid.* 901, but Stuebe has not raised this issue on appeal.

The Court of Appeals also rejected the defendant’s argument that admission of the email and video violated the Confrontation Clause:

¶14 The Sixth Amendment’s Confrontation Clause states, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ U.S. Const. amend. VI. In general, testimonial evidence from a declarant who does not appear at trial may be admitted only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); *State v. Forde*, 233 Ariz. 543, 564, ¶ 80 (2014) (citing *Crawford*, 541 U.S. at 68). ‘[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.’ *Ohio v. Clark*, 576 U.S. 237, 245 (2015). ‘Testimony’ means ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Crawford*, 541 U.S. at 51. Statements are testimonial when the primary purpose is to ‘establish or prove past events potentially relevant to later criminal prosecution.’ *Davis v. Washington*, 547 U.S. 813, 822 (2006); see *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (holding forensic reports on substances alleged to be drugs, prepared in anticipation of prosecution, are testimonial statements). But statements are not testimonial if made to law enforcement during an ongoing emergency, see *Davis*, 547 U.S. at 827, and are ‘much less likely to be testimonial’ if made to someone other than law enforcement, *Clark*, 576 U.S. at 246.

¶15 Considering all the circumstances we cannot conclude that the ‘primary purpose’ of the email and video was to ‘creat[e] an out-of-court substitute for trial testimony.’ *Id.* at 245 (alteration in original) (quoting *Bryant*, 562 U.S. at 358). And Stuebe does not argue otherwise. The email was sent to the property manager, not law enforcement, and was not made in anticipation of criminal prosecution. Thus, it was not testimonial. See *Davis*, 547 U.S. at 827-28 (finding recording of a 911 call seeking police assistance was not testimonial); *State v. Damper*, 223 Ariz. 572, 575, ¶ 12 (App. 2010) (finding text message from murder victim seeking help not testimonial); *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 191, ¶ 35 (App. 2006) (holding breathalyzer calibration reports not testimonial). The property manager testified and was cross-examined about the email and the video, and the admission of the email and video did not implicate the Confrontation Clause. *State v.*

*Fischer*, 219 Ariz. 408, 418, ¶ 37 (App. 2008) ('Non-testimonial statements are not subject to a confrontation challenge.');

*cf. United States v. Waguespack*, 935 F.3d 322, 334 (5th Cir. 2019) (holding that machine-generated images were not 'statements' in the context of the Confrontation Clause).

**Defendant's Motion for New Trial, *United States v. Michel*, Case No. 1:19-cr-00148-CKK (D.D.C. Oct. 16, 2023)**

The defendant was convicted on campaign finance and foreign influence charges. He moved for a new trial for, among other things, ineffective assistance of counsel. His argument includes the allegation that his attorney "used an experimental AI program to write his closing argument, which made frivolous arguments, conflated the schemes, and failed to highlight key weaknesses in the Government's case."

***United States v. Shipp*, 392 F. Supp. 3d 300 (E.D.N.Y. July 15, 2019)**

The court has serious concerns regarding the breadth of Facebook warrants like the one at issue here. The Second Circuit has observed that '[a] general search of electronic data is an especially potent threat to privacy because hard drives and e-mail accounts may be 'akin to a residence in terms of the scope and quantity of private information [they] may contain.' *Ulbricht*, 858 F.3d at 99 (quoting *Galpin*, 720 F.3d at 445); see also *Galpin*, 720 F.3d at 447 (explaining that '[t]his threat demands a heightened sensitivity to the particularity requirement in the context of digital searches'). This threat is further elevated in a search of Facebook data because, perhaps more than any other location—including a residence, a computer hard drive, or a car—Facebook provides a single window through which almost every detail of a person's life is visible. Indeed, Facebook is designed to replicate, record, and facilitate personal, familial, social, professional, and financial activity and networks. Users not only voluntarily entrust information concerning just about every aspect of their lives to the service, but Facebook also proactively collects and aggregates information about its users and non-users in ways that we are only just beginning to understand. Particularly troubling, information stored in non-Facebook applications may come to constitute part of a user's 'Facebook account'—and thus be subject to broad searches—by virtue of corporate decisions, such as mergers and integrations, without the act or awareness of any particular user.

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Compared to other digital searches, therefore, Facebook searches both (1) present a greater 'risk that every warrant for electronic information will become, in effect, a general warrant,' *Ulbricht*, 858 F.3d at 99, and (2) are more easily limited to avoid such constitutional concerns. In light of these considerations, courts can and should take

particular care to ensure that the scope of searches involving Facebook are ‘defined by the object of the search and the places in which there is probable cause to believe that it may be found.’ [citations omitted in part].

***In re: Vital Pharmaceutical, Case No. 22-17842 (Bankr. S.D. Fla. June 16, 2023).***

**The Bankruptcy Court addressed the question of how to determine ownership rights to a social media account. In doing so the court prompted ChatGPT for an answer:**

Nor has Congress or the states regulated the use of artificial intelligence, another area where the evolution of technology has outpaced the law, and regulation is needed to mitigate its risks. Matt O'Brien, *ChatGPT Chief Says Artificial Intelligence Should be Regulated by a US or Global Agency*, Associated Press, May 16, 2023, <https://apnews.com/article/chatgpt-openai-ceo-sam-altman-congress-73ff96c6571f38ad5fd68b3072722790> (‘The head of the artificial intelligence company that makes ChatGPT told Congress . . . that government intervention will be critical to mitigating the risks of increasingly powerful AI systems.’). In preparing the introduction for this Memorandum Opinion, the Court prompted ChatGPT to prepare an essay about the evolution of social media and its impact on creating personas and marketing products. Along with the essay it prepared, ChatGPT included the following disclosure: ‘As an AI language model, I do not have access to the sources used for this essay as it was generated based on the knowledge stored in my database.’ It went on to say, however, that it ‘could provide some general sources related to the topic of social media and its impact on creating personas and marketing products.’ It listed five sources in all. As it turns out, none of the five seem to exist. For some of the sources, the author is a real person; for other sources, the journal is real. But all five of the citations seem made up, which the Court would not have known without having conducted its own research. The Court discarded the information entirely and did its own research the old-fashioned way. Well, not quite old fashioned; it's not like the Court used actual books or anything. But this is an important cautionary tale. Reliance on AI in its present development is fraught with ethical dangers.

***Wi-LAN Inc. v. Sharp Electronics Corp., 992 F.3d 1366 (Fed. Cir. 2021)***

This was an appeal from an award of summary judgment of noninfringement. The district court held that the plaintiff lacked sufficient admissible evidence to prove direct infringement after it found a printout of source code inadmissible. The plaintiff sought to admit the source code to establish that systems used by the defendants “actually practiced” a methodology patented by the plaintiff. The Federal Circuit affirmed.

The plaintiff argued on appeal, among other things, that the source code printout was a business record that was admissible under the business records exception to the hearsay rule:

To establish that the source code printout was an admissible business record under Rule 803(6), Wi-LAN was required to establish by testimony from a ‘custodian or other another qualified witness’ that the documents satisfied the requirements of the Rule. Wi-LAN argues that it properly authenticated the source code printout through the declarations of the chip manufacturers’ employees. We agree with the district court that the declarations could not be used to authenticate the source code printout on the theory that the declarations were a proxy for trial testimony or themselves admissible as business records.

As Wi-LAN notes, declarations are typically used at summary judgment as a proxy for trial testimony. But declarations cannot be used for this purpose unless the witness will be available to testify at trial. Under Federal Rule of Civil Procedure 56(c)(2), Wi-LAN was required to ‘explain the admissible form that is anticipated.’ Fed. R. Civ. P. 56(c)(2) advisory committee’s notes on 2010 amendments. Wi-LAN argued that it met this burden by explaining that the declarants were available to testify at trial. The district court, however, found the opposite. Indeed, when asked by the court at the summary judgment hearing whether the declarants would appear at trial, Wi-LAN’s counsel responded that Wi-LAN did not ‘think that [it would be] able to force them to come to trial.’

Wi-LAN thus did not establish that the declarants would be available to testify at trial and, as a result, the declarations could not be used as a substitute for trial testimony. *E.g., Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016) (testimony admissible if declarants were available to testify at trial); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) (‘[H]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that ‘would be admissible at trial.’ (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 465 n.12 (3d Cir. 1989)).

Wi-LAN also seems to argue that it properly authenticated the source code printout because the declarations were custodial declarations that were themselves admissible as business records under Rule 803(6). Wi-LAN, however, admits that it obtained the source code printout and declarations by filing lawsuits against the manufacturers and then dismissing the lawsuits without prejudice after the manufacturers provided Wi-LAN with the source code printout and declarations it sought. Wi-LAN even explains that ‘[t]he lawsuits were necessary to secure production of the source code and declarations because [the system-on-chip manufacturers] had refused to cooperate in discovery.’ *The declarations thus do not constitute a ‘record [that] was kept in the course of a regularly conducted activity of a business.’* Fed. R. Evid. 803(6)(B). *Instead, the declarations were created and prepared for the purposes of litigation, placing them outside the scope of the*

*exception. As a result, the declarations were not admissible as business records for use to authenticate the source code printout. [emphasis added].*

The Federal Circuit also rejected the plaintiff's reliance on Rule 901(b)(4):

Wi-LAN also appears to argue that the district court should have found the source code printout admissible under Federal Rule of Evidence 901(b)(4). Rule 901(b)(4) permits a record to be admitted into evidence if '[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances' 'support a finding that the item is what the proponent claims it is.' Fed. R. Evid. 901(a), (b)(4).

In support of its Rule 901(b)(4) argument, Wi-LAN states only that 'there was no legitimate reason to question the trustworthiness of the source code.' The district court concluded that the source code printout's 'appearance, contents, substance, internal patterns, [and] other distinctive characteristics,' Fed. R. Evid. 901(b)(4), did not satisfy Rule 901(b)(4)'s strictures 'given the highly dubious circumstances surrounding the production and the lack of indicia of trustworthiness in the source code,' as described in the previous Section. On this record, the district court did not abuse its discretion in refusing to treat the source code printout as evidence under Rule 901(b)(4).

Moreover, the Federal Circuit rejected the plaintiff's reliance on Rule 703:

Wi-LAN alternatively argues that the source code printout should have been admitted into evidence under Federal Rule of Evidence 703. Wi-LAN's expert submitted a report stating that Sharp's and Vizio's television sets infringe the claimed methods of the '654 patent by the use of the source code. Wi-LAN's expert did not attempt to authenticate the source code printout. But Wi-LAN argues that its expert should be able to opine on the meaning of the inadmissible source code printout and to provide the inadmissible source code printout to the jury despite Wi-LAN's failure to authenticate the source code printout.

Wi-LAN's argument presents two separate and distinct questions: (1) whether the source code printout was admissible because it was relied on by the expert and (2) whether the expert's testimony relying on the source code was admissible to establish infringement. The answer to the first question is 'no' because expert reliance does not translate to admissibility. The answer to the second question is also 'no' because Wi-LAN did not establish that experts in the field 'reasonably rely on' unauthenticated source code.

Concluding its discussion of admissibility, the Federal Circuit rejected the plaintiff's argument that the court below should have extended discovery:

In light of these admissibility issues, Wi-LAN's fallback position is that the district court should have granted it additional time to obtain an admissible version of the source code. We disagree. Wi-LAN had ample time to obtain the source code and to find custodial

witnesses to authenticate the source code over the course of discovery but failed to do so.

Wi-LAN had been on notice since early 2016 that it was going to need the system-on-chip source code from third parties to prove its direct infringement case. Throughout the litigation, Wi-LAN repeatedly requested extensions of time to obtain the source code from the third-party manufacturers. Ultimately, however, Wi-LAN only procured a single printout version of the source code with declarations after suing the third-party manufacturers.

Wi-LAN, as the district court found, 'had ample time and opportunities over years of litigation to obtain evidence of infringement from the [system-on-chip] manufacturers' but failed to do so. Given this record, the district court did not abuse its discretion in denying Wi-LAN an additional opportunity to obtain an admissible form of the source code. [citations omitted in part].

## **AI IN LITIGATION ARTICLES**

The Federal Judicial Center, the education arm of the Federal Judiciary, has published J.E. Baker, *et al.*, *An Introduction to Artificial Intelligence for Federal Judges*, in February of 2023. It is available at [https://www.fjc.gov/sites/default/files/materials/47/An\\_Introduction\\_to\\_Artificial\\_Intelligence\\_for\\_Federal\\_Judges.pdf?utm\\_source=thebrainyacts.beehiiv.com&utm\\_medium=newsletter&utm\\_campaign=122-so-damn-convincing](https://www.fjc.gov/sites/default/files/materials/47/An_Introduction_to_Artificial_Intelligence_for_Federal_Judges.pdf?utm_source=thebrainyacts.beehiiv.com&utm_medium=newsletter&utm_campaign=122-so-damn-convincing)

And see “Artificial Intelligence and the Courts: Materials for Judges,” a project of the American Association for the Advancement of Science. These materials are “primarily individual papers, prepared by experts in the relevant field, and finalized through a process that ensures both the technical accuracy of the content and its utility for judges,” and are available at <https://www.aaas.org/ai2/projects/law/judicialpapers>

J. Bambauer, “Negligent AI Speech: Some Thoughts About Duty,” 3 *J. of Free Speech Law* 343 (2023), <https://www.journaloffreespeechlaw.org/bambauer2.pdf>

C. Cwik, P. Grimm, M. Grossman and T. Walsh, “Artificial Intelligence, Trustworthiness, and Litigation.” *Artificial Intelligence and the Courts: Materials for Judges* (AAAS 2022), [https://www.aaas.org/sites/default/files/2022-09/Paper%20AI%20and%20Trustworthiness\\_NIST\\_FINAL.pdf](https://www.aaas.org/sites/default/files/2022-09/Paper%20AI%20and%20Trustworthiness_NIST_FINAL.pdf)

C. Gismondi, *et al.*, “Have Algorithms Opened Up Your Software to Product Liability?” (ABA Litigation Section: July 24, 2023), <https://www.americanbar.org/groups/litigation/resources/newsletters/mass-torts/have-algorithms-opened-your-software-product-liability/>

P.W. Grimm, “New Evidence Rules and Artificial Intelligence,” 45 *Litigation* 6 (2018),

[https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Committees/Rules\\_of\\_Evidence/Grimm.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Rules_of_Evidence/Grimm.pdf)

P.W. Grimm, M.R. Grossman & G.V. Cormack, “Artificial Intelligence as Evidence,” 19 *Nw. J. Tech. & Intell. Prop.* 9 (2021), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1349&context=njtip>

M.R. Grossman, “Is Disclosure and Certification of the Use of Generative AI Really Necessary?” *Judicature*, Vol. 107, No. 2, October 2023 (Forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4537496#:~:text=Concerns%20about%20the%20misuse%20of,in%20connection%20with%20legal%20filings.](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537496#:~:text=Concerns%20about%20the%20misuse%20of,in%20connection%20with%20legal%20filings.)

R. Hedges, G. Gottehrer & J.C. Francis IV, “Artificial Intelligence and Legal Issues,” *Litigation* (ABA: Fall 2020), [Artificial Intelligence and Legal Issues \(americanbar.org\)](https://www.americanbar.org/publications/litigation_updates/2020_fall/artificial_intelligence_and_legal_issues/)

“How to Determine the Admissibility of AI-Generated Evidence in Courts?” *UNESCO News* (updated July 21, 2023), <https://www.unesco.org/en/articles/how-determine-admissibility-ai-generated-evidence-courts>



## **NIST PUBLICATIONS, INCLUDING THE “FRAMEWORK”**

P. Phillips, *et al.*, “Four Principles of Explainable Artificial Intelligence” (NIST: Sept. 2021), <https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8312.pdf>

We introduce four principles for explainable artificial intelligence (AI) that comprise fundamental properties for explainable AI systems. We propose that explainable AI systems deliver accompanying evidence or reasons for outcomes and processes; provide explanations that are understandable to individual users; provide explanations that correctly reflect the system’s process for generating the output; and that a system only operates under conditions for which it was designed and when it reaches sufficient confidence in its output. We have termed these four principles as explanation, meaningful, explanation accuracy, and knowledge limits, respectively. Through significant stakeholder engagement, these four principles were developed to encompass the multidisciplinary nature of explainable AI, including the fields of computer science, engineering, and psychology. Because one-size fits-all explanations do not exist, different users will require different types of explanations. We present five categories of explanation and summarize theories of explainable AI. We give an overview of the algorithms in the field that cover the major classes of explainable algorithms. As a baseline comparison, we assess how well explanations provided by people follow our four principles. This assessment provides insights to the challenges of designing explainable AI systems.

R. Schwartz, *et al.*, “Toward a Standard for Identifying and Managing Bias in Artificial Intelligence,” NIST Special Pub. 1270 (Mar. 2022), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf>

On January 26, 2023, the National Institute of Standards and Technology (“NIST”) released the Artificial Intelligence Risk Management Framework, together with related materials. The Framework is described as follows:

In collaboration with the private and public sectors, NIST has developed a framework to better manage risks to individuals, organizations, and society associated with artificial intelligence (AI). The NIST AI Risk Management Framework (AI RMF) is intended for voluntary use and to improve the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of AI products, services, and systems.

The Framework and related materials can be found at <https://www.nist.gov/itl/ai-risk-management-framework>

On August 24, 2023, NIST announced that it would begin the process of standardizing algorithms intended to resist attacks by quantum computers. See “NIST to Standardize Encryption Algorithms That Can Resist Attack by Quantum

Computers,” (Aug. 24, 2023), <https://www.nist.gov/news-events/news/2023/08/nist-standardize-encryption-algorithms-can-resist-attack-quantum-computers#:~:text=NIST's%20effort%20to%20develop%20quantum,by%20the%20November%202017%20deadline.>

“What’s Wrong with This Picture? NIST Face Analysis Program Helps to Find Answers,” *News* (NIST: Sept. 20, 2023), <https://www.nist.gov/news-events/news/2023/09/whats-wrong-picture-nist-face-analysis-program-helps-find-answers>

E. Tabassi, “Minimizing Harms and Maximizing the Potential of Generative AI,” *Taking Measure* (NIST: Nov. 20, 2023), <https://www.nist.gov/blogs/taking-measure/minimizing-harms-and-maximizing-potential-generative-ai>

“NIST Calls for Information to Support Safe, Secure and Trustworthy Development and Use of Artificial Intelligence” (NIST: Dec. 19, 2023), <https://www.nist.gov/news-events/news/2023/12/nist-calls-information-support-safe-secure-and-trustworthy-development-and#:~:text=NIST%20seeks%20information%20to%20support,2%2C%202024.>

“NIST Offers Draft Guidance on Evaluating a Privacy Protection Technique for the AI Era,” *News* (NIST: Dec. 11, 2023), <https://www.nist.gov/news-events/news/2023/12/nist-offers-draft-guidance-evaluating-privacy-protection-technique-ai-era>

On December 19, 2023, NIST issued a “Request for Information: NIST’s Assignments under Executive Order 14110 on Safe, Secure, and Trustworthy Development and Use of AI,” <https://www.nist.gov/news-events/news/2023/12/nist-calls-information-support-safe-secure-and-trustworthy-development-and>. For “NIST’s Responsibilities Under the October 30, 2023 Executive Order,” see <https://www.nist.gov/artificial-intelligence/executive-order-safe-secure-and-trustworthy-artificial-intelligence>

J. Daniels & A. Chipperson, “NIST Framework Can Nudge Companies Toward Trustworthy AI Use,” *Bloomberg Law* (Aug. 30, 2023), <https://news.bloomberglaw.com/ip-law/nist-framework-can-nudge-companies-toward-trustworthy-ai-use>

W.J. Denvil, *et al.*, “NIST Publishes Artificial Intelligence Risk Management Framework and Resources,” *Engage* (Hogan Lovells: Jan. 31, 2023), <https://www.engage.hoganlovells.com/knowledgeservices/news/nist-publishes-artificial-intelligence-risk-management-framework-and-resources/>

J. Johnson, *et al.*, “NIST Releases New Artificial Intelligence Risk Management Framework” *Inside Privacy* (Covington: Feb. 1, 2023), <https://www.insideprivacy.com/artificial-intelligence/nist-releases-new-artificial-intelligence-risk-management-framework/>

C.F. Kerry, “NIST’s AI Risk Management Framework Plants a Flag in the AI Debate,” *Brookings TechTank* (Feb. 15, 2023), [https://www.brookings.edu/blog/techtank/2023/02/15/nists-ai-risk-management-framework-plants-a-flag-in-the-ai-debate/?utm\\_campaign=Center%20for%20Technology%20Innovation&utm\\_medium=email&utm\\_content=247081757&utm\\_source=hs\\_email](https://www.brookings.edu/blog/techtank/2023/02/15/nists-ai-risk-management-framework-plants-a-flag-in-the-ai-debate/?utm_campaign=Center%20for%20Technology%20Innovation&utm_medium=email&utm_content=247081757&utm_source=hs_email)

J. Near, *et al.*, “The UK-US Blog Series on Privacy: Preserving Federated Learning: Introduction,” *Cybersecurity Insights* (NIST: Dec. 7, 2023), <https://www.nist.gov/blogs/cybersecurity-insights/uk-us-blog-series-privacy-preserving-federated-learning-introduction>

D. Pozza, “Federal Guidance Offers Framework to Minimize Risks in AI Use,” *Bloomberg Law* (Feb. 9, 2023), <https://news.bloomberglaw.com/us-law-week/federal-guidance-offers-framework-to-minimize-risks-in-ai-use>

S. Witley, "AI Risks Guide Sets Starting Point for Compliance, Regulation," *Bloomberg Law* (Feb. 1, 2023), <https://news.bloomberglaw.com/privacy-and-data-security/ai-risks-guide-sets-starting-point-for-compliance-regulation>

## **FEDERAL, STATE, AND LOCAL GOVERNMENT “RESPONSES” TO AI**

### **INTRODUCTION**

AI is being used by business entities to, among other things, sift through job candidates. This use has led to concerns about, among other things, lack of transparency and possible bias in the selection process. Expect statutory and regulatory responses. Here are some.

For an introduction of sorts—and a suggested regulatory framework, see A. Engler, “A Comprehensive and Distributed Approach to AI Regulation,” *Brookings* (Aug. 30, 2023), <https://www.brookings.edu/articles/a-comprehensive-and-distributed-approach-to-ai-regulation/>

And for another introduction to what is being done on the federal level by Congress, federal agencies, and the White House, see S.M. Anstey, “Artificial Intelligence – Congress, Federal Agencies, and the White House Solicit Information and Take Action,” *JDSUPRA* (Sept. 27, 2023), <https://www.jdsupra.com/legalnews/artificial-intelligence-congress-8504605/>

### **FEDERAL-WHITE HOUSE**

“Statement of Interest of the United States” submitted in *Louis v. Saferent Solutions, LLC*, Case No. 22cv10800-AK (D. Mass. Jan. 9, 2023), [https://www.justice.gov/d9/2023-01/u.s. statement of interest - louis et al v. saferent et al.pdf](https://www.justice.gov/d9/2023-01/u.s.%20statement%20of%20interest%20-%20louis%20et%20al%20v.%20saferent%20et%20al.pdf)

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 5171 to assist the Court in evaluating the application of the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., in challenges to an algorithm-based tenant screening system. The United States has a strong interest in ensuring the correct interpretation and application of the FHA’s pleading

standard for disparate impact claims, including where the use of algorithms may perpetuate housing discrimination.

Various federal agencies have weighed in on AI in employment decision-making. See “Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems” (undated), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf)

“Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People” (White House Office of Science and Technology: Oct. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

Summary of the Blueprint at <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>

“Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” (Feb. 16, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>

“FACT SHEET: Biden-Harris Admin. Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI,” *White House* (July 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/>

Executive Order 14110, “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” (The White House: Oct. 30, 2023), <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/](#)

S. Friedler, *et al.*, “How the AI Executive Order and OMB Memo Introduce Accountability for Artificial Intelligence,” *Brookings* (Nov. 16, 2023), [https://www.brookings.edu/articles/how-the-ai-executive-order-and-omb-memo-introduce-accountability-for-artificial-intelligence/](#)

J. Gatto, “Equity and Civil Rights Issues in the White House Executive Order on AI,” *AI Law and Policy Blog* (Sheppard Mullin: Nov. 9, 2023), [https://www.jdsupra.com/legalnews/equity-and-civil-rights-issues-in-the-4760997/](#)

L.A. Harris & C. Jaikaran, “Highlights of the 2023 Executive Order on Artificial Intelligence for Congress,” *Cong. Research Service R47843* (Nov. 17, 2023), [https://crsreports.congress.gov/product/pdf/R/R47843](#)

T.J. Schwartz, *et al.*, “AI Executive Order – Patent Issues,” *MoFo Tech* (Morrison & Foerster: Nov. 8, 2023), [https://mofotech.mofo.com/topics/ai-executive-order-patent-issues](#)

P. Stockburger, “AI Technical Standards Need a Bigger Push than Executive Order,” *Bloomberg Law* (Nov. 6, 2023), [https://news.bloomberglaw.com/environment-and-energy/ai-technical-standards-need-a-bigger-push-than-executive-order](#)

J. Villasenor, “How the White House’s AI Executive Order Could Increase U.S. Cyber Vulnerabilities,” *Brookings* (Nov. 22, 2023), [https://www.brookings.edu/articles/how-the-white-houses-ai-executive-order-could-increase-u-s-cyber-](#)

[vulnerabilities/#:~:text=But%20two%20short%20portions%20of,protect%E2%80%9D%20model%20weights%20associated%20with](#)

## **FEDERAL-CONGRESS**

Algorithmic Accountability Act of 2022, introduced Feb. 3, 2022, see <https://www.wyden.senate.gov/news/press-releases/wyden-booker-and-clarke-introduce-algorithmic-accountability-act-of-2022-to-require-new-transparency-and-accountability-for-automated-decision-systems?peek=BH793HGzEX7gimi20t7HiHEg8n9b3vET476N7MsTy%2BcOuyHe>

Algorithmic Accountability Act of 2023, introduced September 21, 2023, see <https://www.wyden.senate.gov/news/press-releases/wyden-booker-and-clarke-introduce-bill-to-regulate-use-of-artificial-intelligence-to-make-critical-decisions-like-housing-employment-and-education>

N. Krishan, “Sen. Schumer introducing AI Policy Framework, Calls for ‘Comprehensive Legislation,’” *Fedscoop* (June 21, 2013), <https://fedscoop.com/sen-schumer-introduces-ai-policy-framework-calls-for-comprehensive-legislation/>

Senate Comm. on Health, Education, Labor & Pensions, “Exploring Congress’ Framework for the Future of AI: The Oversight and Legislative Role of Congress in the Integration of Artificial Intelligence in Health, Education, and Labor” (Sept. 6, 2023), [https://www.help.senate.gov/imo/media/doc/help\\_committee\\_gop\\_final\\_ai\\_white\\_paper1.pdf](https://www.help.senate.gov/imo/media/doc/help_committee_gop_final_ai_white_paper1.pdf)

N.T. Lee, “Making AI More Explainable to Protect the Public from Individual and Community Harms: Written Statement to the U.S. Senate AI Insight Forum on Transparency, Explainability, Intellectual Property, & Copyright,” *Brookings*



*Testimony* (Nov. 29, 2023), <https://www.brookings.edu/articles/making-ai-more-explainable-to-protect-the-public-from-individual-and-community-harms/>

## **FEDERAL-CISA**

“2023-2024 CISA Roadmap for Artificial Intelligence” (CISA: Nov. 9, 2023), <https://www.cisa.gov/resources-tools/resources/roadmap-ai>

Press Release, “CISA and UK NCSC Unveil Joint Guidelines for Secure AI System Development” (CISA: Nov. 26, 2023), <https://www.cisa.gov/news-events/alerts/2023/11/26/cisa-and-uk-ncsc-unveil-joint-guidelines-secure-ai-system-development#:~:text=CISA%20and%20UK%20NCSC%20Unveil%20Joint%20Guidelines%20for%20Secure%20AI%20System%20Development,-Release%20Date&text=Today%2C%20in%20a%20landmark%20collaboration,for%20Secure%20AI%20System%20Development%20.>

Today, in a landmark collaboration, the U.S. Cybersecurity and Infrastructure Security Agency (CISA) and the UK National Cyber Security Centre (NCSC) are proud to announce the release of the [Guidelines for Secure AI System Development](#). Co-sealed by 23 domestic and international cybersecurity organizations, this publication marks a significant step in addressing the intersection of artificial intelligence (AI), cybersecurity, and critical infrastructure.

The Guidelines, complementing the [U.S. Voluntary Commitments on Ensuring Safe, Secure, and Trustworthy AI](#), provide essential recommendations for AI system development and emphasize the importance of adhering to [Secure by Design](#) principles. The approach prioritizes ownership of security outcomes for customers, embraces radical transparency and accountability, and establishes organizational structures where secure design is a top priority.

The Guidelines apply to all types of AI systems, not just frontier models. We provide suggestions and mitigations that will help data scientists, developers, managers, decision-makers, and risk owners make informed decisions about the secure design, model development, system development, deployment, and operation of their machine learning AI systems.

This document is aimed primarily at providers of AI systems, whether based on models hosted by an organization or making use of external application programming interfaces. However, we urge all stakeholders—including data scientists, developers, managers, decision-makers, and risk owners make—to read this guidance to help them make informed decisions about the design, deployment, and operation of their machine learning AI systems.

CISA invites stakeholders, partners, and the public to explore the [Guidelines for Secure AI System Development](#) as well as our recently published [Roadmap for AI](#) to learn more about our strategic vision for AI technology and cybersecurity. To access learn more, visit [CISA.gov/AI](#).

## **FEDERAL-EEOC**

EEOC Strategic Enforcement Plan Fiscal Years 2024-2028, <https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028#:~:text=The%20final%20FY2024%2D2028%20SEP,making%20that%20vision%20a%20reality>. Among other things, the plan, “[r]Recognizes employers’ increasing use of technology including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring and other employment decisions, practices, or policies \*\*\*.” [emphasis deleted].

EEOC Artificial Intelligence and Algorithmic Fairness Initiative, <https://www.eeoc.gov/ai#:~:text=As%20part%20of%20the%20initiative,and%20their%20employment%20ramifications%3B%20and>

As part of the initiative, the EEOC will:

- Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions;
- Identify promising practices;
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Recent technological advances have dramatically expanded employers’ ability to monitor and manage employees within the workplace and beyond. As more and more employers take advantage of those new capabilities, their practices raise a number of issues under the Act. An issue of particular concern to me is the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees’ ability to engage in protected activity and keep that activity confidential from their employer, if they so choose. Thus, I plan to urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with

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This bill would establish, within the Department of Technology, the Office of Artificial Intelligence, and would grant the office the powers and authorities necessary to guide the design, use, and deployment of automated systems by a state agency to ensure that all AI systems are designed and deployed in a manner that is consistent with state and federal laws and regulations regarding privacy and civil liberties and that minimizes bias and promotes equitable outcomes for all Californians. \*\*\*.

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[nl%3A2&source=newsletter&item=body-link&region=text-section&access-ticket=eyJjdHh0ljojVEVOVyIsImkljoiMDAwMDAxODYtNTY3MC1kMDZlLWE1ZGYtZjdmNjkyMzMwMDAxliwic2lnljojVlJ0S0kzanVDVWQ4aGdZNnE4NXZEWZYTzY0PSlslRpbWUjOjIiOiIjNjc3MTc5MjQzliwidXVpZCI6ImZrdXJhbXZNOVpuTUUpZR2xzVStBTIE9PTBQbFlIc09tS25JdFhPcHNIVzNucFE9PSIsInYiOiIjIn0%3D](https://www.debevoise.com/insights/publications/2023/10/the-final-colorado-ai-insurance-regulations-whats)

Colorado S.B. 169, “Restrict Insurers’ Use of External Consumer Data:” The act prohibits an insurer from \*\*\* using any external consumer data and information source, algorithm, or predictive model (external data source) with regard to any insurance practice that unfairly discriminates against an individual based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression.

A Gesser, *et al.*, “The Final Colorado AI Insurance Regulations: What’s New and How to Prepare,” *Debevoise in Depth* (Debevoise & Plimpton: Oct. 3, 2023), <https://www.debevoise.com/insights/publications/2023/10/the-final-colorado-ai-insurance-regulations-whats>

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Illinois Artificial Intelligence Video Interview Act, 820 ICLS 42/  
Regulates video recording of job interviews and use of AI to analyze the videos, requires notice and consent, limits sharing of video, requires report on demographic data and provides for destruction of videos. See <https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68>

[Maryland] House Bill 1202, “Labor and Employment – Use of Facial Recognition Services – Prohibition,

[https://mgaleg.maryland.gov/2020RS/Chapters\\_noln/CH\\_446\\_hb1202t.pdf](https://mgaleg.maryland.gov/2020RS/Chapters_noln/CH_446_hb1202t.pdf):

FOR the purpose of prohibiting an employer from using certain facial recognition services during an applicant’s interview for employment unless the applicant consents under a certain provision of this Act; authorizing an applicant to consent to the use of certain facial recognition service technologies during an interview by signing a waiver; providing for the contents of a certain waiver; defining certain terms; and generally relating to employer use of facial recognition service technologies during job interviews.

New York State Education Dept., “**Order Bans the Use of Facial Recognition Technology in Schools**” (Sept., 27, 2023),

<https://www.nysed.gov/news/2023/state-education-department-issues-determination-biometric-identifying-technology-schools>

New York State Education Department Commissioner Betty A. Rosa today issued a determination on the use of biometric identifying technology in schools, as required by [State Technology Law](#) Section 106-b. The order prohibits schools in New York State from purchasing or utilizing facial recognition technology. Schools can decide whether to use biometric identifying technology other than facial recognition technology at the local level so long as they consider the technology’s privacy implications, impact on civil rights, effectiveness, and parental input.

In reaching this decision, Commissioner Rosa considered the recommendations of the [biometrics report](#) conducted by the Office of Information Technology Services, which was released on August 7, 2023. She concluded that serious concerns surrounding the use of facial recognition technology do not outweigh its claimed benefits.

**2023 ND H 1361 (Enacted Apr. 11, 2023)**

**SECTION 1. AMENDMENT.** Subsection 8 of section 1-01-49 of the North Dakota Century Code is amended and reenacted as follows:

8. 'Person' means an individual, organization, government, political subdivision, or government agency or instrumentality. The term does not include environmental elements, artificial intelligence, an animal, or an inanimate object.

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure.

Z. Williams, "AI Impact Measurements Gain Favor in States to Combat Abuse," *Bloomberg Law* (Nov. 8, 2023), <https://news.bloomberglaw.com/artificial-intelligence/ai-impact-measurements-gain-favor-in-states-to-combat-abuse>

## LOCAL

New York City Local Law No. 1894-A

Effective April 15, 2023, regulates use of “automated employment decision tools” in hiring and promotion, requires notice prior to being subject to a tool, allows opting-out and another process, and requires annual, independent “bias audit.” See [Legislation Text - Int 1894-2020 \(srz.com\)](#).

M. Capezza, *et al.*, “Deploying a Holistic Approach to Automated Employment Decision-Making in Light of NYC’s AEDT Law” (Mintz: Feb. 3, 2023), <https://www.mintz.com/insights-center/viewpoints/2226/2023-02-03-deploying-holistic-approach-automated-employment>

Press Release, “Mayor Adams Releases First-of-Its-Kind Plan for Responsible Artificial Intelligence Use in NYC Government,” (Office of the Mayor: Oct. 16, 2023), <https://www.nyc.gov/office-of-the-mayor/news/777-23/mayor-adams-releases-first-of-its-kind-plan-responsible-artificial-intelligence-use-nyc#/0>.

The plan outlines 37 key actions — 29 of which are set to be started or completed within the next year. Under this plan, the city will, among other things:

- Establish a framework for AI governance that acknowledges the risks of AI, including bias and disparate impact;
- Create an external advisory network to consult with stakeholders across sectors around the opportunities and challenges posed by AI;
- Build AI knowledge and skills in city government to prepare city employees to effectively and responsibly work with and on AI;
- Enable responsible AI acquisition with AI-specific procurement standards or guidance to support agency-level contracting; and
- Publish an annual AI progress report to communicate about the city’s progress and implementation.

## **OTHER AI ARTICLES**

As noted above, documents related to AI appear daily. Here is a sampling:

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L.F. Barrett, “Darwin Was Wrong: Your Facial Expressions Do Not Reveal Your Emotions,” *Scientific American* (Apr. 27, 2022), <https://www.scientificamerican.com/article/darwin-was-wrong-your-facial-expressions-do-not-reveal-your-emotions/>

E.M. Bosman & M. Robinson, “AI Trends for 2023 – Budgeting for the Future of AI,” *MoFo Tech* (Dec. 29, 2022), <https://www.mofo.com/resources/insights/221229-ai-trends-for-2023-budgeting>

D. Brin, “Give Every AI a Soul – or Else,” *Wired* (July 6, 2023), <https://www.wired.com/story/give-every-ai-a-soul-or-else/> **PS HE IS A GREAT WRITER OF SCIENCE FICTION!**

S. Bushwick, “10 Ways AI was Used for Good This Year,” *Scientific American* (Dec. 15, 2022), <https://www.scientificamerican.com/article/10-ways-ai-was-used-for-good-this-year/>

B. Chakravorti & The Conversation, “How Will AI Change Work? A Look Back at the ‘Productivity Paradox’ of the Computer Age Shows It’s Won’t Be So Simple,”

*Fortune* (June 25, 2023), <https://fortune.com/2023/06/25/ai-effect-jobs-remote-work-productivity-paradox-computers-iphone-chatgpt/>

P. Coffee, “An Anticipated Wave of AI Specialist Jobs Has Yet to Arrive,” *Wall St. J.* (Dec. 20, 2023), <https://www.wsj.com/articles/an-anticipated-wave-of-ai-specialist-jobs-has-yet-to-arrive-01a8169c>

L. Donahue, “A Primer on Using Artificial Intelligence in the Legal Profession,” *JOLT Digest* (Jan. 3, 2018), <http://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession>

K.D. Finley, “How to Be ‘Smart’ About Using Artificial Intelligence in the Workplace,” (JDSUPRA: Jan. 31, 2023), <https://www.jdsupra.com/legalnews/how-to-be-smart-about-using-artificial-3826623/>

D. Frost & H. Nolan, “The Potential and Peril in AI in the Newsroom,” *The Media Today* (Columbia Journalism Rev.: Oct. 25, 2023), [https://www.cjr.org/the\\_media\\_today/the-potential-and-peril-of-ai-in-the-newsroom.php#:~:text=As%20Hamilton%20Nolan%20puts%20it,needs%20to%20be%20carefully%20negotiated](https://www.cjr.org/the_media_today/the-potential-and-peril-of-ai-in-the-newsroom.php#:~:text=As%20Hamilton%20Nolan%20puts%20it,needs%20to%20be%20carefully%20negotiated)

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M. Ingram, “Researchers Under Attack, as Platforms Cut Back and AI-Powered Disinfo Grows,” *The Media Today* (Columbia Journalism Review: Sept. 28, 2023), [https://www.cjr.org/the\\_media\\_today/researchers\\_under\\_attack\\_disinformation.php](https://www.cjr.org/the_media_today/researchers_under_attack_disinformation.php)

Misinformation and disinformation have arguably never been as prominent or widely distributed as they are now, thanks to smartphones, the social Web, and apps such as Facebook, X (formerly Twitter), TikTok, and YouTube. Unfortunately, as the US draws closer to a pivotal election in which trustworthy information is likely to be more important than ever, various researchers and academic institutions are scaling back or even canceling their misinformation programs, due to legal threats and government pressure. At the same time, a number of large digital platforms have laid off hundreds or even thousands of the employees who specialized in finding and removing hoaxes and fakes, in some cases leaving only a skeleton staff to handle the problem. And all of this is happening as the quantity of fakes and conspiracy theories is expanding rapidly, thanks to cheap tools powered by artificial intelligence that can generate misinformation at the click of a button. In other words, a perfect storm could be brewing.

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D. Suskind, “The AI Nanny in Your Baby’s Future,” *Wall St. J.* (Aug. 11, 2023), <https://www.wsj.com/articles/the-ai-nanny-in-your-babys-future-999d0e50>

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## **INTELLECTUAL PROPERTY- FEDERAL AGENCIES AND PRIVATE CAUSES OF ACTION**

**U.S. Copyright Office, Library of Congress, Copyright Registration Guidance, 88 Fed. Reg. 16190 (Mar. 16, 2023),**

**<https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>**

The Copyright Office issues this statement of policy to clarify its practices for examining and registering works that contain material generated by the use of artificial intelligence technology.

**U.S. Copyright Office, Library of Congress, Notice of Inquiry and Request for Comments, 88 Fed. Reg. 59942 (Aug. 30, 2023)**

The United States Copyright Office is undertaking a study of the copyright law and policy issues raised by artificial intelligence ('AI') systems. To inform the Office's study and help assess whether legislative or regulatory steps in this area are warranted, the Office seeks comment on these issues, including those involved in the use of copyrighted works to train AI models, the appropriate levels of transparency and disclosure with respect to the use of copyrighted works, and the legal status of AI-generated outputs.

***Request for Comments Regarding Artificial Intelligence and Inventorship, 88 FR 9492 (Feb. 14, 2023)***

The United States Patent and Trademark Office (USPTO) plays an important role in incentivizing and protecting innovation, including innovation enabled by artificial intelligence (AI), to ensure continued U.S. leadership in AI and other emerging technologies (ET). In June 2022, the USPTO announced the formation of the AI/ET Partnership, which provides an opportunity to bring stakeholders together through a series of engagements to share ideas, feedback, experiences, and insights on the intersection of intellectual property and AI/ET. To build on the AI/ET Partnership efforts, the USPTO is seeking stakeholder input on the current state of AI technologies and inventorship issues that may arise in view of the advancement of such technologies, especially as AI plays a greater role in the innovation process. As outlined in sections II to IV below, the USPTO is pursuing three main avenues of engagement with stakeholders to inform its future efforts on inventorship and promoting AI-enabled innovation: a series of stakeholder engagement sessions; collaboration with academia through scholarly

research; and a request for written comments to the questions identified in section IV. The USPTO encourages stakeholder engagement through one or more of these avenues.

**Comment of the United States Federal Trade Commission to the United States Copyright Office, Docket No. 2023-6 (Oct. 30, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p241200\\_ftc\\_comment\\_to\\_copy\\_right\\_office.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copy_right_office.pdf)**

**Comment of the Copia Institute, Docket No. 2023-6 (Oct. 30, 2023), see <https://www.techdirt.com/2023/11/03/wherein-the-copia-institute-tells-the-copyright-office-theres-no-place-for-copyright-law-in-ai-training/>**

**Reply Comment of the Copia Institute, Docket No. 2023-6 (Dec. 6, 2023), see <https://www.techdirt.com/2023/12/08/the-copia-institute-tells-the-copyright-office-again-that-copyright-law-has-no-business-obstructing-ai-training/>**

***Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise* (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071 (Copyright Review Board: Feb. 14, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>)**

This was the denial of a request by Steven Thaler (see above) to reconsider his attempt to register a “two-dimensional artwork claim” that had been rejected by the Registration Program of the United States Copyright Office. Thaler identified the author of the artwork as the “Creativity Machine,” and stated that it was “autonomously created by a computer algorithm running on a machine.” The Office refused to register the claim as it lacked “human authorship necessary to support a copyright claim.” The Review Board affirmed the refusal to register the claim:

Thaler does not assert that the Work was created with contribution from a human author, so the only issue before the Board is whether, as he argues, the Office’s human authorship requirement is unconstitutional and unsupported by case law. Currently, ‘the Office will refuse to register a claim if it determines that a human being did not create the work.’ Under that standard, the Work is ineligible for registration. After reviewing the statutory text, judicial precedent, and longstanding Copyright Office practice, the Board again concludes that human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered. [citation and footnote omitted].

The Review Board also rejected Thaler’s argument that the human authorship requirement was unconstitutional:

[T]he Board rejects Thaler’s argument that the human authorship requirement is ‘unconstitutional’ because registration of machine-generated works would ‘further the underlying goals of copyright law, including the constitutional rationale for copyright protection.’ Congress is not obligated to protect all works that may constitutionally be protected. ‘[I]t is generally for Congress,’ not the Board, ‘to decide how best to pursue the Copyright Clause’s objectives.’ *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). The Board must apply the statute enacted by Congress; not second-guess whether a different statutory scheme would better promote the progress of science and useful arts. [citation omitted].

***Re: Zarya of the Dawn (Registration # V Au001480196), United States Copyright Office (Feb. 21, 2023), [Letter: In re Zarya of the Dawn](#)***

The Office has completed its review of the Work’s original registration application and deposit copy, as well as the relevant correspondence in the administrative record. We conclude that Ms. Kashtanova is the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the Work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created. [footnote admitted].

***Re: Second Request for Reconsideration for Refusal to Register Theatre D’opera Spatial (Correspondence ID 1-5T5320R; SR # 1-11743923581 (Copyright Review***

**Board: Sept. 5, 2023), <https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf>**

***Andersen v. Stability AI Ltd., Case No. 23-cv-00201-WHO (N.D. Ca. Oct. 30, 2023)***

In this putative class action, various artists challenged the defendants’ creation or use of an AI software product that, they alleged, was trained on their copyrighted works of art. The district court “largely” granted the defendants’ motion to dismiss, but granted plaintiffs leave to amend to “provide clarity regarding their theories of how each defendant separately violated their copyrights, removed or altered their copyright management information, or violated their rights of publicity and plausible facts in support.’

***Kadrey v. Meta Platforms, Inc., Case No. 23-cv-03417-VC (N.D. Ca. Nov. 20, 2023)***

This civil action arose from plaintiffs’ allegations that defendant’s large language model (“LLaMA”) was trained on their works and, among other things, that the use of their works constituted copyright infringement. The district court granted defendant’s motion to dismiss the infringement claim:

1. The plaintiffs allege that the ‘LLaMA language models are themselves infringing derivative works’ because the ‘models cannot function without the expressive information extracted’ from the plaintiffs’ books. This is nonsensical. A derivative work is ‘a work based upon one or more preexisting works’ in any ‘form in which a work may be recast, transformed, or adapted.’ \*\*\*. There is no way to understand the LLaMA models themselves as a recasting or adaptation of any of the plaintiffs’ books.

2. Another theory is that ‘every output of the LLaMA language models is an infringing derivative work,’ and that because third-party users initiate queries of LLaMA, ‘every output from the LLaMA language models constitutes an act of vicarious copyright infringement.’ But the complaint offers no allegation of the contents of any output, let alone of one that could be understood as recasting, transforming, or adapting the plaintiffs’ books. Without any plausible allegation of an infringing output, there can be no vicarious infringement. \*\*\*.

***Thomson Reuters Enterprise Centre GMBH v. Ross Intelligence Inc., No. 1:20-cv-613-SB (D. Del. Sept. 25, 2023)***

Facts can be messy even when parties wish they were not. But summary judgment is proper only if factual messes have been tidied. Courts cannot clean them up.

Thomson Reuters, a media company, owns a well-known legal research platform, Westlaw. It alleges that Ross, an artificial intelligence startup, illegally copied important content from Westlaw. Thomson Reuters thus seeks to recover from Ross. Both sides move for summary judgment on a variety of claims and defenses. But many of the critical facts in this case remain genuinely disputed. So I largely deny Thomson Reuters's and Ross's motions for summary judgment.

The underlying facts included the following:

Ross Intelligence is a legal-research industry upstart. It sought to create a 'natural language search engine' using machine learning and artificial intelligence. \*\*\*. It wanted to 'avoid human intermediated materials.' \*\*\*. Users would enter 3 questions and its search engine would spit out quotations from judicial opinions—no commentary necessary.

It is sufficient to note that plaintiff asserted causes of action for copyright infringement and tortious interference and that defendant raised a fair use defense, all of which (with some exceptions) will go to the jury.

***Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH) (D.D.C. Aug. 18, 2023)**

The plaintiff appealed from the denial of his copyright application:

Plaintiff Stephen Thaler owns a computer system he calls the 'Creativity Machine,' which he claims generated a piece of visual art of its own accord. He sought to register the work for a copyright, listing the computer system as the author and explaining that the copyright should transfer to him as the owner of the machine. The Copyright Office denied the application on the grounds that the work lacked human authorship, a prerequisite for a valid copyright to issue, in the view of the Register of Copyrights. Plaintiff challenged that denial, culminating in this lawsuit against the United States Copyright Office and Shira Perlmutter, in her official capacity as the Register of Copyrights and the Director of the United States Copyright Office ('defendants'). Both parties have now moved for summary judgment, which motions present the sole issue of whether a work generated entirely by an artificial system absent human involvement should be eligible for copyright. See Pl.'s Mot. Summ. J. (Pl.'s Mot.), ECF No. 16; Defs.' Cross-Mot. Summ. J. ('Defs.' Mot.), ECF No. 17. For the reasons explained below, defendants are correct that human authorship is an essential part of a valid copyright claim, and therefore plaintiff's pending motion for summary judgment is denied and defendants' pending cross-motion for summary judgment is granted.



***Thaler v. Hirshfeld*, No. 1:20-cv-903-(LMB/TCB), 2021 WL 3934803 (E.D. Va. Sept. 2, 2021), affirmed, *Thaler v. Vidal*, 2021-2347 (Fed. Cir. Aug. 5, 2022), petition for panel and rehearing *en banc* denied (Fed. Cir. Oct. 20, 2022)**

This was an appeal from the refusal of the USPTO to process two patent applications. The plaintiff alleged that he was the owner of DABUS, “an artificial intelligence machine” listed as the inventor on the applications. The applications included a document through which DABUS had “ostensibly assigned all intellectual property rights” to the plaintiff. The court held:

Before the Court are the parties’ cross-motions for summary judgment, which address the core issue—can an artificial intelligence machine be an ‘inventor’ under the Patent Act? Based on the plain statutory language of the Patent Act and Federal Circuit authority, the clear answer is no.

[P]laintiff’s policy arguments do not override the overwhelming evidence that Congress intended to limit the definition of ‘inventor’ to natural persons. As technology evolves, there may come a time when artificial intelligence reaches a level of sophistication such that it might satisfy accepted meanings of inventorship. But that time has not yet arrived, and, if it does, it will be up to Congress to decide how, if at all, it wants to expand the scope of patent law.

***Sedlik v. Von Drachenberg*, CV 21-1102 (C.D. Ca. Oct. 10, 2023)**

The district court granted in part motions for reconsideration of prior summary judgement rulings, concluding that the Supreme Court decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) had made a material change in the evaluation of the fair use defense and that there was a triable issue of fact on fair use.

Class Action Complaint, *Chabon v. OpenAI, Inc.*, Case No. 3:23-cv-03625-PHK (N.D. Ca. filed Sept. 8, 2023), <https://www.courtlistener.com/docket/67778017/chabon-v-openai-inc/>. Complaint alleges that OpenAI, among other things, used plaintiffs’ copyrighted works as training material for GPT models without their consent. (see *Wester* below).

Class Action Complaint, Silverman v. OpenAI, Inc., Case No. 3:23-cv-03416 (N.D. Ca. July 7, 2023), <https://www.courtlistener.com/docket/67569254/silverman-v-openai-inc/>. Complaint alleges that defendants wrongfully used copyrighted materials in training sets. (see Davis below).

Class Action Complaint, Tremblay v. OpenAI, Case No. 3-23-cv-03223 (N.D. Ca. June 28, 2023), see [https://www.bloomberglaw.com/public/desktop/document/TremblayetalvOPENAIINCetalDocketNo323cv03223NDCaJun282023CourtDo?doc\\_id=X7Q1NOIOROV928BCLAKKL91E1R5](https://www.bloomberglaw.com/public/desktop/document/TremblayetalvOPENAIINCetalDocketNo323cv03223NDCaJun282023CourtDo?doc_id=X7Q1NOIOROV928BCLAKKL91E1R5). Similar allegations to those in Silverman above. (see Cho below).

Complaint, New York Times v. Microsoft Corp., Case # 1:23-cv-11195-UA S.D.N.Y. Dec. 27, 2023), [https://i2.res.24o.it/pdf2010/Editrice/ILSOLE24ORE/ILSOLE24ORE/Online/Oggetti Embedded/Documenti/2023/12/27/nyt\\_complaint\\_dec2023.pdf](https://i2.res.24o.it/pdf2010/Editrice/ILSOLE24ORE/ILSOLE24ORE/Online/Oggetti%20Embedded/Documenti/2023/12/27/nyt_complaint_dec2023.pdf). Complaint alleges that, among other things, “[d]efendants’ GenAI tools can generate output that recites Times content verbatim” and infringes plaintiff’s copyrights.

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[policy/2023/11/artists-may-poison-ai-models-before-copyright-office-can-issue-guidance/](https://www.copyright.gov/policy/2023/11/artists-may-poison-ai-models-before-copyright-office-can-issue-guidance/)

J. Bockman & J.A. Crawford, “AI Trends for 2023 – AI Technology Leads Patent Filing Growth,” *MoFo TECH* (Morrison Foster: Dec. 15, 2022), <https://mofotech.mofo.com/topics/ai-trends-for-2023-ai-technology-leads-patent-filing-growth>

C. Casey, “From Gavel to Gigabytes: ChatGPT’s Groundbreaking Year in Law,” *Reveal* (Nov. 30, 2023), <https://resource.revealdata.com/en/blog/from-gavel-to-gigabytes-chatgpts-groundbreaking-year-in-law>

W. Cho, “Authors Sue OpenAI Claiming Mass Copyright Infringement of Hundreds of Thousand of Novels,” *Hollywood Reporter* (June 29, 2023), <https://www.hollywoodreporter.com/business/business-news/authors-sue-openai-novels-1235526462/>

W. Davis, “Sarah Silverman Is Suing OpenAI and Meta for Copyright Infringement,” *The Verge* (July 9, 2023), <https://www.theverge.com/2023/7/9/23788741/sarah-silverman-openai-meta-chatgpt-llama-copyright-infringement-chatbots-artificial-intelligence-ai>

W. Davis, “AI Companies Have All Kinds of Arguments Against Paying for Copyrighted Content,” *The Verge* (Nov. 4, 2023), <https://www.theverge.com/2023/11/4/23946353/generative-ai-copyright-training-data-openai-microsoft-google-meta-stabilityai> REPORTING ON COMMENTS OF AI COMPANIES IN RESPONSE TO U.S. COPYRIGHT OFFICE AUGUST 30 REQUEST FOR COMMENT ABOVE.

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## **GAI INTRODUCTION**

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## **GAI AND JUDGES**

This section is a little different than the others because it begins with a short introduction rather than “diving” immediately into references. Not surprisingly, given the availability of GAI, attorneys are – or may – rely on it to do research. This has led to the imposition of sanctions in the *Mata* decision (see below) and proactive attempts by judges to deal with the possible use of GAI by attorneys. There does not appear to be any likelihood that the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence will be amended to address GAI or, for that matter, AI. But we will see. And with that, let’s look at some case law and actions by individual federal judges.

### ***Mata v. Avianca, Inc.*, No. 22-cv-1461, 2023 WL 3696209 (PKC) (S.D.N.Y. June 22, 2023)**

The plaintiff’s attorneys in this civil action “submitted non-existent judicial opinions with fake quotes and citations created by \*\*\* ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.” The district court concluded that the attorneys acted with subjective bad faith and violated Rule 11. The court held the firm that represented the plaintiff jointly and severally liable for the attorney’s violation but rejected the imposition of sanctions under Section 1927 because, “[r]eliance on fake cases has caused several harms but dilatory tactics and delay were not among them.” The

court also held that, “alternatively” to Rule 11, sanctions were appropriate under its inherent power. The court imposed a \$5,000.00 monetary penalty, required the attorneys to “inform their client and the judge whose names were wrongfully invoked of the sanctions imposed,” but did not require an apology from the attorneys.

***Berman v. Matteucci*, Case No. 6:23-cv-00660-MO (D. Ore. July 10, 2023)**

The *pro se* petitioner in this *habeas* proceeding responded to an order to show cause why it should not be dismissed as untimely by asserting that, prior to April 2023, when “an artificial intelligence chatbot provided him with insights that helped him discover his claims” that the policy under which he had been sentenced violated several constitutional provisions, “artificial intelligence technology was not sufficiently advanced to impart this knowledge to him.” The district court held that the petitioner’s understanding of his legal claim was not a “factual predicate” under *habeas* law and that his lack of understanding of “the legal significance of known facts” was insufficient to avoid dismissal.

***Ex Parte Allen Michael Lee*, No. 10-22-00281-CR, 2023 WL 4624777 (Tex. Crim. App. July 19, 2023)**

The appellate court here noted that “none of the three published cases cited [in the petitioner’s brief] actually exist \*\*\*. Each citation provides the reader a jump-cite into the body of a different case that has nothing to do with the propositions cited by Lee. Two of the citations take the reader to cases from Missouri.” The court observed: “It appears that at least the ‘Argument’ portion of the brief may have been prepared by artificial intelligence AI,” but took no action.



***People v. Crabill, 23 PDJ067 (Colorado Office of Attorney Regulation: Nov. 22, 2023)***

The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspended Zachariah C. Crabill (attorney registration number 56783) for one year and one day, with ninety days to be served and the remainder to be stayed upon Crabill's successful completion of a twoyear period of probation, with conditions. The suspension took effect November 22, 2023.

In April 2023, a client hired Crabill to prepare a motion to set aside judgment in the client's civil case. Crabill, who had never drafted such a motion before working on his client's matter, cited case law that he found through the artificial intelligence platform, ChatGPT. Crabill did not read the cases he found through ChatGPT or otherwise attempt to verify that the citations were accurate. In May 2023, Crabill filed the motion with the presiding court. Before a hearing on the motion, Crabill discovered that the cases from ChatGPT were either incorrect or fictitious. But Crabill did not alert the court to the sham cases at the hearing. Nor did he withdraw the motion. When the judge expressed concerns about the accuracy of the cases, Crabill falsely attributed the mistakes to a legal intern. Six days after the hearing, Crabill filed an affidavit with the court, explaining that he used ChatGPT when he drafted the motion.

Through this conduct, Crabill violated Colo. RPC 1.1 (a lawyer must competently represent a client); Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 3.3(a)(1) (a lawyer must not knowingly make a false statement of material fact or law to a tribunal); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

***United States v. Cohen, 18-CR-602 (JMF) (S.D.N.Y.)***

On December 12, 2023, Judge Jesse M. Furman issued an Order directing counsel for defendant to show cause why sanctions should not be imposed on him for citing what appeared to be decisions that did not exist, assuming that counsel could not provide copies of the decisions. Counsel's response is available at <https://www.courthousenews.com/wp-content/uploads/2023/12/Cohen-declaration.pdf>.

R. Buckland, "AI, Judges and Judgment: Setting the Scene," M-RCBG Associate Working Paper Series 2023.220, Harvard University, Cambridge, MA, Nov. 2023), <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/senior fellows/2023-24/Buckland%20paper%20final.pdf>

Artificial intelligence (AI) in the administration of justice is growing at rapid pace. <sup>1</sup> This is driven by widespread recognition of AI justice’s undeniable advantages, despite the risks it presents to the integrity of legal systems.

AI justice may, for example, lower the administrative burden of cases. The Crown Courts in England and Wales ended 2022 with a near-record load of over 60,000 outstanding cases.<sup>2</sup> AI can dramatically increase court efficiency and reduce backlogs, providing standardised outcomes faster and at lower cost. After all, AI judges do not need to rest. At the same time, AI-driven judicial decision-making could make justice more accessible to the large segments of society that cannot afford human lawyers.

Proponents also argue algorithms could improve the fairness of judgements because ‘AI judges strictly follow precedents, restrict improper judicial discretion, prevent personal biases and preferences of individual judges, handle large amounts of information, complete complicated calculative balances, and discover statistical representations of variations of fact patterns and legal factors.’ Even where AI tools assist human judges, these tools can push relevant legal provisions through comprehensive data retrieval. This in turn can improve judges’ understanding of cases, helping them avoid one-sided access to data and information.

At this point, it is important to clarify the different ways in which AI is being deployed in the courtroom. At a foundation level, AI may be used for auxiliary administrative functions. This includes communication between judicial personnel, allocation of resources and cases, and ensuring the anonymisation of judicial decisions, documents, or data. These activities may ostensibly appear separate from the core of judicial decision-making but carry subtler implications. For instance, the allocation of a case to a specific judge, given their unique expertise or biases, could indirectly influence the outcome. These nuances notwithstanding, the primary objective of these AI-driven tasks remain administrative in nature, aiming to streamline the judicial process rather than directly determine case outcomes. [footnotes omitted].

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E. Volokh, “Six Federal Cases of Self-Represented Litigants Citing Fake Cases in Briefs, Likely Because They Used AI Programs,” *Reason* (Nov. 13, 2023), <https://reason.com/volokh/2023/11/13/self-represented-litigants-use-ai-to-write-briefs-produce-hallucinated-citations/>

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## ORDERS

“Interim Rules on the Use of Generative AI,” Utah Judicial Council (Oct. 25, 2023), <https://legacy.utcourts.gov/utc/judicial-council/wp-content/uploads/sites/48/2023/10/2023-10-23Judicial-Council-Materials-1.pdf>:

These rules set forth the only authorized use of generative AI tools for court-related work or on court owned devices. 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. [footnote omitted].

The United States Court of Appeals for the Fifth Circuit is considering amending its Rule 32.3 and Form 6 as shown below. Proposed changes are underlined:

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.

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.

“*In re: Use of Unverified Sources*,” General Order 23-1 (D. Hawaii Nov. 14, 2023):

Briefs and memoranda generated by artificial intelligence (AI) platforms (for example, ChatGPT or Bard) and online briefs or memoranda drafted by persons compensated to produce materials not tailored to specific cases (collectively, ‘unverified sources’), have increased the courts concern about the reliability and accuracy of filings and other court submissions. In

particular, the court is concerned about whether factual or legal citations or references in court filings and submissions have been properly vetted by counsel and pro se parties. For example, courts sometimes receive briefs containing fictitious case cites either generated by AI or by human authors.

To address these concerns, if any counsel or pro se party submits to the court any filing or submission generated by an unverified source, that attorney or pro se party must submit a declaration concurrently with that material captioned “Reliance on Unverified Source” that: (1) advises the court that counsel or the pro se party has relied on one or more unverified sources; and (2) verifies that the counsel or pro se party has confirmed that any such material is not fictitious. The scope of the required declaration is that required by Rule 11 of the Federal Rules of Civil Procedure.

This order does not affect the use of basic research tools such as Westlaw, Lexis, or Bloomberg, and no declaration is required if all sources can be located on such well-accepted basic research tools.

“Mandatory Certification Regarding Generative Artificial Intelligence,” Judge Specific Requirement of Judge Brantley Starr, Northern District of Texas, <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>:

All attorneys and pro se litigants \*\*\* must, 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 data bases, by a human being. \*\*\*.

“Order on Artificial Intelligence,” Judge Stephen Alexander Vaden, U.S. Ct. of International Trade (June 8, 2023), <https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf>:

\*\*\* *any* submission in a case assigned to Judge Vaden that contains text drafted with the assistance of a generative artificial intelligence program on the basis of natural language prompts, including but not limited to ChatGPT and Google Bard, must be accompanied by:

A disclosure notice that identifies the program used and the specific portions of text that have been so drafted;

A certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party \*\*\*.

“Notice to counsel: New AI Provision Effective as of July 14, 2023,” Judge Michael J. Newman, Southern District of Ohio, Western Division, Dec. 14, 2023):

## VI. ARTIFICIAL INTELLIGENCE (“AI”) PROVISION

No attorney for a party, or a *pro se* party, may use Artificial Intelligence (“AI”) in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, *inter alia*, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.

“Standing Order Re: Artificial Intelligence (‘AI’) in Cases Assigned to Judge Baylson,” Eastern District of Pennsylvania (June 6, 2023), <https://www.paed.uscourts.gov/documents/standord/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf>:

If any attorney for a party, or a *pro se* party, has used Artificial Intelligence (‘AI’) in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, **MUST**, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and **CERTIFY**, that each and every citation to the law or the record in the paper, has been verified as accurate. [emphasis in original].

General Order 23-11, General Order Amending Local Rules (E.D. Tex. Oct. 30, 2023)

Added to Local Rule CV-11:

- (g) Use of Technology by Pro Se Litigants. Litigants remain responsible for the accuracy and quality of legal documents produced with the assistance of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services). Litigants are cautioned that certain technologies may produce factually or legally inaccurate content. If a litigant chooses to employ technology, the litigant continues to be bound by the requirements of Fed. R. Civ. P. 11 and must review and verify any computer-generated content to ensure that it complies with all such standards. See also Local Rule AT-3(m).

COMMENT: Recent advancements in technology have provided *pro se* litigants access to tools that may be employed in preparing legal documents or pleadings. However, often the product of those tools may be factually or legally inaccurate. Local Rule CV-11 is amended to add new subsection (g) to alert *pro se* litigants to this risk. The rule also alerts litigants that they remain bound by the certification requirements of Fed. R. Civ. P. 11 when employing such tools to verify all content meets those standards. A similar rule, Local Rule AT-3(m), is added to the standards of practice to be observed by attorneys.

### Added to Local Rule AT-3:

(m) If the lawyer, in the exercise of his or her professional legal judgment, believes that the client is best served by the use of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services), then the lawyer is cautioned that certain technologies may produce factually or legally inaccurate content and should never replace the lawyer's most important asset – the exercise of independent legal judgment. If a lawyer chooses to employ technology in representing a client, the lawyer continues to be bound by the requirements of Federal Rule of Civil Procedure 11, Local Rule AT-3, and all other applicable standards of practice and must review and verify any computer-generated content to ensure that it complies with all such standards.

COMMENT: Recent advancements in technology have provided the legal profession with many useful tools for daily practice. Ultimately, however, the most valuable benefit a lawyer provides to a client is the lawyer's independent judgment as informed by education, professional experiences, and participation in the legal and professional community in which the lawyer practices. Although technology can be helpful, it is never a replacement for abstract thought and problem solving. Local Rule AT-3 is amended to add new subsection (m) to remind lawyers of their continuing duties under applicable rules of practice despite any choice to employ technological tools in the course of providing legal services.

In re: Pleadings Using Generative Artificial Intelligence, General Order 2023-03 (N.D. Tex. Bankr. Ct. June 21, 2023),  
<https://www.txnb.uscourts.gov/news/general-order-2023-03-pleadings-using-generative-artificial-intelligence>:

If any portion of a pleading or other paper filed on the Court's docket has been drafted utilizing generative artificial intelligence, including but not limited to ChatGPT, Harvey.AI, or Google Bard, the Court requires that all attorneys and pro se litigants filing such pleadings or other papers verify that any language that was generated was checked for accuracy, using print reporters, traditional legal databases, or other reliable means. Artificial intelligence systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States and are likewise not factually or legally trustworthy sources without human verification. Failure to heed these instructions may subject attorneys or pro se litigants to sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011.

Standing Order for Civil Cases Before Magistrate Judge Fuentes, Magistrate Judge Gabriel A. Fuentes (N.D. Ill.),  
<https://www.ilnd.uscourts.gov/assets/documents/forms/judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20revision%208-11-23.pdf>:



The Court has adopted a new requirement in the fast-growing and fast-changing area of generative artificial intelligence ('AI') and its use in the practice of law. The requirement is as follows: Any party using any generative AI tool in the preparation or drafting of documents for filing with the Court must disclose in the filing that AI was used and the specific AI tool that was used to conduct legal research and/or to draft the document. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, 'I'm sorry, Dave, I'm afraid I can't do that .... This mission is too important for me to allow you to jeopardize it.' 2001: A SPACE ODYSSEY (MetroGoldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes 'bogus judicial decisions' cited for substantive propositions of law. See *Mata v. Avianca, Inc.*, \*\*\*. Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2). \*\*\*.

*Belenzon v. Paws Up Ranch, LLC*, CV 23-69-M-DWM (D. Mont. June 22, 2023):

Order granting *pro hac* admission on "condition that *pro hac* counsel shall do his or her own work. This means that *pro hac* counsel must do his or her own writing; sign his or her own pleadings, motions, and briefs; and appear and participate personally, Use of artificial intelligence automated drafting programs, such as Chat GPT, is prohibited."

Paragraph IB, "Use of Generative Artificial Intelligence," Judge Evelyn Padin's General Pretrial and Trial Procedures (Revised Nov. 13, 2023), <https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf>:

The use of any GAI (e.g., OpenAI's ChatGPT or Google's Bard) for any court filings requires a mandatory disclosure/certification that: (1) identifies the GAI program; (2) identifies the portion of the filing drafted by GAI; and (3) certifies that the GAI work product was diligently reviewed by a human being for accuracy and applicability.

Paragraph 8F, Individual Practices in Civil Cases, District Judge Arun Subramanian (S.D.N.Y.) (revised July 29, 2023), [https://www.nysd.uscourts.gov/sites/default/files/practice\\_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf](https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf):



**Use of ChatGPT and Other Tools.** Counsel is responsible for providing the Court with complete and accurate representations of the record, the procedural history of the case, and any cited legal authorities. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.

*“Court Advisory Concerning Discovery and Other Matters,” Nine Line Apparel, Inc. v. Sergio, Civil Action No. SA-23-CV-0997-FB (W.D. Tex. Oct. 31, 2023):*

As this case begins, the Court wishes to apprise counsel and the parties of the Court’s expectations concerning the conduct of discovery and other matters: \*\*\*

**6. In this modern environment of artificial intelligence, counsel are reminded of traditional obligations of professional responsibility to be honest with the Court and opposing counsel, regardless of drafting methodology employed. The signature of counsel on all pleadings constitutes an affirmation that all the pleading contents have been validated for accuracy and authenticity. [emphasis in original].**

Baroness Carr of Walton-on-the-Hill,  
Lady Chief Justice of England & Wales, *et al.*, “Artificial Intelligence (AI): Guidance for Judicial Office Holders,” *Courts and Tribunals Judiciary* (Dec. 12, 2023), <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/>

From the Introduction:

This guidance has been developed to assist judicial office holders in relation to the use of Artificial Intelligence (AI).

It sets out key risks and issues associated with using AI and some suggestions for minimising them. Examples of potential uses are also included.

Any use of AI by or on behalf of the judiciary must be consistent with the judiciary’s overarching obligation to protect the integrity of the administration of justice.

This guidance applies to all judicial office holders under the Lady Chief Justice and Senior President of Tribunal’s responsibility, their clerks and other support staff.

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## **GAI AND THE PRACTICE OF LAW**

### ***MillerKing, LLC v. DoNotPay, Inc., Case No. 3:23-CV-863 (S.D. Ill. Nov, 17, 2023)***

This case pits real lawyers against a robot lawyer. Defendant DoNotPay, Inc. ('DNP'), is an online subscription service that touts its robot lawyer's ability to allow consumers to '[f]ight corporations, beat bureaucracy and sue anyone at the press of a button.' But, DNP and its robot lawyer are not actually licensed to practice law. So, Plaintiff MillerKing, Inc. ('MK'), a small Chicago law firm that claims to be a direct competitor of DNP, has sued DNP for false association and false advertising under the Lanham Act and Illinois state law.

Now pending before the Court is DNP's motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). \*\*\*. DNP essentially asks MK, in the words of Justice Antonin Scalia, 'What's it to you?' More precisely, how has DNP's conduct injured MK such that it has standing under Article III of the U.S. Constitution to sue DNP in federal court? This Court finds that MK has not adequately alleged such an injury and, thus, its complaint must be dismissed for lack of standing.

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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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### Abstract:

Picture this: You are arrested and accused of a serious crime, like carjacking, assault with a deadly weapon, or child abuse. The only evidence against you is a cellphone video showing the act of violence. To the naked eye, the perpetrator on the video is you. But you are innocent. The video is a ‘deepfake’ – an audiovisual recording created using readily available Artificial Intelligence technology that allows anyone with a smartphone to believably map one person’s movements and words onto another person’s face. How will you prove the video is deepfake in court? And, who—the judge or the jury—gets to decide if it’s fake? The law does not provide clear answers.

But this much is certain--deepfake evidence is an emerging threat to our justice system’s truth-seeking function. Deepfakes will invade court proceedings from several directions— parties may fabricate evidence to win a civil action, governmental actors may rely on deepfakes to secure criminal convictions, or lawyers may purposely exploit juror bias and skepticism about what is real.

Currently, no evidentiary procedure explicitly governs the presentation of deepfake evidence in court. The existing legal standards governing the authentication of evidence are inadequate because the rules were developed before the advent of deepfake technology. As a result, they do not solve the urgent problems of--how to show a video is fake and how to show it isn’t. In addition, although in the last several years, legal scholarship and the popular news media have addressed certain facets of deepfakes, there has been no commentary on the procedural aspects of deepfake evidence in court. Absent from the discussion is who gets to decide whether a deepfake is authentic. This article addresses the matters that prior academic scholarship about deepfakes obscures. It is the first to propose a new rule of evidence reflecting a unique reallocation of the fact-determining responsibilities between the jury and the judge, treating the question of

deepfake authenticity as one for the court to decide as part of an expanded gatekeeping function under the rules of evidence. Confronting deepfakes evidence in legal proceedings demands that courts and lawyers use imagination and creativity to navigate pitfalls of proof and manage a jury's doubts and distrust about what is real. Your freedom may depend on how we meet these challenges.

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## **LAW ENFORCEMENT APPLICATIONS OF AI**

Technology is neutral. That does not mean, however, that a given technology cannot have a military use. AI is no exception, as the examples in this and the section following it demonstrate.

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## **MILITARY APPLICATIONS OF AI**

USDOD, *Autonomy in Weapon Systems*, DoD Directive 3000.09 (Jan. 25, 2023), <https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/300009p.pdf>

The purpose of the Directive:

- Establishes policy and assigns responsibilities for developing and using autonomous and semiautonomous functions in weapon systems, including armed platforms that are remotely operated or operated by onboard personnel.
- Establishes guidelines designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements.
- Establishes the Autonomous Weapon Systems Working Group.

Bureau of Arms Control, Verification and Compliance, US State Dept., *Political Declaration on Responsible Use of Artificial Intelligence and Autonomy* (Feb. 16, 2023), <https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy/>

An increasing number of States are developing military AI capabilities, which may include using AI to enable autonomous systems. Military use of AI can and should be ethical, responsible, and enhance international security. Use of AI in armed conflict must be in accord with applicable international humanitarian law, including its fundamental principles. Military use of AI capabilities needs to be accountable, including through such use during military operations within a responsible human chain of command and control. A principled approach to the military use of AI should include careful consideration of risks and benefits, and it should also minimize unintended bias and accidents. States should take appropriate measures to ensure the responsible development, deployment, and use of their military AI capabilities, including those enabling autonomous systems. These measures should be applied across the life cycle of military AI capabilities. [footnote omitted].

Congressional Research Service, *Emerging Military Technologies: Background and Issues for Congress* (Updated Nov. 1, 2022), <https://sgp.fas.org/crs/natsec/R46458.pdf>



Although the U.S. government has no official definition of artificial intelligence, policymakers generally use the term AI to refer to a computer system capable of human-level cognition. AI is further divided into three categories: narrow AI, general AI, and artificial superintelligence. Narrow AI systems can perform only the specific task that they were trained to perform, while general AI systems would be capable of performing a broad range of tasks, including those for which they were not specifically trained. Artificial superintelligence refers to a system “that greatly exceeds the cognitive performance of humans in virtually all domains of interest.” General AI systems and artificial superintelligence do not yet—and may never—exist.

Narrow AI is currently being incorporated into a number of military applications by both the United States and its competitors. Such applications include but are not limited to intelligence, surveillance, and reconnaissance; logistics; cyber operations; command and control; and semiautonomous and autonomous vehicles. These technologies are intended in part to augment or replace human operators, freeing them to perform more complex and cognitively demanding work. In addition, AI-enabled systems could (1) react significantly faster than systems that rely on operator input; (2) cope with an exponential increase in the amount of data available for analysis; and (3) enable new concepts of operations, such as swarming (i.e., cooperative behavior in which unmanned vehicles autonomously coordinate to achieve a task) that could confer a warfighting advantage by overwhelming adversary defensive systems.

Narrow AI, however, could introduce a number of challenges. For example, such systems may be subject to algorithmic bias as a result of their training data or models. Researchers have repeatedly discovered instances of racial bias in AI facial recognition programs due to the lack of diversity in the images on which the systems were trained, while some natural language processing programs have developed gender bias. Such biases could hold significant implications for AI applications in a military context. For example, incorporating undetected biases into systems with lethal effects could lead to cases of mistaken identity and the unintended killing of civilians or noncombatants.

Similarly, narrow AI algorithms can produce unpredictable and unconventional results that could lead to unexpected failures if incorporated into military systems. In a commonly cited demonstration of this phenomenon \*\*\*, researchers combined a picture that an AI system correctly identified as a panda with random distortion that the computer labeled ‘nematode.’ The difference in the combined image is imperceptible to the human eye, but it resulted in the AI system labeling the image as a gibbon with 99.3% confidence. Such vulnerabilities could be exploited intentionally by adversaries to disrupt AI-reliant or -assisted target identification, selection, and engagement. This could, in turn, raise ethical concerns—or, potentially, lead to violations of the law of armed conflict—if it results in the system selecting and engaging a target or class of targets that was not approved by a human operator.

Finally, recent news reports and analyses have highlighted the role of AI in enabling increasingly realistic photo, audio, and video digital forgeries, popularly known as ‘deep fakes.’ Adversaries could deploy this AI capability as part of their information operations in a ‘gray zone’ conflict. Deep fake technology could be used against the United States and its allies to generate false news reports, influence public discourse, erode public trust, and attempt blackmail of government officials. For this reason, some analysts argue that social media platforms—in addition to deploying deep fake detection tools—may need to expand the means of labeling and authenticating content. Doing so might require that users identify the time and location at which the content originated or properly label content that has been edited. Other analysts have expressed concern that regulating deep fake technology could impose an undue burden

on social media platforms or lead to unconstitutional restrictions on free speech and artistic expression. These analysts have suggested that existing law is sufficient for managing the malicious use of deep fakes and that the focus should be instead on the need to educate the public about deep fakes and minimize incentives for creators of malicious deep fakes.

Government Accountability Office, “Artificial Intelligence: DOD Needs Department-Wide Guidance to Inform Acquisitions,” GAO-23-105850 (June 2023), <https://www.gao.gov/products/gao-23-105850>. Conclusions:

Because of the opportunities AI presents, efforts to acquire AI tools or integrate AI into DOD weapon systems are poised for rapid growth— growth that could outpace DOD’s efforts to develop appropriate and sufficiently broad guidance for those acquisitions. AI offers the potential for broad application across the military services and joint acquisition programs to significantly enhance capabilities available to the warfighter. However, DOD has not issued department-wide guidance to provide a framework to ensure that acquisition of AI is consistent across the department and accounts for the unique challenges associated with AI.

It is especially important that DOD and the military services issue guidance to provide critical oversight, resources, and provisions for acquiring AI given that the U.S. will face AI-enabled adversaries in the future. Without such guidance, DOD is at risk of expending funds on AI technologies that do not consistently address the unique challenges associated with AI and are not tailored to each service’s specific needs. The private company observations previously discussed offer numerous considerations DOD may wish to leverage in guidance, as appropriate, as it continues to pursue AI-enabled capabilities.

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# LawSites

Tracking Technology and Innovation for the Legal Profession

## A Compendium of Legal Ethics Opinions on Gen AI (As Compiled by – You Guessed It – Gen AI)

ChatGPT 4o
Share

Create a report detailing every legal ethics opinion from every national, state, local and specialty bar association or lawyer licensing body pertaining to the ethics of lawyers' use of generative artificial intelligence.

To provide a comprehensive report, could you specify:

- Do you want opinions from only U.S. bar associations and lawyer licensing bodies, or should this include international organizations as well?
- Should the report focus on formal ethics opinions, or would you like to include informal guidance, advisory statements, or policy discussions?
- Do you need a summary of each opinion, or just citations and links where available?
- Should the report cover only currently active opinions, or include historical perspectives as well?
- Any specific format or structure you prefer for the report?

Include opinions from only the U.S., but do include both formal and informal guidance. The report should include summaries of each opinion. I do not have a preference on format.

Got it! I will compile a report detailing every legal ethics opinion from national, state, local, and specialty bar associations or lawyer licensing bodies in the U.S. regarding the ethical use of generative artificial intelligence by lawyers. This will include both formal ethics opinions and informal guidance, along with summaries of each opinion.

Message ChatGPT

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Deep research
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ChatGPT can make mistakes. Check important info.

By **Bob Ambrogio** on February 7, 2025



This week, I have been experimenting with **Deep Research**, the AI agent OpenAI released on Sunday that it says is capable of completing multi-step research tasks and synthesizing large amounts of online information. Not to be confused with the controversial Chinese AI product DeepSeek), Deep Research is said to be particularly useful for people in fields such as finance, science and law.

Already this week, I published two of these experiments. In the first, I used it **to analyze the legality of President Trump's pause of federal grants**. In about 10 minutes, it produced a 9,000 word detailed memorandum, concluding that the pause “appears to rest on shaky legal ground.”

Next, I used it to research and recommend the best law practice management suite for a four-lawyer firm. It **produced a fairly detailed response**, including two charts comparing features, pricing, usability, security, support and user satisfaction.

For today's task, I asked it to create a report detailing every legal ethics opinion pertaining to generative AI. Here was my exact prompt:

“Create a report detailing every legal ethics opinion from every national, state, local and specialty bar association or lawyer licensing body pertaining to the ethics of lawyers’ use of generative artificial intelligence.”

It responded to my prompt with several questions about the scope of the research I’d requested, such as whether it should focus only on formal ethics opinions or also include informal guidance. After I answered its questions, it produced the report published below. After it produced the report, I asked it to also summarize the findings in a chart, which is what you see immediately below.

I have not verified that this is a complete list. If anyone knows where I can find a complete list to compare against, please let me know.

That said, I was again impressed by its ability to conduct comprehensive research across multiple sources and generate a report. The entire task took it 15 minutes.



<b>Issuing Body</b>	<b>Opinion Title/Number</b>	<b>Date Issued</b>	<b>Key Themes</b>	<b>Disclosure Required</b>	<b>Billing Guidance</b>
<b><u>ABA</u></b>	Formal Opinion 512	July 2024	Competence, Confidentiality, Supervision, Candor, Fees	Case-dependent	AI efficiency should reduce fees
<b><u>California</u></b>	Practical Guidance	November 2023	Confidentiality, Competence, AI Disclosure, Supervision	Not mandatory, but recommended	Efficiency gains must be fair to clients
<b><u>Florida</u></b>	Advisory Opinion 24-1	January 2024	Confidentiality, Supervision, Fees, AI Transparency	Client informed consent advised	Must not charge for AI time savings
<b><u>New York State Bar</u></b>	Task Force Report	April 2024	Competence, Bias, AI Oversight, Client Communication	Recommended in certain cases	Clients should benefit from AI-driven efficiency
<b><u>New York City Bar</u></b>	Formal Opinion 2024-5	August 2024	Confidentiality, Competence, Supervision, AI Disclosure	Required for external AI use	No overcharging for AI use
<b><u>New Jersey Supreme Court</u></b>	Preliminary Guidelines	January 2024	Competence, Candor, Supervision, AI Verification	Not always, but recommended	No billing for time not actually spent
<b><u>Pennsylvania &amp; Philadelphia Bars</u></b>	Joint Opinion 2024-200	June 2024	Competence, Candor, AI Hallucinations, Billing Ethics	Yes, in some AI use cases	Cannot bill AI time as manual work
<b><u>Kentucky</u></b>	Ethics Opinion KBA E-457	March 2024	Competence, AI Use in Billing, Supervision, Client Consent	Depends on AI's impact on case	Cannot bill for AI learning time
<b><u>North Carolina</u></b>	Formal Ethics Opinion 2024-1	November 2024	Competence, Supervision, Confidentiality, AI Oversight	Not always, but must protect confidentiality	AI-based efficiency should lower costs
<b><u>Texas</u></b>	Proposed Opinion 2024-6	November 2024	Competence, Confidentiality, AI Trustworthiness,	Not explicitly required	Fair pricing required for AI use



			Supervision		
<b><u>Virginia</u></b>	AI Guidance Update	August 2024	Confidentiality, Billing, Supervision, AI Court Compliance	Not mandated but recommended	AI costs must align with ethical billing
<b><u>D.C. Bar</u></b>	Ethics Opinion 388	September 2024	Competence, AI Verification, Supervision, Client Files	Required in specific situations	No excess fees for AI use
<b><u>USPTO</u></b>	Practice Guidance (2023–2024)	April 2024	Candor, Confidentiality, AI Use in Legal Submissions	Court compliance required	Legal AI use cannot inflate costs

## National Bar Associations

### American Bar Association – Formal Opinion 512 (July 2024)

The ABA Standing Committee on Ethics and Professional Responsibility issued **Formal Opinion 512, “Generative Artificial Intelligence Tools,” on July 29, 2024.** [americanbar.org](https://www.americanbar.org) [americanbar.org](https://www.americanbar.org). This is the ABA’s first ethics guidance focused on generative AI use by lawyers. It instructs attorneys to “*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.*” [jenkinslaw.org](https://www.jenkinslaw.org) In short, existing ABA Model Rules apply to AI just as they do to any technology.

**Key concerns and recommendations:** The opinion emphasizes that lawyers must maintain technological **competence** – understanding the benefits and risks of AI tools they use [jenkinslaw.org](https://www.jenkinslaw.org). It notes the duty of **confidentiality** (Model Rule 1.6) requires caution when inputting client data into AI tools; lawyers should ensure no confidential information is revealed without informed client consent [jenkinslaw.org](https://www.jenkinslaw.org). Lawyers should also evaluate whether to **inform or obtain consent from clients** about AI use, especially if using it in ways that affect the representation [jenkinslaw.org](https://www.jenkinslaw.org). AI outputs must be independently verified for accuracy to fulfill duties of **candor** and avoid filing false or frivolous material (Rules 3.3, 3.1) [jenkinslaw.org](https://www.jenkinslaw.org). The ABA highlights that “hallucinations”

(convincing but false outputs) are a major pitfall [americanbar.org](https://www.americanbar.org). **Supervision** duties (Rules 5.1 and 5.3) mean lawyers must oversee both subordinate lawyers and nonlawyers *and* the AI tools they use [jenkinslaw.org](https://www.jenkinslaw.org). The opinion also warns that **fees** must be reasonable – if AI improves efficiency, lawyers should not overbill for time not actually spent [kaiserlaw.com](https://www.kaiserlaw.com). Overall, Formal Op. 512 provides a comprehensive framework mapping generative AI use to existing ethics rules [americanbar.org](https://www.americanbar.org) [americanbar.org](https://www.americanbar.org).

(See ABA Formal Op. 512 [jenkinslaw.org](https://www.jenkinslaw.org) for full text.)

### State Bar Associations and Regulatory Bodies

#### California – “Practical Guidance” by COPRAC (November 2023)

The **State Bar of California** took early action by issuing “**Practical Guidance for the Use of Generative AI in the Practice of Law**,” approved by the Bar’s Board of Trustees on Nov. 16, 2023

[calbar.ca.gov](https://www.calbar.ca.gov) [jdsupra.com](https://www.jdsupra.com). Rather than a formal opinion, it is a guidance document (in chart format) developed by the Committee on Professional Responsibility and Conduct (COPRAC). It applies California’s Rules of Professional Conduct to generative AI scenarios.

**Key points:** California’s guidance stresses **confidentiality** – attorneys “*must not input any confidential client information*” into AI tools that lack adequate protections [calbar.ca.gov](https://www.calbar.ca.gov). Lawyers should vet an AI vendor’s security and data use policies, and **anonymize or refrain from sharing sensitive data** unless certain it will be protected [calbar.ca.gov](https://www.calbar.ca.gov) [calbar.ca.gov](https://www.calbar.ca.gov). The **duty of competence and diligence** requires understanding how the AI works and its limitations [jdsupra.com](https://www.jdsupra.com). Lawyers should review AI outputs for accuracy and bias, and “*AI should never replace a lawyer’s professional judgment.*” [jdsupra.com](https://www.jdsupra.com) If AI assists with research or drafting, the attorney must critically review the results. The guidance also addresses **supervision**: firms should train and supervise lawyers and staff in proper AI use [jdsupra.com](https://www.jdsupra.com). **Communication with clients** may entail disclosing AI use in some cases – e.g. if it materially affects the representation – but California did *not mandate* disclosure in all instances [jdsupra.com](https://www.jdsupra.com). Finally, the guidance notes **candor**: the duty of candor to tribunals means attorneys must check AI-generated citations and facts to avoid false statements in court [jdsupra.com](https://www.jdsupra.com). Overall, California’s approach is to treat AI as another technology that must be used consistent with existing rules on competence, confidentiality, supervision, etc., providing “guiding principles rather than best practices” [calbar.ca.gov](https://www.calbar.ca.gov).

(Source: State Bar of CA Generative AI Guidance [jdsupra.com](https://www.jdsupra.com) [jdsupra.com](https://www.jdsupra.com).)

#### Florida – Advisory Opinion 24-1 (January 2024)

The **Florida Bar** issued **Proposed Advisory Opinion 24-1** in late 2023, which was adopted by the Bar’s Board of Governors in January 2024 [floridabar.org](https://www.floridabar.org) [floridabar.org](https://www.floridabar.org). Titled “*Lawyers’ Use of Generative AI*,” this formal ethics opinion gives a green light to using generative AI “**to the extent that the lawyer can reasonably guarantee compliance with the lawyer’s ethical obligations.**” [floridabar.org](https://www.floridabar.org) It identifies four focus areas: confidentiality, oversight, fees, and advertising [hinshawlaw.com](https://www.hinshawlaw.com) [hinshawlaw.com](https://www.hinshawlaw.com).

**Key points: Confidentiality:** Florida stresses that protecting client confidentiality (Rule 4-1.6) is paramount. Lawyers should take “*reasonable steps to prevent inadvertent or unauthorized disclosure*” of client info by an AI system [jdsupra.com](https://www.jdsupra.com). The opinion “*advisable to obtain a client’s informed consent before using a third-party AI that would disclose confidential information.*”

[jdsupra.com](https://www.jdsupra.com) This aligns with prior cloud-computing opinions. **Oversight:** Generative AI must be treated like a non-lawyer assistant – the lawyer must supervise and vet its work [jdsupra.com](https://www.jdsupra.com). The opinion warns that lawyers relying on AI face “*the same perils as relying on an overconfident nonlawyer assistant*” [floridabar.org](https://www.floridabar.org). Attorneys must review AI outputs (research, drafts, etc.) for accuracy and legal soundness before use [floridabar.org](https://www.floridabar.org). Notably, after the infamous *Mata v. Avianca* incident of fake cases, Florida emphasizes **candor**: no frivolous or false material from AI should be submitted [floridabar.org](https://www.floridabar.org). **Fees:** Improved efficiency from AI cannot be used to charge inflated fees. A lawyer “*can ethically only charge a client for actual costs incurred*” – time saved by AI should not be billed as if the lawyer did the work [jdsupra.com](https://www.jdsupra.com). If a lawyer will charge for using an AI tool (as a cost), the client must be informed in writing [jdsupra.com](https://www.jdsupra.com). And **training time** – a lawyer’s time learning an AI tool – *cannot* be billed to the client [jdsupra.com](https://www.jdsupra.com). **Advertising:** If lawyers advertise their use of AI, they must not be false or misleading. Florida

specifically notes that if using a chatbot to interact with potential clients, those users must be told they are interacting with an AI, not a human lawyer [jdsupra.com](#). Any claims about an AI’s capabilities must be objectively verifiable (no puffery that your AI is “better” than others without proof) [floridabar.org floridabar.org](#). In sum, Florida concludes: “a lawyer may ethically utilize generative AI, but only to the extent the lawyer can reasonably guarantee compliance with duties of confidentiality, candor, avoiding frivolous claims, truthfulness, reasonable fees, and proper advertising.” [floridabar.org](#).

(Sources: Florida Bar Op. 24-1 [floridabar.org jdsupra.com](#).)

#### **New York State Bar Association – Task Force Report (April 2024)**

The **New York State Bar Association (NYSBA)** did not issue a formal ethics opinion via its ethics committee, but its **Task Force on Artificial Intelligence** produced a comprehensive *85-page report* adopted by the House of Delegates on April 6, 2024 [floridabar.org floridabar.org](#). This report includes a chapter on the “*Ethical Impact*” of AI on law practice [floridabar.org](#), effectively providing guidance to NY lawyers. It mirrors many concerns seen in formal opinions elsewhere.

**Key points:** The NYSBA report underscores **competence** and cautions against “techno-solutionism.” It notes that “a refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent representation” [nysba.org nysba.org](#) – implying lawyers should stay current with helpful AI tools. At the same time, it warns attorneys not to blindly trust AI as a silver bullet. The report coins “*techno-solutionism*” as the overbelief that new tech (like gen AI) can solve all problems, reminding lawyers that human verification is still required [nysba.org nysba.org](#). The infamous Avianca case is cited to illustrate the need to **verify AI outputs** and supervise the “nonlawyer” tool (AI) under Rule 5.3 [nysba.org](#). The report addresses the **duty of confidentiality & privacy** in depth: Lawyers must ensure client information isn’t inadvertently shared or used to train public AI models [nysba.org nysba.org](#). It suggests that if AI tools store or learn from inputs, that raises confidentiality concerns [nysba.org](#). Client consent or use of secure “closed” AI systems may be needed to protect privileged data. The report also covers **supervision** (Rule 5.3) – attorneys should supervise AI use similarly to how they supervise human assistants [nysba.org](#). It touches on **bias** and fairness, noting generative AI trained on biased data could perpetuate discrimination, which lawyers must guard against [lawnext.com](#). Interestingly, the NYSBA guidance also links AI use to **reasonable fees**: it suggests effective use of AI can factor into whether a fee is reasonable [jdsupra.com jdsupra.com](#) (e.g. inefficiently refusing to use available AI might waste client money, whereas using AI and still charging full hours might be unreasonable). In sum, New York’s bar leaders affirm that ethical duties of competence, confidentiality, and supervision fully apply to AI. They encourage using AI’s benefits to improve service, but caution against its risks and urge ongoing attorney oversight [floridabar.org floridabar.org](#).

(Sources: NYSBA Task Force Report [nysba.org nysba.org](#).)

#### **New York City Bar Association – Formal Opinion 2024-5 (August 2024)**

The **New York City Bar Association Committee on Professional Ethics** issued **Formal Ethics Opinion 2024-5** on August 7, 2024 [nydailyrecord.com nydailyrecord.com](#). This opinion, in a user-friendly chart format, provides practical guidelines for NYC lawyers on generative AI. The Committee explicitly aimed to give “guardrails and not hard-and-fast restrictions” in this evolving area [nydailyrecord.com](#).

**Key points: Confidentiality:** The NYC Bar draws a distinction between “*closed*” AI systems (e.g. an in-house or vendor tool that does **not** share data externally) and public AI services like ChatGPT. If using an AI that stores or shares inputs outside the firm, **client informed consent is required** before inputting any confidential information [nydailyrecord.com](#). Even with closed/internal AI, lawyers must maintain internal confidentiality protections. The opinion warns lawyers to review AI **Terms of Use** regularly to ensure the provider isn’t using or exposing client data without consent [nydailyrecord.com](#). **Competence:** Echoing others, NYC advises that lawyers “*understand to a reasonable degree how the technology works, its limitations, and the applicable Terms of Use*” before using generative AI [nydailyrecord.com](#). Attorneys should avoid delegating their professional judgment to AI; any AI output is just a starting point or draft [nydailyrecord.com](#). Lawyers must ensure outputs are **accurate and tailored to the client’s needs** – essentially, *verify everything* and edit AI-generated material so that it truly serves the client’s interests [nydailyrecord.com](#). **Supervision:** Firms should implement policies and training for lawyers and staff on acceptable AI use [nydailyrecord.com](#). The Committee notes that **client intake chatbots** (if used on a firm’s website, for

example) require special oversight to avoid inadvertently forming attorney-client relationships or giving legal advice without proper vetting [nydailyrecord.com](https://www.nydailyrecord.com). In other words, a chatbot interacting with the public should be carefully monitored by lawyers to ensure it doesn't mislead users about its nature or create unintended obligations [nydailyrecord.com](https://www.nydailyrecord.com). The NYC Bar's guidance aligns with California's in format and substance, reinforcing that the core duties of confidentiality, competence (tech proficiency), and supervision all apply when lawyers use generative AI tools [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com).

(Source: NYC Bar Formal Op. 2024-5 [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com).)

#### New Jersey Supreme Court – Preliminary Guidelines (January 2024)

In New Jersey, the state's highest court itself weighed in. On January 24, 2024, the **New Jersey Supreme Court's Committee on AI and the Courts** issued "**Preliminary Guidelines on the Use of AI by New Jersey Lawyers**," which were published as a Notice to the Bar [njcourts.gov](https://www.njcourts.gov) [njcourts.gov](https://www.njcourts.gov). These guidelines, effective immediately, aim to help NJ lawyers comply with existing Rules of Professional Conduct when using generative AI [njcourts.gov](https://www.njcourts.gov).

**Key points:** The Court made clear that **AI does not change lawyers' fundamental duties**. Any use of AI "*must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of practice.*" [njcourts.gov](https://www.njcourts.gov) In other words, tech advances *do not* dilute responsibilities. The NJ guidelines highlight **accuracy and truthfulness:** lawyers have an ethical duty to ensure their work is accurate, so they must *always check AI-generated content for "hallucinations" or errors* before relying on it [jdsupra.com](https://www.jdsupra.com). Submitting false or fake information generated by AI would violate rules against misrepresentations to the court. The guidelines reiterate **candor to tribunals** – attorneys must not present AI-produced output containing fabricated cases or facts (the *Mata/Avianca* situation is alluded to) [jdsupra.com](https://www.jdsupra.com). Regarding **communication and client consent**, NJ took a measured approach: There is "*no per se requirement to inform a client*" about every AI use, *unless* not telling the client would prevent the client from making informed decisions about the representation [jdsupra.com](https://www.jdsupra.com). For example, if AI is used in a trivial manner (typo correction, formatting), disclosure isn't required; but if it's used in substantive tasks that affect the case, lawyers should consider informing the client, especially if there's heightened risk. **Confidentiality:** Lawyers must ensure any AI tool is secure to avoid inadvertent disclosures of client info [jdsupra.com](https://www.jdsupra.com). This echoes the duty to use "*reasonable efforts*" to safeguard confidential data (RPC 1.6). **No misconduct:** The Court reminds that all rules on attorney misconduct (dishonesty, fraud, bias, etc.) apply in AI usage [jdsupra.com](https://www.jdsupra.com). For instance, using AI in a way that produces discriminatory outcomes or that frustrates justice would breach Rule 8.4. **Supervision:** Law firms must supervise how their lawyers and staff use AI [jdsupra.com](https://www.jdsupra.com) – establishing internal policies to ensure ethical use. Overall, New Jersey's top court signaled that it embraces innovation (noting AI's potential benefits) but insists lawyers "*balance the benefits of innovation while safeguarding against misuse.*" [njcourts.gov](https://www.njcourts.gov)

(Sources: NJ Supreme Court Guidelines [jdsupra.com](https://www.jdsupra.com) [jdsupra.com](https://www.jdsupra.com).)

#### Pennsylvania & Philadelphia Bars – Joint Opinion 2024-200 (June 2024)

The **Pennsylvania Bar Association (PBA)** and **Philadelphia Bar Association** jointly issued **Formal Opinion 2024-200** in mid-2024 [lawnext.com](https://www.lawnext.com) [lawnext.com](https://www.lawnext.com). This collaborative opinion ("Joint Formal Op. 2024-200") provides ethical guidance for Pennsylvania lawyers using generative AI. It repeatedly emphasizes that *the same rules apply to AI as to any technology* [lawnext.com](https://www.lawnext.com).

**Key points:** The joint opinion places heavy emphasis on **competence (Rule 1.1)**. It famously states "*Lawyers must be proficient in using technological tools to the same extent they are in traditional methods*" [lawnext.com](https://www.lawnext.com). In other words, attorneys should treat AI as part of the competence duty – understanding e-discovery software, legal research databases, *and now generative AI*, is part of being a competent lawyer [lawnext.com](https://www.lawnext.com). The opinion acknowledges generative AI's unique risk: it can **hallucinate** (generate false citations or facts) [lawnext.com](https://www.lawnext.com). Thus, due diligence is required – lawyers must **verify all AI outputs**, especially legal research results and citations [lawnext.com](https://www.lawnext.com) [lawnext.com](https://www.lawnext.com). The opinion bluntly warns that if you ask AI for cases and "*then file them in court without even bothering to read or Shepardize them, that is stupid.*" [lawnext.com](https://www.lawnext.com) (The opinion uses more polite language, but this captures the spirit.) It highlights **bias** as well: AI may carry implicit biases from training data, so lawyers should be alert to any discriminatory or skewed content in AI output [lawnext.com](https://www.lawnext.com). The Pennsylvania/Philly opinion also advises lawyers to **communicate with clients** about AI use. Specifically, lawyers should be transparent

and “provide clear, transparent explanations” of how AI is being used in the case [lawnext.com lawnext.com](#). In some situations, obtaining *client consent* before using certain AI tools is recommended [lawnext.com lawnext.com](#) – e.g., if the tool will handle confidential information or significantly shape the legal work. The opinion lays out “**12 Points of Responsibility**” for using gen AI [lawnext.com lawnext.com](#), which include many of the above: ensure truthfulness and accuracy of AI-derived content, double-check citations, maintain confidentiality (ensure AI vendors keep data secure) [lawnext.com](#), check for conflicts (make sure use of AI doesn’t introduce any conflict of interest) [lawnext.com](#), and **transparency** with clients, courts, and colleagues about AI use and its limitations [lawnext.com](#). It also addresses **proper billing practices**: lawyers shouldn’t overcharge when AI boosts efficiency [lawnext.com](#). If AI saves time, the lawyer should not bill as if they did it manually – they may bill for the *actual* time or consider value-based fees, but padding hours violates the rule on reasonable fees [lawnext.com](#). Overall, the Pennsylvania and Philly bars take the stance that embracing AI is fine – even beneficial – as long as lawyers “*remain fully accountable for the results*,” use AI carefully, and don’t neglect any ethical duty in the process [lawnext.com lawnext.com](#).

(Sources: Joint PBA/Phila. Opinion 2024-200 summarized by Ambrogi [lawnext.com lawnext.com](#).)

#### Kentucky – Ethics Opinion KBA E-457 (March 2024)

The **Kentucky Bar Association** issued **Ethics Opinion KBA E-457, “The Ethical Use of Artificial Intelligence in the Practice of Law,”** on March 15, 2024 [cdn.ymaws.com](#). This formal opinion (finalized after a comment period in mid-2024) provides a nuanced roadmap for Kentucky lawyers. It not only answers basic questions but also offers broader insight, reflecting the work of a KBA Task Force on AI [techlawcrossroads.com](#).

**Key points: Competence:** Like other jurisdictions, Kentucky affirms that keeping abreast of technology (including AI) is a *mandatory* aspect of competence [techlawcrossroads.com techlawcrossroads.com](#). Kentucky’s Rule 1.1 Comment 6 (equivalent to ABA Comment 8) says lawyers “*should keep abreast of ... the benefits and risks associated with relevant technology.*” The opinion stresses this is not optional: “*It’s not a ‘should’; it’s a must.*”

[techlawcrossroads.com](#) Lawyers cannot ethically ignore AI’s existence or potential in law practice [techlawcrossroads.com techlawcrossroads.com](#) (implying that failing to understand how AI might improve service could itself be a lapse in competence). **Disclosure to clients:** Kentucky takes a practical stance that there is “*no duty to disclose to the client the ‘rote’ use of AI generated research,*” absent special circumstances

[techlawcrossroads.com](#). If an attorney is just using AI as a tool (like one might use Westlaw or a spell-checker), they generally need not inform the client. However, there are *important exceptions* – if the client has specifically limited use of AI, or if use of AI presents significant risk or would require client consent under the rules, then disclosure is needed [techlawcrossroads.com](#). Lawyers should discuss **risks and benefits** of AI with clients if client consent is required for its use (for example, if AI will process confidential data, informed consent may be wise) [techlawcrossroads.com](#).

**Fees:** KBA E-457 is very direct about fees and AI. If AI significantly reduces the time spent on a matter, *the lawyer may need to reduce their fees* accordingly [techlawcrossroads.com](#). A lawyer cannot charge a client as if a task took 5 hours if AI allowed it to be done in 1 hour – that would make the fee unreasonable. The opinion also says a lawyer can only charge a client for the *expense* of using AI (e.g., the cost of a paid AI service) if the client agrees to that fee in writing

[techlawcrossroads.com](#). Otherwise, passing along AI tool costs may be impermissible. In short, AI’s efficiencies should benefit clients, not become a hidden profit center. **Confidentiality:** Lawyers have a “*continuing duty to safeguard client information if they use AI,*” and must comply with all applicable court rules on AI use

[techlawcrossroads.com](#). This means vetting AI providers’ security and ensuring no confidential data is exposed. Kentucky echoes that attorneys must **understand the terms and operation** of any third-party AI system they use

[techlawcrossroads.com](#). They should know how the AI service stores and uses data. **Court rules compliance:** Notably, the opinion reminds lawyers to follow any court-imposed rules about AI (for instance, if a court requires disclosure of AI-drafted filings, the lawyer must do so) [cdn.ymaws.com](#).

**Firm policies and training:** KBA E-457 advises law firms to create informed policies on AI use and to supervise those they manage in following these policies [techlawcrossroads.com](#).

In summary, Kentucky’s opinion encourages lawyers to embrace AI’s potential but to do so carefully: stay competent with the technology, be transparent when needed, adjust fees fairly, protect confidentiality, and always maintain ultimate responsibility for the work. It concludes that Kentucky lawyers “*cannot run from or ignore AI.*” [techlawcrossroads.com](#)

(Source: KBA E-457 (2024) via TechLaw Crossroads summary [techlawcrossroads.com techlawcrossroads.com](#).)



### North Carolina – Formal Ethics Opinion 2024-1 (November 2024)

The **North Carolina State Bar** adopted **2024 Formal Ethics Opinion 1, “Use of Artificial Intelligence in a Law Practice,”** on November 1, 2024 [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). This opinion squarely addresses whether and how NC lawyers can use AI tools consistent with their ethical duties.

**Key points:** The NC State Bar gives a cautious **“Yes”** to using AI, under specific conditions: *“Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying on the AI’s work product.”* [ncbar.gov](https://www.ncbar.gov). That single sentence captures the three pillars of NC’s guidance: **competence, confidentiality, and supervision**. NC acknowledges that *nothing in the Rules explicitly prohibits AI use* [ncbar.gov](https://www.ncbar.gov), so it comes down to applying existing rules. **Competence:** Lawyers must understand the technology sufficiently to use it effectively and safely [ncbar.gov](https://www.ncbar.gov). Rule 1.1 and its Comment in NC (which, like the ABA, includes tech competence) require lawyers to know what they don’t know – if a lawyer isn’t competent with an AI tool, they must get up to speed or refrain. NC emphasizes that using AI is often the lawyer’s *own decision* but it must be made prudently, considering factors like the tool’s reliability and cost-benefit for the client [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). **Confidentiality & Security:** Rule 1.6(c) in North Carolina obligates lawyers to take reasonable efforts to prevent unauthorized disclosure of client info. So, before using any cloud-based or third-party AI, the lawyer must ensure it is *“sufficiently secure and compatible with the lawyer’s confidentiality obligations.”* [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). The opinion suggests attorneys evaluate providers like they would any vendor handling client data – e.g., examine terms of service, data storage policies, etc., similar to prior NC guidance on cloud computing [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). If the AI is *“self-learning”* (using inputs to improve itself), lawyers should be wary that client data might later resurface to others [ncbar.gov](https://www.ncbar.gov). NC stops short of mandating client consent for AI use, but it implies that if an AI tool can’t be used consistent with confidentiality, then either don’t use it or get client permission. **Supervision and Independent Judgment:** NC treats AI output like work by a nonlawyer assistant. Under Rule 5.3, lawyers must supervise the use of AI tools and *“exercise independent professional judgment in determining how (or if) to use the product of an AI tool”* for a client [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). This means a lawyer cannot blindly accept an AI’s result – they must review and verify it before relying on it. If an AI drafts a contract or brief, the lawyer is responsible for editing and ensuring it’s correct and appropriate. NC explicitly analogizes AI to both other software and to nonlawyer staff: AI is *“between”* a software tool and a nonlawyer assistant in how we think of it [ncbar.gov](https://www.ncbar.gov). Thus, the lawyer must both **know how to use the software** and **supervise its output** as if it were a junior employee’s work. **Bottom line:** NC FO 2024-1 concludes that a lawyer *may* use AI in practice – for tasks like document review, legal research, drafting, etc. – as long as the lawyer remains fully responsible for the outcome [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov). The opinion purposefully doesn’t dictate when AI is appropriate or not, recognizing the technology is evolving [ncbar.gov](https://www.ncbar.gov). But it clearly states that if a lawyer **decides** to employ AI, they are *“fully responsible”* for its use and must ensure it is competent use, confidential use, and supervised use [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov).

(Source: NC 2024 FEO-1 [ncbar.gov](https://www.ncbar.gov) [ncbar.gov](https://www.ncbar.gov).)

### Texas – Proposed Opinion 2024-6 (Draft, November 2024)

The **State Bar of Texas Professional Ethics Committee** has circulated a **Proposed Ethics Opinion No. 2024-6** (posted for public comment on Nov. 19, 2024) regarding lawyers’ use of generative AI [texasbar.com](https://www.texasbar.com). (As of this writing, it is a draft opinion awaiting final adoption.) This Texas draft provides a *“high-level overview”* of ethical issues raised by AI, requested by a Bar task force on AI [texasbar.com](https://www.texasbar.com).

**Key points (draft):** The proposed Texas opinion covers familiar ground. It notes the duty of **competence (Rule 1.01)** extends to understanding relevant technology [texasbar.com](https://www.texasbar.com). Texas specifically cites its prior ethics opinions on cloud computing and metadata, which required lawyers to have a *“reasonable and current understanding”* of those technologies [texasbar.com](https://www.texasbar.com) [texasbar.com](https://www.texasbar.com). By analogy, any Texas lawyer using generative AI *“must have a reasonable and current understanding of the technology”* and its capabilities and limits [texasbar.com](https://www.texasbar.com). In practical terms, this means lawyers should educate themselves on how tools like ChatGPT actually work (e.g. that they predict text rather than retrieve vetted sources) and what their known pitfalls are [texasbar.com](https://www.texasbar.com). The draft opinion spends time describing *Mata v. Avianca* to illustrate the dangers of not understanding AI’s lack of a reliable legal database [texasbar.com](https://www.texasbar.com) [texasbar.com](https://www.texasbar.com). On **confidentiality (Rule 1.05 in Texas)**, the opinion again builds on prior guidance: lawyers must safeguard client information when using any third-party service [texasbar.com](https://www.texasbar.com) [texasbar.com](https://www.texasbar.com). It suggests precautions similar to those for cloud storage: *“acquire a general understanding of how the technology works; review (and*

*potentially renegotiate) the Terms of Service; [ensure] the provider will keep data confidential; and stay vigilant about data security.” [texasbar.com](#).* (These examples are drawn from Texas Ethics Op. 680 on cloud computing, which the AI opinion heavily references.) If an AI tool cannot be used in a way that protects confidential info, the lawyer should not use it for those purposes. The Texas draft also flags **duty to avoid frivolous submissions (Rule 3.01)** and **duty of candor to tribunal (Rule 3.03)** as directly relevant [texasbar.com](#). Using AI doesn’t excuse a lawyer from these obligations – citing fake cases or making false statements is no less an ethical violation because an AI generated them. Lawyers must thoroughly vet AI-generated legal research and content to ensure it’s grounded in real law and facts [texasbar.com](#) [texasbar.com](#). The opinion essentially says: if you choose to use AI, you must double-check its work *just as you would a junior lawyer’s memo or a nonlawyer assistant’s draft. Supervision (Rules 5.01, 5.03):* Supervising partners should have firm-wide measures so that any use of AI by their team is ethical [texasbar.com](#) [texasbar.com](#). This could mean creating policies on approved AI tools and requiring verification of AI outputs. In summary, the Texas proposed opinion doesn’t ban generative AI; it provides a “snapshot” of issues and reinforces that core duties of competence, confidentiality, candor, and supervision must guide any use of AI in practice [texasbar.com](#) [texasbar.com](#). (The committee acknowledges the AI landscape is rapidly changing, so they focused on broad principles rather than specifics that might soon be outdated [texasbar.com](#).) Once finalized, Texas’s opinion will likely align with the consensus: lawyers can harness AI’s benefits if they remain careful and accountable.

(Source: Texas Proposed Op. 2024-6 [texasbar.com](#) [texasbar.com](#).)

### Virginia State Bar – AI Guidance Update (August 2024)

In 2024 the **Virginia State Bar** released a short set of **guidelines on generative AI** as an update on its website (around August 2024) [nydailyrecord.com](#). This concise guidance stands out for its practicality and flexibility. Rather than an extensive opinion, Virginia issued overarching advice that can adapt as AI technology evolves [nydailyrecord.com](#).

**Key points:** Virginia first emphasizes that **lawyers’ basic ethical responsibilities “have not changed” due to AI**, and that generative AI presents issues “fundamentally similar” to those with other technology or with supervising people [nydailyrecord.com](#). This frames the guidance: existing rules suffice. On **confidentiality**, the Bar advises lawyers to vet how AI providers handle data just as they would with any vendor [nydailyrecord.com](#) [nydailyrecord.com](#). Legal-specific AI products (designed for lawyers, with better data security) may offer more protection, but even then attorneys “*must make reasonable efforts to assess*” the security and “*whether and under what circumstances*” confidential info could be exposed [nydailyrecord.com](#). In other words, even if using an AI tool marketed as secure for lawyers, you should confirm that it truly keeps your client’s data confidential (no sharing or training on it without consent) [nydailyrecord.com](#) [nydailyrecord.com](#). Virginia notably aligns with most jurisdictions (and diverges from a stricter ABA stance) regarding **client consent**: “*there is no per se requirement to inform a client about the use of generative AI in their matter*” [nydailyrecord.com](#). Unless something about the AI use would necessitate client disclosure (e.g., an agreement with the client, or an unusual risk like using a very public AI for sensitive info), lawyers generally need not obtain consent for routine AI use [nydailyrecord.com](#). This is consistent with the idea that using AI can be like using any software tool behind the scenes. Next, **supervision and verification**: The bar stresses that lawyers must review all AI outputs as they would work done by a junior attorney or nonlawyer assistant [nydailyrecord.com](#) [nydailyrecord.com](#). Specifically, “*verify that any citations are accurate (and real)*” and generally ensure the AI’s work product is correct [nydailyrecord.com](#). This duty extends to supervising others in the firm – if a paralegal or associate uses AI, the responsible lawyer must ensure they are doing so properly [nydailyrecord.com](#). On **fees and billing**, Virginia takes a clear stance: a lawyer may not bill a client for time *not actually spent* due to AI efficiency gains [nydailyrecord.com](#). “*A lawyer may not charge an hourly fee in excess of the time actually spent ... and may not bill for time saved by using generative AI.*” [nydailyrecord.com](#) If AI cuts a research task from 5 hours to 1, you can’t still charge 5 hours. The Bar suggests considering alternative fee arrangements to account for AI’s value, instead of hourly billing windfalls [nydailyrecord.com](#). As for passing along AI tool costs: the Bar says you can’t charge the client for your AI subscription or usage *unless* it’s a reasonable charge and permitted by the fee agreement [nydailyrecord.com](#). Finally, Virginia reminds lawyers to stay aware of any **court rules about AI**. Some courts (even outside Virginia) have begun requiring attorneys to certify that filings were checked for AI-generated falsehoods, or even prohibiting AI-drafted documents absent verification. Virginia’s guidance highlights that lawyers must comply with any such disclosure or anti-AI rules in whatever jurisdiction they are in [nydailyrecord.com](#) [nydailyrecord.com](#). Overall, the Virginia State Bar’s message is: use common sense and existing rules. Be transparent

when needed, protect confidentiality, supervise and double-check AI outputs, bill fairly, and follow any new court requirements [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com). This short-form guidance was praised for being “streamlined” and adaptable as AI tools continue to change [nydailyrecord.com](https://www.nydailyrecord.com).

(Source: Virginia State Bar AI Guidance via N.Y. Daily Record [nydailyrecord.com](https://www.nydailyrecord.com) [nydailyrecord.com](https://www.nydailyrecord.com).)

#### District of Columbia Bar – Ethics Opinion 388 (September 2024)

The D.C. Bar issued **Ethics Opinion 388: “Attorneys’ Use of Generative AI in Client Matters”** in 2024 (the second half of the year) [kaiserlaw.com](https://www.kaiserlaw.com). This opinion closely analyzes the ethical implications of lawyers using gen AI, using the well-known *Mata v. Avianca* incident as a teaching example [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). It then organizes guidance under specific D.C. Rules of Professional Conduct.

**Key points:** The opinion breaks its analysis into categories of duties [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com):

- **Competence (Rule 1.1):** D.C. reiterates that tech competence is part of a lawyer’s duty. Attorneys must “*keep abreast of ... practice [changes], including the benefits and risks of relevant technology.*” [kaiserlaw.com](https://www.kaiserlaw.com) Before using AI, lawyers should understand *how it works, what it does, and its potential dangers* [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). The opinion vividly quotes a description of AI as “*an omniscient, eager-to-please intern who sometimes lies to you.*” [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com) In practical terms, D.C. lawyers must know that AI output can be very convincing but incorrect. The Mata/Avianca saga – where a lawyer unknowingly relied on a tool that “**sometimes lies**” – underscores the need for knowledge and caution [dcb.org](https://www.dcb.org) [dcb.org](https://www.dcb.org).
- **Confidentiality (Rule 1.6):** D.C.’s Rule 1.6(f) specifically requires lawyers to prevent unauthorized use of client info by third-party service providers [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). This applies to AI providers. Lawyers are instructed to ask themselves: “*Will information I provide [to the AI] be visible to the AI provider or others? Will my input affect future answers for other users (potentially revealing my data)?*” [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). If using an AI tool that sends data to an external server, the lawyer must ensure that data is protected. D.C. likely would advise using privacy-protective settings or choosing tools that allow opt-outs of data sharing, or obtaining client consent if needed. Essentially, treat AI like any outside vendor under Rule 5.3/1.6: do due diligence to ensure confidentiality is preserved [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com).
- **Supervision (Rules 5.1 & 5.3):** A lawyer must supervise both other lawyers and nonlawyers in the firm regarding AI use [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). This may entail firm policies: e.g., vetting which AI tools are approved and training staff to **verify AI output** for accuracy [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). If a subordinate attorney or paralegal uses AI, the supervising attorney should reasonably ensure they are doing so in compliance with all ethical duties (and correcting any mistakes). The opinion views AI as an extension of one’s team – requiring oversight.
- **Candor to Tribunal & Fairness (Rules 3.3 and 3.4):** Simply put, a lawyer cannot make false statements to a court or submit false evidence [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). D.C. notes the existing comment to Rule 3.3 already forbids knowingly misrepresenting legal authority. Opinion 388 makes clear this *includes* presenting AI-fabricated cases or quotes as if they were real [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). Even if the lawyer didn’t intend to lie, relying on AI without checking and thereby filing fake citations could violate the duty of candor (at least negligently, if not knowingly). The lesson: **no courtroom use of AI content without verification**. Also, under fairness to opposing party (3.4), one must not use AI to manipulate evidence or discovery unfairly.
- **Fees (Rule 1.5):** The D.C. Bar echoed the consensus on billing: if you charge hourly, you “*may never charge a client for time not expended.*” [kaiserlaw.com](https://www.kaiserlaw.com) Increased efficiency through AI cannot be used as an opportunity to overcharge. They cite a 1996 D.C. opinion which said that a lawyer who is more efficient than expected (perhaps through technology or expertise) can’t then bill extra hours that weren’t worked [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). The same principle applies now: time saved by AI is the client’s benefit, not the lawyer’s windfall. So if AI drafts a contract in 1 hour whereas manual drafting would take 5, the lawyer cannot bill 5 hours – only the 1 hour actually spent (or use a flat fee structure that the client agrees on, but not lie about hours).
- **Client Files (Rule 1.16(d)):** Interestingly, D.C. Opinion 388 touches on whether AI interactions should be retained as part of the client file upon termination [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). D.C. law requires returning the “entire file” to a client, including internal notes, unless they are purely administrative. The opinion



suggests lawyers should consider saving important AI prompts or outputs used in the representation as part of the file material that may need to be provided to the client [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com). For example, if an attorney used an AI tool to generate a research memo or a draft letter that was then edited and sent to a client, the initial AI-generated text might be analogous to a draft or research note. This is a new facet many haven't considered: how to handle AI-generated work product in terms of file retention.

In conclusion, D.C.'s Ethics Opinion 388 aligns with other jurisdictions while adding thoughtful details. It "*recognizes AI may eventually greatly benefit the legal industry,*" but in the meantime insists that lawyers "*must be vigilant*" [kaiserlaw.com](https://www.kaiserlaw.com). The overarching theme is captured in the NPR quote: treat AI like an intern who needs close supervision [kaiserlaw.com](https://www.kaiserlaw.com). Do not assume the AI is correct; double-check everything, maintain confidentiality, and use the tool wisely and transparently. D.C. lawyers were effectively told that generative AI is permissible to use, but only in a manner that fully preserves all ethical obligations as enumerated above [kaiserlaw.com](https://www.kaiserlaw.com).

(Sources: D.C. Ethics Op. 388 via Kaiser summary [kaiserlaw.com](https://www.kaiserlaw.com) [kaiserlaw.com](https://www.kaiserlaw.com).)

### Specialty Bar and Licensing Bodies

#### U.S. Patent and Trademark Office (USPTO) – Practice Guidance (2023–2024)

Beyond state bars, at least one **lawyer licensing body** has addressed AI: the **USPTO**, which regulates patent and trademark attorneys. In 2023 and 2024, the USPTO issued guidance on the use of AI by practitioners in proceedings before the Office. On April 10, 2024, the USPTO published a notice (and a **Federal Register** guidance document) concerning "**the use of AI tools by parties and practitioners**" before the USPTO [uspto.gov](https://www.uspto.gov) [uspto.gov](https://www.uspto.gov). This followed an earlier internal guidance on Feb 6, 2024 for USPTO administrative tribunals [uspto.gov](https://www.uspto.gov).

**Key points:** The USPTO made clear that existing duties in its rules (37 C.F.R. and USPTO ethics rules) "**apply regardless of how a submission is generated.**" [uspto.gov](https://www.uspto.gov) In other words, whether a patent application or brief is written by a human or with AI assistance, the attorney is fully responsible for compliance with all requirements. The guidance reminds practitioners of pertinent rules and "*helps inform ... the risks associated with AI*" while giving suggestions to mitigate them [uspto.gov](https://www.uspto.gov). For example, patent attorneys have a duty of candor and truthfulness in dealings with the Office; using AI that produces inaccurate statements could violate that duty if not corrected. USPTO Director Kathi Vidal emphasized "*the integrity of our proceedings*" must be protected and that the USPTO encourages "*safe and responsible use of AI*" to benefit efficiency [uspto.gov](https://www.uspto.gov). But critically, lawyers and agents must ensure AI is **not misused or left unchecked**. The USPTO guidance likely points to rules akin to Fed. R. Civ. P. 11: patent practitioners must make a reasonable inquiry that submissions (claims, arguments, prior art citations, etc.) are not frivolous or false, even if AI was used as a tool. It also addresses **confidentiality and data security** concerns: patent lawyers often handle sensitive technical data, so if they use AI for drafting or searching prior art, they must ensure they aren't inadvertently disclosing invention details. The USPTO suggested **mitigation steps** such as: carefully choosing AI tools (perhaps ones that run locally or have strong confidentiality promises), verifying outputs (especially legal conclusions or prior art relevance), and staying updated as laws/regulations evolve in this area [uspto.gov](https://www.uspto.gov) [uspto.gov](https://www.uspto.gov). In sum, the USPTO's stance is aligned with the bar associations': AI can expand access and efficiency, but practitioners must use it *responsibly*. They explicitly note that AI's use "*does not change*" the attorney's obligations to avoid delay, avoid unnecessary cost, and uphold the quality of submissions [uspto.gov](https://www.uspto.gov). The **patent bar** was cautioned by the USPTO, much as litigators were by the courts, that any mistakes made by AI will be treated as the practitioner's mistakes. The Office will continue to "listen to stakeholders" and may update policies as needed [uspto.gov](https://www.uspto.gov), but for now practitioners should follow this guidance and existing rules.

(Source: USPTO Director's announcement [uspto.gov](https://www.uspto.gov) [uspto.gov](https://www.uspto.gov).)

#### Other Specialty Groups

Other specialty lawyer groups and bar associations have engaged in policy discussions about AI (for example, the **American Immigration Lawyers Association** and various sections of the ABA have offered CLE courses or informal tips on AI use). While these may not be formal ethics opinions, they echo the themes above: maintain client confidentiality, verify AI output, and remember that technology doesn't diminish a lawyer's own duties.

**In summary, across national, state, and local bodies in the U.S., a clear consensus has emerged:** Lawyers may use generative AI tools in their practice, but they must do so cautiously and in full compliance with their ethical obligations. Key recommendations include obtaining client consent if confidential data will be involved [jdsupra.com](https://www.jdsupra.com) [nydailyrecord.com](https://www.nydailyrecord.com), understanding the technology's limits (no blind trust in AI) [nysba.org](https://www.nysba.org) [kaiserlaw.com](https://www.kaiserlaw.com), thoroughly vetting and supervising AI outputs [ncbar.gov](https://www.ncbar.gov) [kaiserlaw.com](https://www.kaiserlaw.com), and ensuring that AI-driven efficiency benefits the client (through accurate work and fair fees) [lawnext.com](https://www.lawnext.com) [kaiserlaw.com](https://www.kaiserlaw.com). All the formal opinions – from the ABA to state bars like California, Florida, New York, Pennsylvania, Kentucky, North Carolina, Virginia, D.C., and others – converge on the message that **the lawyer is ultimately responsible** for everything their generative AI tool does or produces. Generative AI can assist with research, drafting, and more, but it remains “*a tool that assists but does not replace legal expertise and analysis.*” [lawnext.com](https://www.lawnext.com). As the Pennsylvania opinion neatly put it, in more colloquial terms: *don't be stupid* – a lawyer cannot abdicate common sense and professional judgment to an AI [lawnext.com](https://www.lawnext.com). By following these ethics guidelines, lawyers can harness AI's benefits (greater efficiency and capability) while upholding their duties to clients, courts, and the justice system.

**Sources:** Formal ethics opinions and guidance from the ABA and numerous bar associations, including ABA Formal Op. 512 [jenkinslaw.org](https://www.jenkinslaw.org), State Bar of California guidance [jdsupra.com](https://www.jdsupra.com), Florida Bar Op. 24-1 [jdsupra.com](https://www.jdsupra.com), New Jersey Supreme Court AI Guidelines [jdsupra.com](https://www.jdsupra.com), New York City Bar Op. 2024-5 [nydailyrecord.com](https://www.nydailyrecord.com), Pennsylvania Bar & Philadelphia Bar Joint Op. [lawnext.com](https://www.lawnext.com), Kentucky Bar Op. E-457 [techlawcrossroads.com](https://www.techlawcrossroads.com), North Carolina Formal Op. 2024-1 [ncbar.gov](https://www.ncbar.gov), D.C. Bar Op. 388 [kaiserlaw.com](https://www.kaiserlaw.com), and USPTO practitioner guidance [uspto.gov](https://www.uspto.gov). Each of these sources provides detailed discussion of ethical concerns and best practices for using generative AI in law.



**Bob Ambrogi**

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#### ABOUT LAW SITES

LawSites is a blog covering legal technology and innovation. It is written by Robert Ambrogi, a lawyer and journalist who has been writing and speaking about legal technology, legal practice and legal ethics for more than two decades.

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**THE NEW YORK CITY BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2024-5: ETHICAL OBLIGATIONS OF LAWYERS AND LAW FIRMS RELATING TO THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW**

**TOPIC:** The use of generative artificial intelligence by New York lawyers, law firms, legal departments, government law offices and legal assistance organizations.

**DIGEST:** This opinion provides general guidance on the use of tools that use generative artificial intelligence.

**RULES:** 1.1, 1.2(d), 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 3.1, 3.3, 5.1, 5.2, 5.3, 7.1, 7.3, 8.4

**QUESTION:** The availability of tools to assist lawyers in their practice that employ generative artificial intelligence has been dramatically expanding and continues to grow. What are the ethical issues that lawyers should consider when deciding whether to use these tools and, if the decision is made to do so, how to use them?

**OPINION:** When using generative artificial intelligence tools, a lawyer should take into account the duty of confidentiality, the obligation to avoid conflicts of interest, the duty of competence and diligence, the rules governing advertising and solicitation, the duty to comply with the law, the duty to supervise both lawyers and non-lawyers, the duty of subordinate attorneys, the duty to consult with clients, the duty of candor to tribunals, the prohibition on making non-meritorious claims and contentions, the limitations on what a lawyer may charge for fees and costs, and the prohibition on discrimination.

## **Introduction**

Generative artificial intelligence (“Generative AI”), like any technology, must be used in a manner that comports with a lawyer’s ethical obligations. General-purpose technology platforms offer AI chatbots. Legal research platforms tout “legal generative AI” that can draft, analyze documents, and provide legal citations. Even data management vendors offer Generative AI-assisted review, analytic, and visualization capabilities. This summary of currently available tools will likely soon be outdated because of the rapid evolution of Generative AI. This guidance, therefore, is general. We expect that this advice will be updated and supplemented in years to come to cover issues not yet anticipated.

This Opinion provides guidance on the ethical obligations of lawyers and law firms relating to the use of Generative AI. It follows and is consistent with the format used by the Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law released by the California State Bar’s Standing Committee on Professional Responsibility and Conduct in November 2023.<sup>1</sup> This

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<sup>1</sup> State Bar of Cal., Standing Comm. on Pro. Resp. & Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (Nov. 16, 2023) (“California Guidance”),

Opinion is in the same format as the California State Bar’s guidance and contains multiple quotations from that guidance. Like the California State Bar and other bar associations that have addressed Generative AI,<sup>2</sup> we believe that when addressing developing areas, lawyers need guardrails and not hard-and-fast restrictions or new rules that could stymie developments. By including advice specifically based on New York Rules and practice, this Opinion is intended to be helpful to the New York Bar.

Applicable Authorities	New York Guidance
<p><b>Duty of Confidentiality</b> Rule 1.6</p>	<p>Generative AI systems are able to use information that is inputted, including prompts, uploaded data, documents, and other resources, to train AI. They may also share inputted information with third parties or use it for other purposes.<sup>3</sup> Even if a system does not use or share inputted information, it may lack “reasonable or adequate security.”<sup>4</sup></p> <p>Without client consent, a lawyer must not input confidential client information into any Generative AI system that will share the inputted confidential information with third parties.<sup>5</sup> Even with consent, a lawyer should “avoid entering details that can be used to identify the client.”<sup>6</sup> Consent is not needed if no confidential client information is shared, for example through anonymization of client information. Generative AI systems that keep inputted information entirely within the firm’s own protected databases, sometimes called “closed”</p>

<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>; see also Am. Bar Ass’n, Formal Op. 512 (2024); Fla. Bar Bd. Rev. Comm. on Pro. Ethics, Op. 24-1 (2024); D.C. Bar Ethics Op. 388 (April 2024); N.J. STATE BAR ASS’N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS (2024), <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>; N.Y. STATE BAR ASS’N, REPORT & RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ARTIFICIAL INTELLIGENCE (2024), [https://www.nycbar.org/wp-content/uploads/2024/06/20221290\\_AI\\_NYS\\_Judiciary.pdf](https://www.nycbar.org/wp-content/uploads/2024/06/20221290_AI_NYS_Judiciary.pdf). (All websites last accessed on Aug. 5, 2024).

<sup>2</sup> In general, this Opinion is consistent with the ABA, California Bar, Florida Bar, District of Columbia Bar, and New Jersey Bar opinions cited in Footnote 1. However, the New York State Bar suggests adoption of certain rules to address Generative AI, which we believe is premature because of the rapid pace of technological development and change. See, e.g., N.Y. STATE BAR ASS’N, *supra*, at 53–56.

<sup>3</sup> Generative AI systems that share inputted information with third parties are sometimes called “open” systems.

<sup>4</sup> California Guidance at 2.

<sup>5</sup> Lawyers may wish to obtain advance client consent to use Generative AI that will involve sharing of client information, but, because such consent must be knowing, the client must understand the potential consequences of such information-sharing for the consent to be effective. See N.Y. State Op. 1020 ¶ 10 (a lawyer “may post and share documents using a ‘cloud’ data storage tool” that does not provide “reasonable protection to confidential client information” only where “the lawyer obtains informed consent from the client after advising the client of the relevant risks”).

<sup>6</sup> *Id.*

	<p>systems, do not present these risks. But a lawyer must not input any confidential information of the client into any Generative AI system that lacks adequate confidentiality and security protections, regardless of whether the system uses or shares inputted information, unless the client has given informed consent to the lawyer’s doing so. Even with closed systems, a lawyer must take care that confidential information is not improperly shared with other persons at or clients of the same law firm, including persons who are prohibited access to the information because of an ethical wall.<sup>7</sup></p> <p>A lawyer or law firm<sup>8</sup> should “consult with IT professionals or cybersecurity experts to the extent necessary for the lawyer or law firm to ensure that any Generative AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.”<sup>9</sup></p> <p>A lawyer should review the system’s Terms of Use. “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 use the information for its own use in any manner, including to train or improve its product,” again without informed client consent.<sup>10</sup> Terms of Use can change frequently and a lawyer’s obligation to understand the system’s use of inputs is continuing. Accordingly, lawyers should periodically monitor Terms of Use or other information to learn about any changes that might compromise confidential information.<sup>11</sup></p> <p>A law firm may wish to consider implementing policies and control procedures to regulate the use of confidential client information in Generative AI systems if the law firm is going to make use of such systems.</p>
<p><b>Conflicts of Interest</b></p>	<p>Where a Generative AI system uses client information, a law firm must ensure that the system implements any ethical screens required under the Rules. For example, if an ethical</p>

<sup>7</sup> See Am. Bar Ass’n, Formal Op. 512 at 6-7 (2024).

<sup>8</sup> Consistent with Rule 1.0(h), in this Opinion “law firm” includes a private firm as well as qualified legal assistance organizations, government law offices and corporations, and other entities’ legal departments.

<sup>9</sup> California Guidance at 2.

<sup>10</sup> *Id.*

<sup>11</sup> See N.Y. STATE BAR ASS’N, *supra*, at 58.

<p>Rule 1.7; Rule 1.8; Rule 1.9; Rule 1.10; Rule 1.11; Rule 1.12</p>	<p>screen excludes a lawyer from any information or documents with respect to a client, the lawyer must be not exposed to such information or documents through the law firm’s Generative AI systems.</p>
<p><b>Duties of Competence and Diligence</b></p> <p>Rule 1.1; Rule 1.3</p>	<p>A lawyer should be aware that currently Generative AI outputs may include historical information that is false, inaccurate, or biased.</p> <p>“A lawyer must ensure the competent use of technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.”<sup>12</sup></p> <p>“Before selecting and using a Generative AI tool, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable [T]erms of [U]se and other policies governing the use and exploitation of client data by the product.”<sup>13</sup> A lawyer may wish to consider acquiring skills through a continuing legal education course. Consultation with IT professionals or cybersecurity experts may be appropriate as well.</p> <p>Generative AI outputs may be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must ensure that the input is correct and then critically review, validate, and correct 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 [Generative AI] outputs.”<sup>14</sup></p> <p>The use of Generative AI tools without the application of trained judgment by a lawyer is inconsistent with the competent and diligent practice of law. “A lawyer’s professional judgment cannot be delegated to [G]enerative AI and remains the lawyer’s responsibility at all times. A lawyer should take steps to avoid overreliance on Generative AI to such a degree that it hinders critical attorney analysis</p>

<sup>12</sup> California Guidance at 2. There have been claims that certain Generative AI tools violate intellectual property rights of third parties. A lawyer planning to use a Generative AI tool should keep abreast of whether there are any such risks associated with the tool the lawyer plans to use.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3.

	fostered by traditional research and writing. For example, a lawyer must supplement any Generative AI-generated research with human-performed research and supplement any Generative AI-generated argument with critical, human-performed analysis and review of authorities.” <sup>15</sup>
<b>Advertising and Solicitation</b> Rule 7.1; Rule 7.3	Lawyers must not use Generative AI in a way that would circumvent their responsibilities under the Rules regarding marketing and solicitation. For example, a lawyer must not use Generative AI to make false statements, to search the internet for potential clients and send solicitations that would otherwise be prohibited under the Rules, or to pose as a real person to communicate with prospective clients.
<b>Duty to Comply with the Law</b> Rule 8.4; Rule 1.2(d)	“There are many relevant and applicable legal issues surrounding [G]enerative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns.” <sup>16</sup> A lawyer must comply with the law and cannot counsel a client to engage in, 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.
<b>Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers</b> Rule 5.1; Rule 5.2; Rule 5.3; Rule 8.4	“Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of [G]enerative AI and make reasonable efforts to ensure that the law firm adopts measures that give reasonable assurance that the law firm’s lawyers and non-lawyers’ conduct complies with their professional obligations when using [G]enerative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of [G]enerative 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.” <sup>17</sup> A subordinate lawyer should disclose to a supervisory lawyer the use of Generative AI that is not generally understood to be routinely used by lawyers. <sup>18</sup>

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Likewise, where a client provides citations to a lawyer, a lawyer must review the decisions to make sure that they are genuine and properly cited. *See United States v. Cohen*, No. 18-CR-602, 2024 WL 1193604 (S.D.N.Y. Mar. 20,

	<p>A lawyer using a Generative AI chatbot for client intake purposes must adequately supervise the chatbot.<sup>19</sup> A high degree of supervision may be required if there is a likelihood that ethical problems may arise. For example, a chatbot may fail to disclose that it is not a lawyer or may attempt or appear to provide legal advice, increasing the risk that a prospective client relationship or a lawyer–client relationship could be created.</p>
<p><b>Communication Regarding Generative AI Use</b> Rule 1.4; Rule 1.2</p>	<p>“A lawyer should evaluate ... communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with [G]enerative AI use, scope of the representation, and sophistication of the client.”<sup>20</sup></p> <p>A lawyer should consider disclosing to the client the intent to use Generative AI that is not generally understood to be routinely used by lawyers as part of the representation,<sup>21</sup> particularly as part of an explanation of the lawyer’s fees and disbursements. The disclosure will depend on circumstances including how the technology will be used, and the benefits and risks of such use. A lawyer should obtain client consent for Generative AI use if client confidences will be disclosed in connection with the use of Generative AI.</p> <p>A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of Generative AI. We note that, because Generative AI currently is used routinely by lawyers, when a lawyer receives a request from a client that Generative AI not be used at all, the lawyer should consider discussing the request with the client before agreeing to it.</p>

2024) (criticizing an attorney-defendant and his counsel for citing “three cases that do not exist” where client provided citations hallucinated by Google Bard and counsel failed to check them).

<sup>19</sup> See Fla. Bar Bd. Rev. Comm. on Pro. Ethics, *supra* (section on Oversight of Generative AI).

<sup>20</sup> California Guidance at 4.

<sup>21</sup> Note that some Generative AI is routinely used. For example, Microsoft Word employs Generative AI in its auto-complete and grammar check functions. Westlaw, Lexis, and search engines also employ Generative AI. We do not mean to suggest that an attorney needs to disclose such uses of Generative AI. For a discussion of the importance of evaluating Generative AI tools based on intended users, see N.J. STATE BAR ASS’N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS 15–19 (2024) (discussing “AI Tools Intended for the Public” and “Tools Tailored for Legal Professionals”), <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf>.



<p><b>Candor to the Tribunal; and Meritorious Claims and Contentions</b></p> <p>Rule 1.2(c); Rule 3.1; Rule 3.3; Rule 1.16</p>	<p>A lawyer should recognize the risks posed by Generative AI-generated content. Generative AI tools can, and do, fabricate or “hallucinate” precedent.”<sup>22</sup> They can also create “deepfakes”—media that appear to reflect actual events but are actually doctored or manufactured.</p> <p>“A lawyer must review all [G]enerative AI outputs,” including but not limited to “analysis and citations to authority,” for accuracy before use for client purposes and submission to a court or other tribunal.<sup>23</sup> If the lawyer suspects that a client may have provided the lawyer with Generative AI-generated evidence, a lawyer may have a duty to inquire.<sup>24</sup> A lawyer must correct any errors or misleading statements made to adversaries, the public, or the court.<sup>25</sup></p> <p>“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 [G]enerative AI.”<sup>26</sup></p>
<p><b>Charging for Work Produced by Generative AI and Generative AI Costs</b></p> <p>Rule 1.5</p>	<p>“A lawyer may use [G]enerative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining [G]enerative AI inputs and prompts, or reviewing and editing [G]enerative AI outputs).”<sup>27</sup> A lawyer must not charge hourly fees for the time that would otherwise have been spent absent the use of Generative AI.<sup>28</sup> Lawyers may wish to consider</p>

<sup>22</sup> A Stanford University study found that Generative AI chatbots from OpenAI, Inc., Google LLC, and Meta Platforms Inc. hallucinate “at least 75% of the time when answering questions about a court’s core ruling.” Isabel Gottlieb & Isaiah Poritz, *Popular AI Chatbots Found to Give Error-Ridden Legal Answers*, Bloomberg L. (Jan. 12, 2024), <https://news.bloomberglaw.com/business-and-practice/legal-errors-by-top-ai-models-alarmpingly-prevalent-study-says>. Courts are already grappling with parties’ citation to hallucinated precedents. *See generally Mata v. Avianca, Inc.*, No. 22-CV-1461, 2023 WL 4114964 (S.D.N.Y. June 22, 2023) (sanctioning attorneys for “submit[ing] non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT”); *Cohen*, 2024 WL 1193604; *see also* D.C. Bar, Ethics Op. 388 (2024) (discussing the dangers of hallucinations).

<sup>23</sup> California Guidance at 4.

<sup>24</sup> *See* N.Y. City Op. 2018-4 (discussing a lawyer’s duty to inquire when asked to assist in a transaction that the lawyer suspects may involve a crime or fraud); *see also* ABA Op. 491 (2020); Colo. Bar Ass’n Ethics Comm., Formal Op. 142 (2021). These same standards apply when a lawyer suspects that a client may have given the lawyer fabricated evidence.

<sup>25</sup> *See* Rule 3.3.

<sup>26</sup> California Guidance at 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

	<p>developing alternative fee arrangements relating to the value of their work rather than time spent.</p> <p>Costs associated with Generative AI should be disclosed in advance to clients as required by Rule 1.5(b). The costs charged should be consistent with ethical guidance on disbursements and should comply with applicable law.<sup>29</sup></p> <p>A lawyer may wish to consider appropriate use of Generative AI tools to minimize client cost as the use of Generative AI becomes more widespread.</p>
<p><b>Prohibition on Discrimination</b></p> <p>Rule 8.4</p>	<p>“Some [G]enerative AI is trained on biased [historical] information, and a lawyer should be aware of possible biases and the risks they may create when using [G]enerative AI (<i>e.g.</i>, to screen potential clients or employees).”<sup>30</sup></p>

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<sup>29</sup> See ABA Op. 93-379 (1993).

<sup>30</sup> California Guidance at 4.

## **NJSBA 2025 Family Law Retreat**

**Los Cabos, Mexico**

### **Ethics from the Movies**

#### **Master of Ceremonies (MC – played by Mike Saponara):**

Welcome to Cabo 2025 and ethics, and what we can learn about ethics from the movies.

Three illustrations for Ethics from the Movies: It's a Wonderful Life, the Wizard of Oz and The Godfather.

#### **It's a Wonderful Life**

Let's set our first movie scene from "It's a Wonderful Life", we're going to talk about the beautiful little town of Belford, New Jersey. Belford, New Jersey is one of the most idyllic towns in all of America. It has one unfortunate person living in that town, and that is Amanda Potter. Amanda Potter is a billionaire. She is an heiress and has grown her family fortune countless sums. She is obsessed with music from the 1920s. She insists that the high school only play music from the 1920s and older. For example, school dances must always play the "Charleston" on a loop and the students must sing "Buffalo Gal" every morning when they wake up. It's in this world where the Baileys exist. The Baileys had started out as a young family building an empire of their own because they had invested in cryptocurrency when no one else was. The star of the family is one of the brothers who singlehandedly freed 5 hostages. And so, the family is well acclaimed. The Baileys are definitely riding high. Well, we now come to a scene where Amanda Potter is there with her chauffeur. Oddly enough, the chauffeur's name is never known. She is only referred to as chauffeur. Let's drop in on a scene where we see Amanda Potter,

played by Amanda Trigg, her Chauffeur played by Francesca O’Cathain and Amanda Potter’s counsel, Violet Bick, played by Carolyn Daly. By the way, Violet was in the world’s oldest profession at night but then changed her profession after attending law school during the day.

**Amanda Potter:**

Chauffeur! Come here! (**with magisterial grandeur**).

**Chauffeur:**

Yes Boss (**with servants’ fervor**)

**Amanda Potter:**

Chauffeur, I am so tired of hearing about the Baileys and their successes and crypto and saving the world from hostage taking and I’ve had it with them. That Uncle Billy - George Bailey’s forgetful and absent-minded Uncle - coming around to my place, flaunting the successes of the family; he could not stop bragging; What a piece I work.

You know what? When I saw him at the Country Club, he dropped a flash drive on my lap, here take this Chauffeur and see what is on this flash drive.

**Chauffeur:**

I will boss.

**MC:**

Time has passed and the beleaguered Chauffeur returns.

**Chauffeur:**

Boss you will not believe what is on this flash drive; it's the crypto wallet for the whole entire Bailey empire. It's worth billions. In fact, it would make them worth more than you; this is worth a fortune.

**Amanda Potter:**

Be gone. Give it to me and wash my Bentley.

**Chauffer:**

Yes boss, mumbling under her breath I just washed it. Talking to herself I will get back at you Ms. Potter (**raises fist in the air**).

**MC:**

Scene change Amanda Potter is visited by her attorney, Violet Bick.

**Amanda Potter:**

Bick I never mentioned this to you, but I have been investing in crypto, here is a flash drive of my crypto wallet, open up a trust in the Cayman Islands and this is to be kept top secret. I don't want people to realize how filthy rich I am.

**Violet Bick:**

Ms. Potter of course I can do that (**with know-it-all attitude**), but I am fascinated that you have invested in crypto after you have preached to me for years that the only thing worth anything is a brick-and-mortar business, (**and then yell –**) Tradition! (**with both hands raised over the head like Tevye**).

**Amanda Potter:**

Bick that's what I like about you always asking the extra question, but what you need to know is you are my attorney, and you do what I say, now do what I tell you.

**MC:**

Meanwhile, the chauffeur was very disgruntled by all this and had posted something online, talking about the eccentricities of her boss, the crazy 1920s lady billionaire who apparently has stolen someone's crypto wallet and has given nothing to me.

The attorney, Bick, unaware of the chauffeur's posting, puts a posting of her own on a legal group chat site and questioning folks about what to do when you suspect a client has stolen a crypto wallet and wants you to create a trust in the Cayman Islands.

Meanwhile the Bailey's have gone to the press asking for the stolen flash drive to be returned especially considering all they have done for the community and the world.

**For Panel discussion:**

What is appropriate for a legal chat group, especially when facts are in the public forum that can be linked with some imagination back to your client?

What are attorneys' ethical responsibilities if their client may be asking them to do something illegal, i.e., stealing?

**MC:**

**The Wizard of Oz**

The part of Dorothy will be played by Sheryl Seiden, the part of the Wizard is played by Judge Jodi Rosenberg, and the part of the Scarecrow will be played by Jeralyn Lawrence.

Unlike any Wizard of Oz you've ever seen, this Land of Oz is in the world of Newark, New Jersey. Newark, New Jersey, where a young girl, Dorothy was abandoned by her family, they all ran to the tornado shelter, left her out to die, clearly a victim of child

abuse. She then went to law school where she suffered law student abuse, and is working now for the Scarecrow, where she suffers from law associate abuse. Due to all this abuse, Dorothy decides to have a day at the spa while her boss is being restuffed.

We're going to drop in now where Dorothy is at the spa with the Wizard. By the way, Dorothy has never been into the courtroom since she is a young attorney; also, the Wizard keeps a low profile and often hides behind drapes. Dorothy speaks to the attendant and the other patrons of the spa.

**Dorothy:**

My life is a mess (**over the top dramatic acting**) all I can think about sometimes is that horrible day when the tornado hit and my family left me out of the storm shelter. I bury myself in work, but my boss is taking advantage of me.

**MC:**

The Wizard is there enjoying the spa (**the Wizard should make frustrated facial gestures**) while Dorothy becomes a nuisance as she continues to tell this story, and she goes on and on and on. Dorothy has no idea who the Wizard is and goes on and on and on about her boss.

**Dorothy:**

I am so overwhelmed at work I really need this spa treatment; I use AI for all my work and typically make a mental note to go back and check the cites but I rarely have time. But I am sure my boss checks my work given her reputation.

**MC:**

The Wizard simply takes in the information and makes no comment (**Wizard should make knowing Facial gestures**). Frankly, she's over people talking outside of shop and

is just enjoying her day at the spa. A few weeks go by and the Scarecrow, Dorothy and the Wizard are in a courtroom. This is what happens that day.

**Wizard:**

Ms. Scarecrow, I see you have cited a NJ case of the Munchkins for the proposition that your client is entitled to a disproportionate share of the marital estate due to being height challenged, do you realize that is not a case in New Jersey but is a case from Munchkin Land, yet you cite it as a NJ case.

**Scarecrow:**

Your honor that is an oversight by my firm (**with great confidence**).

**Wizard:**

Ms. Scarecrow I find your comment regrettable, you signed the brief, yet you are attempting to blame your firm.

**Scarecrow:**

Your Honor, I specifically told my associate to check the cites (**with indignation turns to Dorothy who mouths I am so sorry boss**).

**Wizard:**

I have direct knowledge that you and your firm are using AI (**Scarecrow mouths what is AI**) and you are not checking the source material. I'm holding you and Ms. Dorothy as culpable and reporting you to the Wizard's panel of ethical review (**with self-righteous rebuke**).

**MC:**

**For Panel Discussion**



What is an attorney's responsibility when using AI? (See attached guidelines).

What is an attorney's responsibility when speaking in a public setting?

Is it reasonable for a lead attorney to rely on the work of an associate?

If an ethics charge is made when should an attorney hire an attorney? Does it matter if it is a random audit?

**MC:**

### **The Godfather**

Next, we move on to the Godfather. The Godfather's attorney (for both Godfathers), Tina Hagen, is played by Jerylyn Lawrence, Mama Corleone (Vito's wife) is played by Carolyn Daly, and Kay Adams (Michael's wife) is played by Franchesca O'Caththian. Given the families' business both Mama Carleone and Kay have had it and file for divorce. Tina asks for a sit down with Mama Carleone and Kay along with their attorneys and makes them an offer they can't refuse. Both Mama and Kay don't listen to their attorneys and directly engage with Tina.

**Tina:**

Mama Corleone and Kay, my clients have great respect for you both as the women who gave birth to their children (**act like the Godfather**) and offer you the following to end your respective marriages. Mama Corleone my client would like to know how you would like to (**dramatic pause**) die, he is very religious and could not possibly get a divorce; however, you will have a beautiful grave, and generations of the family will fondly

remember you. Kay you can have the divorce and lavish alimony, but **(long pause)** the kid stays with my client, and you will never see the child again.

**Mama Carleone:** (MC: despite her attorney telling her to be quiet, says)

Tina this is a big misunderstanding I still love Vito **(over the top hand waving and some crying)** and, and, and, **(holding back tears)** would never leave him I just would like a bank account in my own name, and to sometimes wear a dress that is not black, and I will withdrawal the divorce complaint.

**Tina:**

Mama, I suspect your suggestion is too late, but I will take it to my client.

**Mama:**

Thank you, thank you, thank you **(dramatic groveling)** Tina you are too kind.

**Tina:**

Kay what about you do you accept the offer.

**Kay:** (MC: despite her attorney telling her to be quiet Kay says:)

Wake up Tina **(very belligerently)** this isn't the 1950s I have rights, and I need to share custody with Michael, and I know also who he is, and I will tell the court.

**Tina:**

No **(with aggression)**, you wake up Kay, you wore the furs, you had the servants, you lived the high life you have just as much a risk going to court as my client. You are no innocent spouse.

**Kay:**

Tina you are a monster, and you work for a monster, I will see you in court.

**MC:** The showdown ends, and no one knows for sure what happens next.

**Panel discussion:**

What is an attorney's responsibility when their client makes unreasonable demands?  
Should they make the demand?

When does religious demands cross the line into illegal behavior and coercion? And is it appropriate for an attorney to participate in the demands based on religious beliefs?

Is the threat of exposing criminal activity ever appropriate? What about exposing that someone is not an innocent spouse?

# **If at First You Don't Succeed, try, try again!**

## **Mediation Tips**

**Jeffrey Fiorello, Esq. &  
Jessica Ragno Sprague, Esq.**

Rule 1:40-5 Governs mediation in Family Part Matters, as to procedure and process. However, the success or failure of a mediation doesn't usually depend on the process. What and how we choose to conduct a mediation is much more likely to assist in producing a successful resolution of all or a part of the matter. But, even with best intentions, some cases present difficult issues or personalities which may make impasse seem inevitable. Notwithstanding, there are some tips which may assist to bring a mediation back on course to resolve.

1. Try and get something resolved early on. Even if it is a simple issue, showing the Parties that Mediation works, encourages them to "buy in" to the process, and provide hope that the rest of the matter may be settled as well.
2. You may need more than 1 session. Family matters are often complex and can not be resolved with only one session of mediation. Scheduling a follow up session, can be very useful. However, try to keep the parties engaged between sessions. If there is additional information needed, give the Parties "homework" to return with additional information, needed to resolve the matter.
3. Don't get stuck on a difficult issue. Just because you can't resolve your 1<sup>st</sup> issue, doesn't mean that you can't resolve other issues in the case. Returning to the difficult issue after having resolved the rest of the matter can provide momentum which may make that difficult issue fall into place. Seeing how the rest of the matter is resolved, can assist to bring that difficult, remaining issue into perspective for the Parties.
4. Don't be afraid to walk away. The treat of impasse can be helpful, but it should be used sparingly. Every time a party is not getting their way shouldn't result in a best and final threat. However, if one party has already compromised significantly more than the other party, on an important issue, making an offer as a "take it or leave it" proposition, can be effective. Such an offer may be more successful if the other party is given a day or so to consider such an offer.
5. Sometimes the desired result is met for both parties, through substantially different conversations with each side. A resolution is what is desired. If both parties are satisfied with the settlement how they arrived at the concluded settlement may not be through the same approach. When a mediation summary is presented, don't be surprised if the summary is vague on why each party agrees with the resolution.

6. You don't have to settle everything. There are other avenues of Alternate Dispute Resolution, which are available to assist:

a. Parent Coordination: if a matter resolves, with the exception of a few minor issues in the parenting plan, the parties can bring that issue to a Parent Coordinator to assist in resolving such an issue.

b. If you resolve certain issues, you may choose to submit the remaining issues to an Arbitrator to try unsettled issues. But you are limiting the scope of what is being decided. Stipulate to what is resolved, and leave the remaining issue(s) for adjudication by the Arbitrator.

These are just some of the things which can be done to avoid impasse, and resolve a matter. Mediation and other Alternate Dispute Resolution Programs are designed to allow creativity. The creativity isn't exclusively reserved for the resolved outcome. Creativity can extend to the process as to how you arrive at that outcome. Don't be afraid to think outside of the box and take risks in attempting settlement.

**CUSTODY / PARENTING TIME TRIAGE**  
**Creative and Effective Management of High Conflict Matters**

**Jeffrey Fiorello, Esq.**

With Access to the Courts becoming increasingly more difficult, high conflict matters tend to suffer the most. In some counties, Parties are waiting upwards of 12 months for a 1<sup>st</sup> Case Management Conference to be scheduled. In cases where Custody and Parenting time are highly contested, waiting a year before action is taken can have devastating results on a family. Getting our cases early intervention, is essential. Similarly, it is just as important to make sure that families are utilizing their resources on the RIGHT types of services available.

All too often in our cases, we see courts ordering the “triumvirate” of services and experts in the form of:

1. a Guardian Ad Litem;
2. a Parenting Coordinator; and
3. a Best Interest Evaluation.

Not all cases need all of these services. Furthermore, there are other services available which may be better suited address the particular issues present in a complex custody case. Not all cases are the same. Not all issues are the same. As attorneys, we should be thinking outside of the box, assess our cases, and get the right services for the families we work with.

Here are some tips to consider in addressing complex custody and parenting time issues in a case:

1. Early Intervention: Since access to the courts (in some counties) is so difficult, we may want to consider getting the parties into Mediation early in the case. A mediator may be able to assist Parties to determine what services will best serve their needs.
2. Case Management: If we are fortunate enough to have a Case Management Conference with the Court, we need to advocate for the right services. Judges do not know our cases as well as we do, nor should they be expected to. We need to request the services that will best address the issues.
3. Guardian Ad Litem (GAL): We need to understand the role of the GAL. If we are requesting that a Guardian Ad Litem be appointed in our cases, it is helpful to have the scope of the GAL’s role to be defined in the Order.

4. Parenting Coordination (PC): Can be very helpful in assisting parties in implementing a parenting plan. Not all issues are appropriate for a PC to address.
5. Co Parenting Therapy: Can help to educate parties and give them the skills necessary to raise their children together. Co Parenting Therapy can help parties improve their communication, and understand the needs and feelings of the other parent.
6. Parenting Coach: A Parenting Coach can assist a party or both parties in addressing challenges and issues in their case. A Parenting Coach can help to educate a Party to the best practices in dealing with parenting issues.
7. Reunification Therapy: Is a therapeutic process what can be used to help repair a relationship between a Parent in a Child.
8. Individual Therapy: Sometimes, a particular party or parties have personal issues that need to be addressed, to help them to cope, and improve their quality of life.
9. Best Interest Evaluation: “Best Interest” is the standard that a court must use to determine custody. However, every case does not require a full Best Interest Evaluation. Once an expert is told that they need to perform a Best Interest Evaluation, the process becomes formal, as that expert is held to defined standards in performing such an evaluation. Not every case requires a full custody assessment.
10. Brief Focused Assessment: If the issues in a case are more limited, and do not require Best Interest Evaluation, we may want to consider a Brief Focused Assessment (BFA). With a BFA, you can limit the scope of the evaluation, to address a particular issue. A BFA can usually be accomplished faster than a Best Interest Evaluation, so we can get our parties the help that is needed more expeditiously.

The issues in our cases are unique. The solutions to address those problems should not be “cookie cutter”. Understanding the issues in our cases and the different kinds of services available can be helpful in better serving the families we represent.

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## RPC 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent."

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(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.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are

such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely adoption and enforcement by a law firm of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, electronic communication, and embedded information (metadata) in an electronic document. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(p) "Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins.

Note: Adopted November 17, 2003 to be effective January 1, 2004; paragraph (o) amended and new paragraph (p) adopted August 1, 2016 to be effective September 1, 2016.

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- RPC 1.1 Competence

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### RPC 1.1 Competence

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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- Rules of Professional Conduct
- RPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

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## **RPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

A lawyer may counsel a client regarding New Jersey's marijuana laws or the marijuana laws of other states, provided the lawyer meets the requirements of those states, and may assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (c) amended, and paragraph (e) deleted and redesignated as RPC 1.4(d). November 17, 2003 to be effective January 1, 2004; paragraph (d) amended

August 1, 2016 to be effective September 1, 2016; paragraph (d) amended November 17, 2020 to be effective immediately.





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### RPC 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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- RPC 1.4 Communication

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### RPC 1.4 Communication

(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new paragraphs (a) and (d) adopted and former paragraphs (a) and (b) redesignated as paragraphs (b) and (c) November 17, 2003 to be effective January 1, 2004.

### Official Comment to RPC 1.4 (March 5, 2025)

In *Delaney v. Dickey*, 244 N.J. 466, 472-73 (2020), the Court held that attorneys may include in their retainer agreements provisions requiring clients to resolve potential fee disputes and legal malpractice claims by arbitration. As a condition of enforcing such an agreement, however, the Court held that "an attorney must generally explain to a client the benefits and disadvantages of arbitrating a prospective dispute between the attorney and client."

The Court offers the following general guidance and sample language to assist attorneys and clients in the drafting of arbitration provisions in retainer agreements. The Court does not require that the sample language be used; it is provided solely for the convenience of the bar. Attorneys and clients may decide to use different language about arbitration in a retainer agreement.

Pursuant to RPC 1.4(c), arbitration agreements that are part of attorney-client retainer agreements must be written in plain English that is understandable to the least

sophisticated client.

It is not necessary for the attorney to orally explain the arbitration agreement to the prospective client, because attorneys generally encourage clients to contact them with any questions prior to signing the retainer agreement. A written agreement, conforming to this guidance, that informs the client, in a balanced way, of the advantages and disadvantages of arbitration will suffice.

Prospective clients retain the right to seek advice from independent counsel regarding the arbitration agreement, although independent review is not mandatory.

The arbitration agreement should speak to both the advantages and disadvantages of arbitration in a balanced manner.

Waiver of an arbitration provision in a signed retainer agreement is permissible, but the parties must mutually agree to waive the arbitration provision. Provisions allowing for unilateral waiver are not permissible.

In the event the prospective client rejects the arbitration provision, an attorney is at liberty to decline the representation.

The following non-exhaustive list of arbitration-related concepts and issues is provided to serve as a guide for attorneys in preparing arbitration provisions within their retainer agreements:

- \* Overview of Arbitration;
- \* Waiver of Jury and Appeal Rights;
- \* Confidentiality;
- \* Discovery;
- \* Costs;
- \* Arbitrator's Decision;
- \* Rules of Arbitration;
- \* Selection of the Arbitrator;
- \* Place of Arbitration and Choice of Law;
- \* Fee Arbitration.

### **Sample Arbitration Provisions for Retainer Agreements**

In the event that [I/we, the attorney/firm], and you, the client, are unable to come to an amicable resolution with respect to any dispute including, but not limited to, claims of alleged legal malpractice and, in certain circumstances, attorney fee disputes, you and I/we agree that such dispute will be submitted to and finally determined by arbitration in accordance with the provisions set forth in this agreement. If you have any questions or

concerns about the arbitration process, please raise them before signing the retainer agreement. You may also have independent counsel of your choice review the retainer agreement, including this provision addressing arbitration, before you sign it.

(1) Overview. There are both advantages and disadvantages to arbitration. Arbitrations may resolve disputes efficiently and expeditiously. The parties to an arbitration have an opportunity to agree on a skilled and experienced arbitrator, including one in a specialized field if so desired, to preside over and decide the dispute privately. Those potential benefits of arbitration should be weighed against certain potential disadvantages, including but not limited to a limitation on the exchange of information (called "discovery"), as well as both parties' obligation to pay certain upfront costs of the arbitration. In contrast to arbitration, the party that files a lawsuit generally can proceed in the county where the party resides or where the law firm is located, whereas the place of an arbitration may be the subject of negotiation. Additionally, in a lawsuit, the case will be decided by a judge or jury in open court and will be part of the public record, and the parties will have the right to appeal the verdict and award. Parties to an arbitration, however, typically have a limited right to appeal the arbitrator's decision, and that right applies only in very limited circumstances.

(2) Waiver of Right to Trial by Jury. By agreeing to arbitrate, both you and [the attorney/firm] are waiving the constitutional right to a trial by jury in a courtroom open to the public.

(3) Confidentiality. The entire arbitration, including the parties' claims and the decision of the arbitrator, under most circumstances will be private and confidential. This contrasts with proceedings in court, which are open to the public and in which, for example, the jury's verdict is a matter of public record.

(4) Discovery. The discovery process in an arbitration generally will be more limited than the discovery process in court. For example, the number of depositions and other forms of discovery may be restricted, which may limit the opportunity for the parties to exchange information during the arbitration. Consequently, arbitration may have the potential for reducing costs associated with discovery when compared to a more extensive discovery process available in court.

(5) Costs. In arbitration, you as the client will be responsible for some of the costs of the arbitration, including your share of the arbitrator's fees and the upfront costs. Arbitrators generally bill by the hour, and the arbitration will likely move forward only if both parties pay their share of the required fees and costs. If you cannot afford the costs of arbitration, you may not be able to proceed. In contrast, in court, the parties are responsible only for certain filing fees and costs.

(6) Arbitrator's Decision. Whereas the losing party may appeal a judge's order or judgment following a jury's verdict to a higher court, the arbitrator's award will be final and binding. The parties will only be able to appeal from an arbitration award in very limited circumstances.

(7) Rules of Arbitration. The arbitration will generally be conducted in accordance with procedures outlined by the arbitrator. Disputes concerning those procedures are governed by New Jersey law.

(8) Selection of the Arbitrator. The arbitration will be conducted by [one] impartial arbitrator(s), who may be a former judge, practicing attorney, or non-lawyer, selected by mutual agreement between the parties. If the parties cannot agree, the arbitrator will be selected in accordance with New Jersey law.

(9) Place of Arbitration & Choice of Law. The arbitration will take place in the county where you reside, the county where [the attorney/firm] is located, the county where the arbitrator is located, or at a mutually acceptable location. The arbitration will apply the substantive law of the State of New Jersey. If a dispute were brought before a court, the court that would hear the dispute would most likely be located in the county where the client resides or the county where [the attorney/firm] is located.

(10) Fee Arbitration. You retain the absolute right to proceed under the fee arbitration rules set forth in New Jersey Court Rule 1:20A. This process allows you to file a fee arbitration claim for any dispute with the Office of Attorney Ethics District Fee Arbitration Committee. This fee arbitration process applies to disputes over attorneys' fees billed to you and is always available to you.



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- RPC 1.5 Fees

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## RPC 1.5 Fees

(a) A lawyer's fee shall be reasonable. 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, 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;

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these

rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is notified of the fee division; and

(3) the client consents to the participation of all the lawyers involved; and

(4) the total fee is reasonable.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new subparagraph (e) (2) added and former subparagraphs (e)(2) and (e)(3) redesignated as subparagraphs (e) (3) and (e)(4) November 17, 2003 to be effective January 1, 2004.

- Rules of Professional Conduct
- RPC 1.6 Confidentiality of Information

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## RPC 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c) and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved;

(3) to prevent the client from causing death or substantial bodily harm to himself or herself;



(4) to comply with other law; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

(f) 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.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended, new paragraph (c) added, former paragraph (c) redesignated as paragraph (d), and former paragraph (d) amended and redesignated as paragraph (e) November 17, 2003 to be effective January 1, 2004; former subparagraph (d)(3) redesignated as subparagraph (d)(4) and new subparagraph (d)(3) adopted July 19, 2012 to be effective September 4, 2012; paragraph (d) amended, new paragraph (f) adopted, and Official Comment added August 1, 2016 to be effective September 1, 2016; paragraphs (a) and (b) amended, and additional Official Comment added July 27, 2018 to be effective September 1, 2018.

### **Official Comment (August 1, 2016)**

Paragraph (d)(5) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering merger, or a lawyer is considering the purchase of a law practice. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed written consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Any information disclosed pursuant to paragraph (d)(5) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

Paragraph (d)(5) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (d)(5). Paragraph (d)(5) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Paragraph (f) requires a lawyer to act competently to safeguard information, including electronically stored information, relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (f) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent in writing to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

### **Official Comment (September 1, 2018)**

The Court adopts the comment in the Restatement (Third) of the Law Governing Lawyers on confidential information, which states:

Whether information is "generally known" depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.



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## **RPC 1.7 Conflict of Interest: General Rule**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text deleted and new text adopted November 17, 2003 to be effective January 1, 2004.



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### **RPC 1.8 Conflict of Interest: Current Clients; Specific Rules**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted September 10, 1984 to be effective immediately; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; caption amended, paragraphs (a), (b), (c), (f), (g), (h) amended, former paragraph (i) deleted, former paragraph (j) redesignated as paragraph (i), former paragraph (k) deleted, and new paragraphs (j), (k) and (l) added November 17, 2003 to be effective January 1, 2004; subparagraph (e)(3) amended July 22, 2014 to be effective January 1, 2015.



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- Rules of Professional Conduct
- RPC 1.9 Duties to Former Clients

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## RPC 1.9 Duties to Former Clients

(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (b) amended, and new paragraphs (c) and (d) added November 17, 2003 to be effective January 1, 2004.







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- RPC 1.10 Imputation of Conflicts of Interest: General Rule

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### **RPC 1.10 Imputation of Conflicts of Interest: General Rule**

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

(1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in RPC 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by RPC 1.11.

(f) Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that: (1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter, (2) the screened attorney acknowledges the obligation to remain screened and takes action to insure the same, and (3) the screened attorney is apportioned no part of the fee therefrom.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (b) corrected in *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 217-18 (1988); caption and paragraphs (a), (b), and (c) amended, paragraph (d) deleted, former paragraph (e) amended and redesignated as paragraph (d), new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.



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### **RPC 1.11 Successive Government and Private Employment**

(a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

(1) in which the lawyer participated personally and substantially as a public officer or employee, or

(2) for which the lawyer had substantial responsibility as a public officer or employee; or

(3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

(c) In the event a lawyer is disqualified under (a) or (b), the lawyer may not represent a private client, but absent contrary law a firm with which that lawyer is associated may undertake or continue representation if:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(2) written notice is given promptly to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment,

(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c).

(e) As used in this Rule, the term:

(1) "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency;

(2) "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended, text of paragraph (b) deleted and new text adopted, new paragraph (c) adopted, former paragraphs (c) and (d) amended and redesignated as paragraphs (d) and (e), and former paragraph (e) merged into redesignated paragraph (e) November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 9, 2008 to be effective September 1, 2008.

### **Comment by Court (Regarding 2008 Amendment)**

In *In re ACPE Opinion 705*, 192 N.J. 46 (2007), the Court deferred to the Legislature in the spirit of comity and held that the post-government employment restrictions imposed by the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-17, apply in the context of former State attorneys. The 2008 amendment to paragraph (c) implements that decision.



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- RPC 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk

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### **RPC 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk**

(a) Except as stated in paragraph (c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding have given consent, confirmed in writing.

(b) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral. A lawyer serving as law clerk to such a person may negotiate for employment with a party or attorney involved in a matter in which the law clerk is participating personally and substantially, but only after the lawyer has notified the person to whom the lawyer is serving as law clerk.

(d) An arbitrator selected by a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended, new paragraph (b) adopted, former paragraphs (b) and (c) amended and redesignated as paragraphs (c) and (d) November 17, 2003 to be effective January 1, 2004.



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### **RPC 1.13 Organization as the Client**

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of

the organization as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonable believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. If the organization's consent to the dual representation is required by RPC 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

(f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Note: Adopted September 10, 1984 to be effective immediately; amended June 28, 1996 to be effective September 1, 1996.



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## RPC 1.14 Client Under a Disability

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.



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### **RPC 1.15 Safekeeping Property**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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### **RPC 1.16 Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. No lawyer shall assert a common law retaining lien.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b), (c), and (d) amended November 17, 2003 to be effective January 1, 2004; paragraph (d) amended March 25, 2013 to be effective April 1, 2013.



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## **RPC 1.17 Sale of Law Practice**

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law in this jurisdiction.
- (b) The entire practice is sold to one or more lawyers or law firms.

(c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.

(1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.

(2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

(3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the New Jersey Law Journal and the New Jersey Lawyer at least thirty days in advance of the effective date of the transfer.

(d) The fees charged to clients shall not be increased by reason of the sale of the practice.

(e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.

(f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

Note: Adopted October 16, 1992, to be effective immediately; paragraph (f) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended November 17, 2003 to be effective January 1, 2004.



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## RPC 1.18 Prospective Client

(a) A lawyer who has had communications in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.

(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).

(c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.

(d) A person who communicates with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," and if no client-lawyer relationship is formed, is a "former prospective client."

Note: Adopted November 17, 2003 to be effective January 1, 2004; paragraphs (a) and (d) amended, and Official Comment adopted August 1, 2016 to be effective September 1, 2016.

### Official Comment (August 1, 2016)

A person who communicates with a lawyer to disqualify that lawyer is not considered a prospective client. For example, an uninvited electronic communication is not, without more, considered to be a consultation with a prospective client.

 R.P.C.

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## RPC 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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R.P.C.	2
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## RPC 2.2 (Reserved)

Note: RPC 2.2 ("Intermediary") adopted July 12, 1984 to be effective September 10, 1984; caption and rule deleted November 17, 2003 effective January 1, 2004.





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- Rules of Professional Conduct
- RPC 2.3 Evaluation for Use by Third Persons

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N.J. Attorney Ethics	8
R.P.C.	1
N.J. Advisory Comm. Op.	1

### RPC 2.3 Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless:

(1) the lawyer describes the conditions of the evaluation to the client, in writing, including disclosure of information otherwise protected by RPC 1.6;

(2) the lawyer consults with the client; and

(3) the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.

(d) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended and redesignated as paragraphs (a) and (b), former paragraph (b) redesignated as paragraph (d), and paragraph (c) amended November 17, 2003 to be effective January 1, 2004.



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- Rules of Professional Conduct
- RPC 2.4 Lawyer Serving as Third-Party Neutral

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N.J. Attorney Ethics	4
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## **RPC 2.4 Lawyer Serving as Third-Party Neutral**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform the parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Note: Adopted November 17, 2003 to be effective January 1, 2004.



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- Rules of Professional Conduct
  - RPC 3.1 Meritorious Claims and Contentions

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N.J. Attorney Ethics	44
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N.J. Federal Practice Rules - Annotated	2
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### RPC 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that 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, or the establishment of new 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.

Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.



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- Rules of Professional Conduct
- RPC 3.2 Expediting Litigation

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N.J. Evidence Rules - Annotated	1
N.J. Federal Practice Rules - Annotated	3
N.J.A.C. General	1
R.P.C.	1
N.J. Advisory Comm. Op.	1

### **RPC 3.2 Expediting Litigation**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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- Rules of Professional Conduct
- RPC 3.3 Candor Toward the Tribunal

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N.J. Appellate Practice	19
N.J. Attorney Ethics	183
N.J. Federal Practice Rules - Annotated	7
N.J. Municipal Court	2
N.J.A.C. General	1
R.P.C.	2
N.J. Advisory Comm. Op.	28

### **RPC 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

(3) 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;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

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- Rules of Professional Conduct
- RPC 3.4 Fairness to Opposing Party and Counsel

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Cases - N.J. Super. (Superior Court)	39
N.J. Attorney Ethics	84
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N.J. Federal Practice Rules - Annotated	3
N.J. Municipal Court	1
N.J.A.C. General	1
R.P.C.	2
N.J. Advisory Comm. Op.	12

### RPC 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990.



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- Rules of Professional Conduct
- RPC 3.5 Impartiality and Decorum of the Tribunal

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N.J.A.C. General	<u>1</u>
R.P.C.	<u>2</u>
N.J. Advisory Comm. Op.	<u>3</u>

### **RPC 3.5 Impartiality and Decorum of the Tribunal**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law;

(c) engage in conduct intended to disrupt a tribunal; or

(d) contact or have discussions with a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral (hereinafter "judge") about the judge's post-retirement employment while the lawyer (or a law firm with or for whom the lawyer is a partner, associate, counsel, or contractor) is involved in a pending matter in which the judge is participating personally and substantially.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b) and (c) amended and new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.





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- Rules of Professional Conduct
- RPC 3.6 Trial Publicity

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N.J. Federal Practice Rules - Annotated	6
N.J.A.C. General	1
R.P.C.	2
N.J. Advisory Comm. Op.	20

### RPC 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(1) amended October 1, 1992, to be effective immediately; paragraph (a) amended, paragraph (b) deleted and restated in Official Comment, paragraph (c) amended and redesignated as paragraph (b), and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.

### **Official Comment by Supreme Court (November 17, 2003)**

A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.



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- Rules of Professional Conduct
- RPC 3.7 Lawyer as Witness

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N.J. Attorney Ethics	65
N.J. Evidence Rules - Annotated	2
N.J. Federal Practice Rules - Annotated	24
R.P.C.	1
N.J. Advisory Comm. Op.	8

### **RPC 3.7 Lawyer as Witness**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;  
or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

- Rules of Professional Conduct
- RPC 3.8 Special Responsibilities of a Prosecutor

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Cases - N.J. (Suprema Court)	9
Cases - N.J. Super. (Superior Court)	17
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N.J. Advisory Comm. Op.	32
N.J. Advertising Comm. Op.	3
N.J. Unauth. Pract. Comm. Op.	1

### RPC 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (c) and (d) amended and new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.

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- Rules of Professional Conduct
  - RPC 3.9 Advocate in Nonadjudicative Proceedings

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N.J. Attorney Ethics	<u>23</u>
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### **RPC 3.9 Advocate in Nonadjudicative Proceedings**

A lawyer representing a client before a legislative body or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a) through (d), RPC 3.4(a) through (g), and RPC 3.5(a) through (c).

Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.



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- Rules of Professional Conduct
- RPC 4.1 Truthfulness in Statements to Others

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Cases - N.J. Super. (Superior Court)	5
N.J. Attorney Ethics	49
N.J.A.C. General	1
R.P.C.	1
N.J. Advisory Comm. Op.	10

### **RPC 4.1 Truthfulness in Statements to Others**

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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- Rules of Professional Conduct
- RPC 4.2 Communication with Person Represented by Counsel

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N.J. Advisory Comm. Op.	36
N.J. Advertising Comm. Op.	1

## RPC 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counselling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996; amended and official comment added November 17, 2003 to be effective January 1, 2004; additional official comment added July 15, 2024 to be effective September 1, 2024.

### Official Comment by Supreme Court (November 17, 2003)

Concerning organizations, RPC 4.2 addresses the issue of who is represented under the rule by precluding a lawyer from communicating with members of the organization's litigation control group. The term "litigation control group" is not intended to limit application of the rule to matters in litigation. As the Report of the Special Committee on RPC 4.2 states, "... the 'matter' has been defined as a 'matter whether or not in litigation.'" The primary determinant of membership in the litigation control group is the person's role in determining the organization's legal position. See *Michaels v. Woodland*, 988 F. Supp. 468, 472 (D.N.J. 1997).

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. See *State v. Bisaccia*, 319 N.J. Super. 1, 22-23 (App. Div. 1999). Concerning communication with governmental officials, the New Jersey Supreme Court Commission on the Rules of Professional Conduct agrees with the American Bar Association's Commission comments, which state:



Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

### **Official Comment by Supreme Court (July 15, 2024)**

A lawyer shall not engage in a prohibited communication through the acts of another. See RPC 8.4(a) (a lawyer may not violate any of the ethics rules "through the acts of another").

Communications that are intended to gain access to non-public social media postings of a represented party fall within the prohibition of this Rule.



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- Rules of Professional Conduct
- RPC 4.3 Dealing with Unrepresented Person; Employee of Organization

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N.J. Federal Practice Rules - Annotated	4
N.J. Products Liability & Toxic Torts Law	1
R.P.C.	2
N.J. Advisory Comm. Op.	3

### **RPC 4.3 Dealing with Unrepresented Person; Employee of Organization**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

Note: Adopted September 10, 1984 to be effective immediately; amended June 28, 1996 to be effective September 1, 1996.



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- Rules of Professional Conduct
- RPC 4.4 Respect for Rights of Third Persons

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Cases - N.J. Super. (Superior Court)	7
N.J. Attorney Ethics	28
N.J. Federal Practice Rules - Annotated	2
R.P.C.	2
N.J. Advisory Comm. Op.	4

## RPC 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.

A lawyer who receives a document or electronic information that contains privileged lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information (2) return the document to the other lawyer and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text redesignated as paragraph (a) and new paragraph (b) adopted November 17, 2003 to be effective January 1, 2004; paragraph (b) amended and Official Comment adopted August 1, 2016 to be effective September 1, 2016.

### Official Comment (August 1, 2016)

Lawyers should be aware of the presence of metadata in electronic documents. "Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications.

A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic "mining" software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simple computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata.

A document will not be considered "wrongfully obtained" if it was obtained for the purposes of encouraging, participating in, cooperating with, or conducting an actual or potential law enforcement, regulatory, or other governmental investigation. Government lawyers, namely, lawyers at the offices of the Attorney General, County Prosecutors, and United States Attorney, who have lawfully received materials that could be considered to be inadvertently sent or wrongfully obtained under this Rule are not subject to the notification and return requirements when such requirements could impair the legitimate interests of law enforcement. These specified government lawyers may also review and use such materials to the extent permitted by the applicable substantive law, including the law of privileges.



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- Rules of Professional Conduct
- RPC 5.1 Responsibilities of Partners, Supervisory Lawyers, and Law Firms

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### **RPC 5.1 Responsibilities of Partners, Supervisory Lawyers, and Law Firms**

(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers 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.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or ratifies the conduct involved; or

(2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate or holds some other comparable status with the firm.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended November 17, 2003 to be effective January 1, 2004; new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.



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## **RPC 5.2 Responsibilities of a Subordinate Lawyer**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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N.J. Advisory Comm. Op.	8
N.J. Unauth. Pract. Comm. Op.	10

### **RPC 5.3 Responsibilities Regarding Nonlawyer Assistance**

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

(a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization 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 ratifies the conduct involved;

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; caption amended and Official Comment adopted August 1, 2016 to be effective September 1, 2016.

#### **Official Comment (August 1, 2016)**

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is

responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

### Nonlawyers Within the Firm

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

### Nonlawyers Outside the Firm

A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. 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. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdiction in which the services will be performed, particularly with regard to confidentiality. 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.

Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer should reach an agreement in writing with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.





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### **RPC 5.4 Professional Independence of a Lawyer Except as otherwise provided by the Rules of Court:**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) lawyers or law firms who purchase a practice from the estate of a deceased lawyer, or from any person acting in a representative capacity for a disabled or disappeared lawyer, may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed upon price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation, association, or limited liability entity authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time

during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a)(2) amended and paragraph (a)(3) adopted October 16, 1992, to be effective immediately; paragraph (d) amended July 10, 1998, to be effective September 1, 1998; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

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N.J. Unauth. Pract. Comm. Op.	85

## RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;

(4) not hold himself or herself out as being admitted to practice in this jurisdiction;

(5) comply with R. 1:21-1(a)(1); and

(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, former text designated as paragraph (a), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; subparagraphs (b)(3)(ii) and (b)(3)(iii) amended, former subparagraph (b)(3)(iv) redesignated as subparagraph (b)(3)(v) and amended, new subparagraph (b)(3)(iv) adopted, and paragraph (c) and subparagraphs (c)(3) and (c)(6) amended July 23, 2010 to be effective September 1, 2010; subparagraph (b)(3)(iv) amended July 19, 2012 to be effective September 4, 2012; subparagraph (c)(5) amended July 9, 2013 to be effective September 1, 2013.



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## RPC 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

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N.J. Attorney Ethics	2
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N.J. Advisory Comm. Op.	2

## **RPC 6.1 Voluntary Public Interest Legal Service**

Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and text amended November 17, 2003 to be effective January 1, 2004.



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- Rules of Professional Conduct
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## RPC 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

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### **RPC 6.3 Membership in Legal Services Organization**

A lawyer may serve as a director, officer or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if:

(a) the organization complies with RPC 5.4 concerning the professional independence of its legal staff; and

(b) when the interests of a client of the lawyer could be affected, participation is consistent with the lawyer's obligations under RPC 1.7 and the lawyer takes no part in any decision by the organization that could have a material adverse effect on the interest of a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.





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## **RPC 6.4 Law Reform Activities Affecting Client Interests**

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client, except that when the organization is also a legal services organization, RPC 6.3 shall apply.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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## RPC 6.5 Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to RPC 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to RPC 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by RPC 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), RPC 1.10 is inapplicable to a representation governed by this RPC.

Note: Adopted November 17, 2003 to be effective January 1, 2004.



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- RPC 7.1 Communications Concerning a Lawyer's Service

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N.J. Advertising Comm. Op.	97
N.J. Unauth. Pract. Comm. Op.	2

### **RPC 7.1 Communications Concerning a Lawyer's Service**

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or

(4) relates to legal fees other than:

(i) a statement of the fee for an initial consultation;

(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive.

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (b) added June 26, 1987, to be effective July 1, 1987; paragraph (a) amended June 29, 1990, to be effective September 4, 1990; paragraph (b) amended January 5, 2009 to be effective immediately; paragraph (a)(3) amended and Official Comment adopted November 2, 2009 to be effective immediately.

### **Official Comment by Supreme Court (November 2, 2009)**

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

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N.J. Advisory Comm. Op.	27
N.J. Advertising Comm. Op.	27
N.J. Unauth. Pract. Comm. Op.	8

## RPC 7.2 Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may communicate information regarding the lawyer's services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication.

(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a) amended December 10, 1986, to be effective December 10, 1986; paragraph (c) amended October 16, 1992, to be effective immediately; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; paragraph (b) amended July 27, 2018, to be effective September 1, 2018; paragraph (a) amended July 30, 2021 to be effective September 1, 2021.

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R.P.C.	1
N.J. Advisory Comm. Op.	51
N.J. Advertising Comm. Op.	63
N.J. Unauth. Pract. Comm. Op.	17

### **RPC 7.3 Personal Contact with Prospective Clients**

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided that the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient; The envelope shall contain nothing other than the lawyer's name, firm, return address and "ADVERTISEMENT" prominently displayed; and

(ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and

(iii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iv) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 970, Trenton, New Jersey 08625-0970. The name and address of the attorney responsible for the content of the letter shall be included in the notice.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if:

(1) the promotional activity involves use of a statement or claim that is false or misleading within the meaning of RPC 7.1; or

(2) the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by RPC 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school.

(ii) operated or sponsored by a bona fide nonprofit community organization.

(iii) operated or sponsored by a governmental agency.

(iv) operated, sponsored, or approved by a bar association.

(2) a military legal assistance office.

(3) a lawyer referral service operated, sponsored, or approved by a bar association.

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters when such organization bears ultimate liability of its member or beneficiary.

(ii) neither the lawyer, nor the lawyer's partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have received any financial or other benefit from such initiation or promotion.

(iii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(iv) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(v) any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own expense except where the organization's plan provides for assuming such expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.

(vi) the lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

(f) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(4) amended June 29, 1990, to be effective September 4, 1990; new paragraph (b)(4) adopted and former paragraph (b)(4) redesignated and amended as paragraph (b)(5) April 28, 1997, to be effective May 5, 1997; paragraph (b)(5) amended November 17, 2003 to be effective January 1, 2004; subparagraph (b)(5)(i) amended July 23, 2010 to



be effective September 1, 2010; paragraphs (b) and (b)(5) amended July 22, 2014, to be effective September 1, 2014; subparagraph (b)(5)(iv) amended April 30, 2018 to be effective immediately.



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- Rules of Professional Conduct
- RPC 7.4 Communication of Fields of Practice and Certification

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R.P.C.	1
N.J. Advisory Comm. Op.	2
N.J. Advertising Comm. Op.	12
N.J. Unauth. Pract. Comm. Op.	2

## RPC 7.4 Communication of Fields of Practice and Certification

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.

(d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; former rule amended and designated paragraph (a) and new paragraph (b) adopted July 15, 1993, to be effective September 1, 1993; paragraph (a) amended, paragraph (b) redesignated as paragraph (d), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004.

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- Rules of Professional Conduct
- RPC 7.5 Law Firm Names and Letterheads

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## RPC 7.5 Law Firm Names and Letterheads

(a) A lawyer shall not use a law firm name, letterhead, or other professional designation that violates RPC 7.1.

(b) A law firm practicing in more than one jurisdiction may use the same law firm name in New Jersey, provided the law firm name complies with this Rule. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the law firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a law firm name, or where the law firm name does not include the name of a lawyer in the firm or the name of a lawyer who has ceased to be associated with the firm through death or retirement, any advertisement, letterhead or other communication containing the law firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

(c) A law firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

(d)(1) Lawyers may state or imply that they practice in a partnership only if the persons designated in the law firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.

(2) When lawyers practice in an entity authorized by Rules 1:21-1A, 1:21-1B, or 1:21-1C, the persons designated in the law firm name must be shareholders, members, or partners of the entity.

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language. Use of a trade name shall be permissible so long as it is not

misleading, comparative, or suggestive of the ability to obtain results. Where the law firm trade name does not include the name of a lawyer in the firm or the name of a lawyer who has ceased to be associated with the firm through death or retirement, any advertisement, letterhead or other communication containing the law firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

(f) In any case in which a legal assistance organization referred to in R. 1:21-1(e) practices under a trade name, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraphs (a) and (d) amended, paragraph (e) amended and redesignated as paragraph (f) and new paragraph (e) added June 29, 1990, to be effective September 4, 1990; paragraph (a) amended January 5, 2009 to be effective immediately; paragraph (e) amended, and Official Comment adopted July 27, 2015 to be effective September 1, 2015; caption and paragraphs (a), (b), (c), (d), (e), and (f) amended September 9, 2020 to be effective immediately; paragraph (d) amended and Official Comment to paragraph (d) adopted April 5, 2022 to be effective immediately.

#### **Official Comment to RPC 7.5(e) by Supreme Court (July 27, 2015)**

By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Smith & Jones Millburn Personal Injury Lawyers," provided that the law firm's primary location is in Millburn and its primary practice area is tax law or personal injury law, respectively. "John Smith Criminal Defense and Municipal Law" would also be permissible. However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results. Similarly, "Budget Lawyer John Smith, Esq." is not permissible as it is comparative and likely to be misleading; "Million Dollar Personal Injury Lawyer John Smith, Esq." is not permissible as it suggests the ability to achieve results; and "Tough As Nails Lawyer John Smith, Esq." is not permissible as it purports to describe the lawyer and does not describe the nature of the firm's legal practice.

#### **Official Comment to RPC 7.5(d) by Supreme Court (April 5, 2022)**

The name of the partnership or entity may reflect the names of lawyers who were principal partners, members, or shareholders in a predecessor firm who are deceased or retired.



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- Rules of Professional Conduct
- RPC 8.1 Bar Admission and Disciplinary Matters

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### **RPC 8.1 Bar Admission and Disciplinary Matters**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure or information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

 R.P.C.

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- Rules of Professional Conduct
- RPC 8.2 Judicial and Legal Officials

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## RPC 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984.



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- Rules of Professional Conduct
- RPC 8.3 Reporting Professional Misconduct

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N.J. Attorney Ethics	19
N.J. Federal Practice Rules - Annotated	1
R.P.C.	1
N.J. Advisory Comm. Op.	5

### **RPC 8.3 Reporting Professional Misconduct**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.

(d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irreparable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (d) adopted October 5, 1993, to be effective immediately; paragraphs (a) and (b) amended November 17, 2003 to be effective January 1, 2004.



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- RPC 8.4 Misconduct

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N.J. Advisory Comm. Op.	<u>57</u>
N.J. Advertising Comm. Op.	<u>7</u>
N.J. Unauth. Pract. Comm. Op.	<u>5</u>

## RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

### **Official Comment by Supreme Court (May 3, 1994)**

This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for



example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. In *re Vincenti*, 114 N.J. 275 (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., *In re Vincenti*, 114 N.J. 275 (1989).





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- Rules of Professional Conduct
- RPC 8.5 Disciplinary Authority; Choice of Law

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## RPC 8.5 Disciplinary Authority; Choice of Law


**(a) Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

**(b) Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, text amended and redesignated as paragraph (a) with caption added, new paragraph (b) with caption adopted November 17, 2003 to be effective January 1, 2004; paragraph (b) amended August 1, 2016 to be effective September 1, 2016.

 **N.J. Attorney Advertising Guidelines**


- N.J. Attorney Advertising Guidelines
- Attorney Advertising Guideline 1

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<b>NON-SUBSCRIBED TREATISES</b>	
N.J. Attorney Ethics	<u>5</u>
N.J. Advisory Comm. Op.	<u>1</u>
N.J. Advertising Comm. Op.	<u>2</u>

## **Attorney Advertising Guideline 1**

In any advertisement by an attorney or law firm, the advertisement shall include contact information for the attorney or law firm. The contact information for the attorney or law firm may be any of the following: (a) street address of the regular place of business, (b) mailing address, (c) telephone number, (d) fax number, (e) email address, or (f) website URL.

Note: Adopted June 29, 1990, to be effective September 4, 1990; amended August 14, 2013 to be effective October 1, 2013; amended September 10, 2019 to be effective immediately.

 **N.J. Attorney Advertising Guidelines**

- N.J. Attorney Advertising Guidelines
- Attorney Advertising Guideline 2

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SUBSCRIBED TREATISES	
N.J. Court Rules - Annotated	1
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N.J. Attorney Ethics	7
N.J. Advertising Comm. Op.	1

## Attorney Advertising Guideline 2

(a) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) at the top of the first page of text of a solicitation letter must be at least two font sizes larger than the largest size used in the advertising text in the body of the letter.

(b) The font size of notices required by RPC 7.3(b)(5)(iii) and iv) must be no smaller than the font size generally used in the advertisement.

(c) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) on the face of the outside of the envelope must be at least one font size larger than the largest size font used on the envelope. If any words on the outside of the envelope are in bold, the word "ADVERTISEMENT" also be in bold. The envelope shall contain no language other than the lawyer's name firm, and address; the word "ADVERTISEMENT"; and the recipient's name and address.

Note: Adopted March 2, 2005 to be effective immediately; paragraphs (a) and (c) amended August 14, 2013 to be effective October 1, 2013; paragraphs (a), (b), and (c) amended February 10, 2015, to be effective March 1, 2015.

**Print** N.J. Attorney Advertising Guidelines

- N.J. Attorney Advertising Guidelines
- Attorney Advertising Guideline 3

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**Attorney Advertising Guideline 3****Attorney Advertisements: Use of Quotations or Excerpts From Judicial Opinions about the Legal Abilities of an Attorney**

An attorney or law may include, on a website or other advertisement, an accurate quotation or excerpt from a court opinion (oral or written) about the attorney's abilities or legal services. The following disclaimer must be prominently displayed in proximity to such quotation or excerpt: "This comment, made by a judge in a particular case, is not an endorsement of my legal skill or ability."

**Official Comment to Guideline 3 by the Supreme Court (October 15, 2014)**

It is the responsibility of the attorney to confirm the accuracy of the quotation or excerpt. Court opinions or official transcripts of proceedings are the proper source to confirm statements posted on a website or used in some other form of advertising.

Note: Guideline and Official Comment adopted May 15, 2012 to be effective June 1, 2012; revised Guideline and Official Comment adopted October 15, 2014 to be effective immediately.

**Print** N.J. Attorney Advertising Guidelines

- N.J. Attorney Advertising Guidelines
- Attorney Advertising Guideline 4

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Database	Hits
<b>SUBSCRIBED TREATISES</b>	
N.J. Court Rules - Annotated	1

### **Attorney Advertising Guideline 4**

#### **Legal Assistance Organizations and Retention of Posted Website Materials.**

Rule of Professional Conduct 7.2(b), requiring lawyers to "capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years," does not apply to legal assistance organizations that are approved pursuant to Rule 1:21-11(b). However, legal assistance organizations should make reasonable efforts to maintain a backup of material on their websites.

Note: Adopted February 28, 2023 to be effective immediately.