



# 2024 WV State Bar Regional Meeting



Office of Lawyer Disciplinary Counsel  
[www.wvodc.org](http://www.wvodc.org)

# Artificial Intelligence

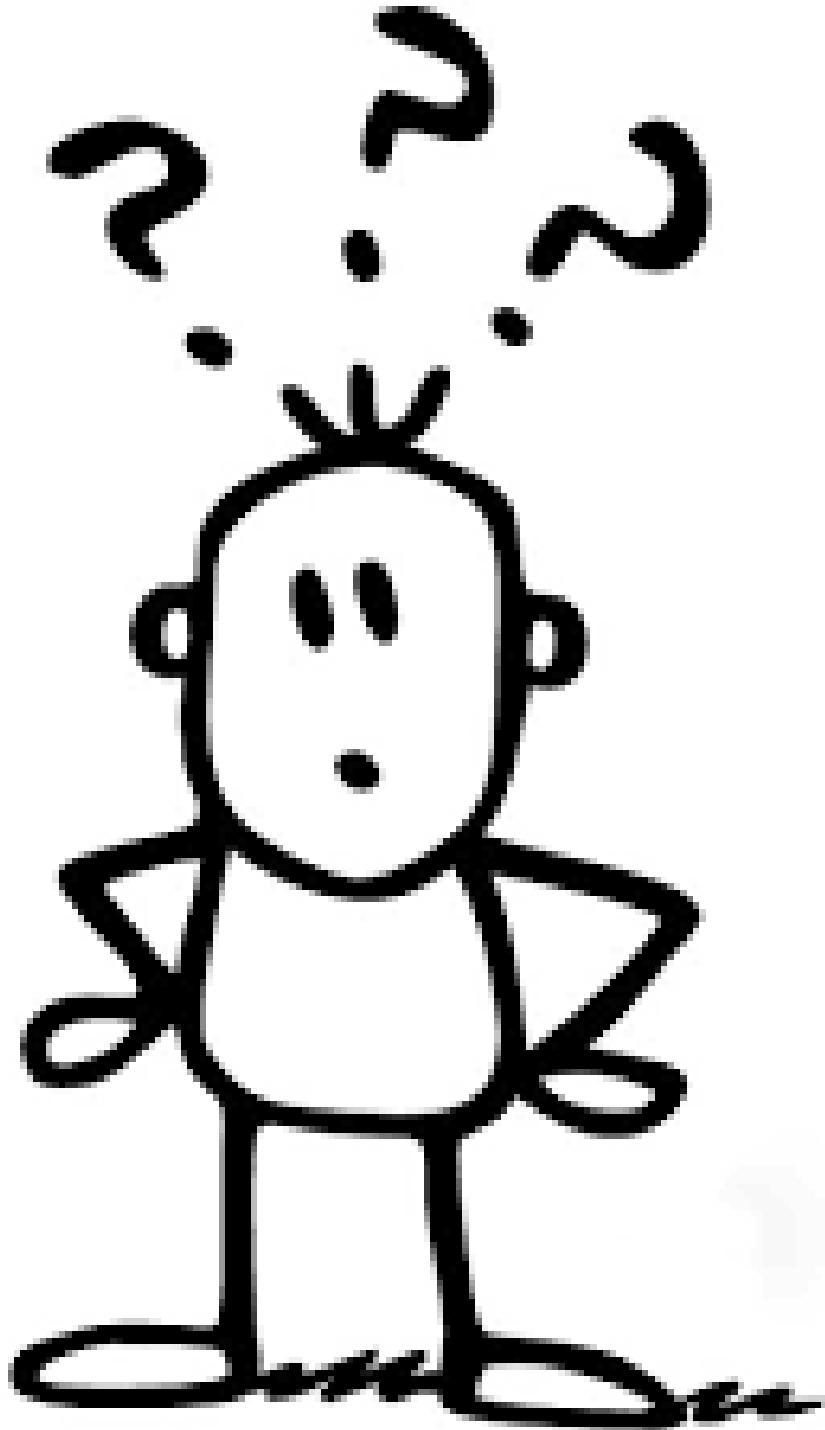


What is artificial intelligence????



According to [15 U.S. Code § 9401](#) AI is defined as “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.” The notes in [10 U.S. Code § 2358](#) define AI as:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.
5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.



Artificial intelligence is technology that enables computers and digital devices to learn, read, write, create and analyze.

# Types of Artificial Intelligence

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Nongenerative v. Generative



# ARTIFICIAL INTELLIGENCE

- **Non-generative artificial intelligence** models perform computations based on input data. Non-generative AI, also known as discriminative AI or analytical AI, focus on tasks such as classification, prediction, and decision-making. This type of AI doesn't generate any new content. Instead, it automates tasks while learning and adapting.

Examples: **Grammar and Spell Checker**: detect and correct grammatical errors and spelling mistakes in written text; **Fraud detection**: Detecting fraudulent transactions in financial systems; **Spam filtering**: Identifying and filtering out spam emails; **Recommendation systems**: Netflix uses non-generative AI to suggest personalized content or products based on a user's preferences and past behavior.

- **Generative artificial intelligence** is artificial intelligence capable of generating text, images, videos, or other data using generative models, often in response to prompts. Generative AI models LEARN the patterns and structure of their input training data and then generate new data that has similar characteristics. AI models, there are text-to-text generators, text-to-image generators, image-to-image generators, and even image-to-text generators.

Examples: **Chat GPT**; **Lex Machina**; **Artificial Intelligence Virtual Artist** is a music composer that can create original pieces of music in different styles, such as classical, pop, and rock; **Chatbots** and other conversational agents that can interact with users in natural language; **3D Modeling**; **Video and Image** creation and editing.

Why do  
you  
care....





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The primary areas where AI is being applied in the practice of law include the following categories: review of documents for discoverable or otherwise relevant information, generally referred to as technology-assisted review (TAR); legal research through automated searches of a universe of case law, regulations, and statutes; contract and legal document analysis; generative drafting of legal memoranda and case briefs through the use of large language models; and proofreading, error correction and document organization.



LEGAL ETHICS  
OPINION 24-01  
ARTIFICIAL  
INTELLIGENCE



There is nothing in the Rules of Professional Conduct that *per se* prohibits a lawyer from using AI as a tool in a law practice.

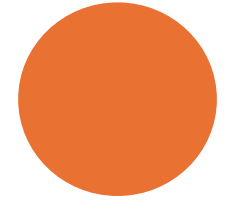
However, lawyers are cautioned to check for jurisdiction specific rules or standing orders to determine whether they are prohibited from using generative AI to prepare pleadings filed in that court or otherwise are required to disclose the use of generative AI and/or to certify human verification of the pleadings filed in the court.

Lawyers use non-generative AI without even realizing it, such as in legal research tools or with spelling and grammar tools associated with word processing programs. Lawyers are increasingly using forms of AI in their practices to improve the efficiency and accuracy of legal services offered to their clients. However, to remain compliant with their ethical obligations, lawyers must not only be aware of AI's ability to deliver efficient legal services to clients, but they must also take care to exercise independent judgment, communicate with clients, maintain client confidentiality, ensure fees and costs are reasonable, comply with advertising regulations, and supervise the work performed by AI. The Rules of Professional Conduct were drafted with the intent of being adaptable to modern times and its technologies, and AI is no different.

# KEY POINTS



Generative AI programs may make a lawyer's work more efficient, but this increase in efficiency must not result in double billing for services or falsely inflated claims of time. (See Rule 1.5, 8.4(c) and 8.4(d) of the Rules of Professional Conduct.)



A lawyer should be careful when using generative AI chatbot for intake purposes as the lawyer will be responsible in the event the chatbot provides misleading information to prospective clients (See Rule 1.18 of the Rules of Professional Conduct) or otherwise communicates in a manner that is violative of the Rules of Professional Conduct (See *generally* Rule 4.2 and Rule 4.3 of the Rules of Professional Conduct.)



**DO.  
YOUR.  
JOB.**

## Duty of Competence

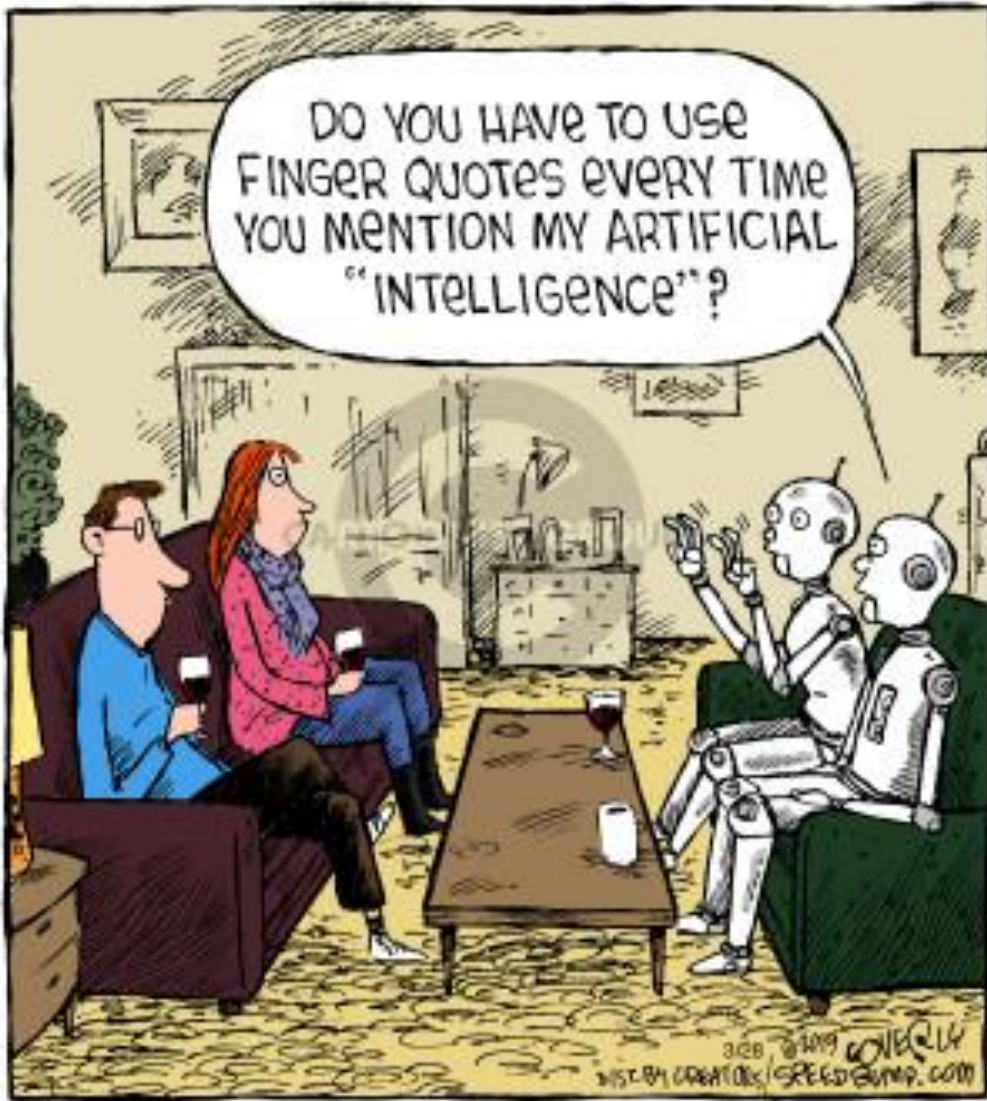
Rule 1.1 of the Rules of Professional Conduct provides that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

In 2015, our Supreme Court adopted Comment 8 to Rule 1.1 which states that “[t]o maintain the requisite knowledge and skill, lawyers must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ...”

Reading Rule 1.1 and Comment 8 together indicates that lawyers have an ethical obligation to keep up to date on the technology used in the legal field to provide competent representation to clients.

Lawyers may incorporate AI tools into their practices but must do so without compromising the competent representation of their clients.

If the lawyers choose to use AI programs, it should be to supplement, not replace their own legal reasoning.



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## Duty of Diligence

Rule 1.3 requires lawyers to act with reasonable diligence and promptness in representing a client. To fulfil the lawyer's duty of diligence, a lawyer's use of AI resources requires human input, human oversight, and when necessary, human intervention to correct mistakes.

AI resources utilized by a lawyer should be regularly monitored and assessed to minimize the risk of errors or biases that could compromise the quality of the lawyer's work product.

Lawyers are responsible for their work product and the legal advice they render, and this includes taking any corrective measures as needed from the errors that result from the use of AI.

## Duty to Communicate

Rule 1.4 governs a lawyer's duty to communicate with clients and requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." A lawyer's duty of communication under Rule 1.4 includes discussing with his or her client the decision to use generative AI in providing legal services.

Disclosures may be challenging to draft and navigate if the lawyer and the client do not have the same understanding of AI programs. Specifically, a lawyer needs to consult with a client prior to delegating certain tasks to a generative AI program or process, like a lawyer's responsibilities when outsourcing legal support services. A lawyer should obtain approval from the client before using generative AI, and this consent must be informed and should be confirmed in writing. The discussion should include the risks and limitations of the generative AI tool.

In certain circumstances, a lawyer's decision not to use AI also may need to be communicated to the client particularly, if using AI would benefit the client.







hey y'all

If you have embraced the use of artificial intelligence, you may want to consider an addendum to your standard engagement letter. Clients appreciate transparency.

You may use this opportunity to advise clients that AI tools may assist in legal tasks, such as data analysis, legal research, document review, and other supportive functions. You should consider informing the client that your use of AI will be supervised by you and is used in adherence with your ethical obligations, including your duty to maintain their confidentiality and diligence. In addition to adding this to your initial engagement letter, you may want to add it to your newsletter or client update communications to make existing clients aware.

## Duty of Confidentiality

Under Rule 1.6, lawyers owe their clients a duty of confidentiality and this duty specifically requires a lawyer affirmatively to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Lawyers using generative AI services (or any services on behalf of clients) should familiarize themselves with its terms of use and privacy policies before using the service. The use of some generative AI tools may require client confidences to be “shared” with third-party vendors and this use creates a risk that confidential information may be exposed.

Some generative AI models may store and use confidential information provided by lawyers in order to “teach” the model and/or it may be produced by the model to other parties as a result of similar searches. As a result, lawyers must take proper steps to ensure that their clients’ information is safeguarded. To minimize the risks of using generative AI that utilizes client information, a lawyer should discuss the confidentiality safeguards used by the providers.

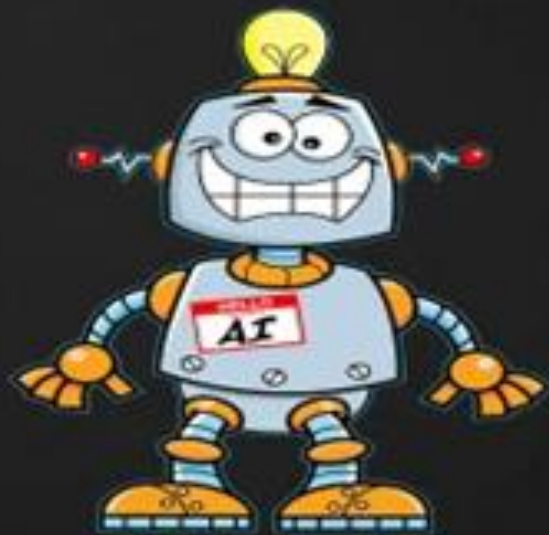


## **Duty to Supervise**

Under Rules 5.1 and 5.3, lawyers have an ethical obligation to supervise lawyers and nonlawyers who are aiding lawyers in the provision of legal services to ensure that their conduct complies with the Rules of Professional Conduct.

In 2015, our Court adopted changes to the Rules of Professional Conduct, one of which included changing the title of the Rule from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance.” Rule 5.3 encompasses nonlawyers and the lawyer’s attendant duty to supervise those nonlawyers --whether human or not. Under Rules 5.1 and 5.3, lawyers are obligated to supervise the work of the AI used in the provision of legal services and understand the technology well enough to ensure compliance with the lawyer’s ethical duties.

One of the biggest risks associated with a lawyer’s use of generative AI is overestimating the capabilities of the software or accepting the AI’s work product on its face as credible. Lawyers have a duty to make sure the work product produced by AI is accurate and complete. The failure to do so can lead to violations of the lawyer’s duties of competence (Rule 1.1), avoidance of frivolous claims and contentions (Rule 3.2), candor to the tribunal (Rule 3.3), and truthfulness to others (Rule 4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer’s client.



I don't lie...but, I may  
**HALLUCINATE**  
from time to time.

Generative AI can “hallucinate”—that is, generative AI can confidently convey incorrect or misleading results and can present false information as true.

Generative AI may also produce information that is subject to copyright law.

The use of generative AI in any capacity in the practice of law requires due diligence by the lawyer to avoid errors and potentially disastrous results. Lawyers should view AI at best as a secondary source and should never be relied upon as the primary source itself.

Lawyers still need to make final substantive decisions on the exact content of and language used after reviewing the suggestions from AI.

Steven A. Schwartz and Peter LoDuca faced sanctions in the Southern District of New York over a filing in a civil personal injury lawsuit against an airline. Schwartz used ChatGPT to help him find case law to bolster his client's lawsuit, but the bot completely fabricated the cases, unbeknownst to the attorney. He ultimately filed the legal brief citing the fictitious cases, prompting Judge Kevin Castel to haul him into court for a hearing on whether to sanction the firm.

The sanctions were ordered under Rule 11, to serve as a deterrent, rather than as punishment or compensation.

In addition to each paying a \$5,000 fine, the attorneys and their law firm, were ordered to notify each judge falsely identified as the author of the bogus case rulings about the sanction.

Discussing the potential harm of attributing fictional conduct to judges, Castel wrote that: "It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity."

In the aftermath of the highly publicized case involving Mr. Steven Schwartz, federal judges around the country have issued orders requiring litigants to disclose to the Court whether they have used generative AI to draft court filings.

Mata v. Avianca, Inc., 22-CV-1461, United States District Court Southern District of New York.

## **Duty of Candor to the Tribunal**

The use of generative AI outputs that contain misrepresentations of fact or law, or that provide fake citations, implicates the lawyers' duty to be candid with the tribunal and to the opposing party and counsel. This is especially true if the tribunal has adopted rules or procedures or has issued a standing order requiring the disclosure of the use of generative AI and/or the verification or other safeguards with respect to generative AI outputs.

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Your Honor, I would move for  
the admission of Exhibit A.

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Generative AI raises ethical concerns  
related to the creation of fake content,  
deepfakes, and misinformation.





# AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512

July 29, 2024

Generative Artificial Intelligence Tools

The Opinion references the following ABA Model Rules of Professional Conduct:

Competence (1.1). This obligates lawyers to provide competent representation to clients and requires they exercise the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Confidentiality of Information (1.6). Under this model rule, a lawyer using GAI must be cognizant of the duty to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent.

Communications (1.4). This addresses lawyers’ duty to communicate with their clients and builds on lawyers’ legal obligations as fiduciaries, which include “the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.”

Fees (1.5). If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the program, the lawyer may charge for that time as well as for the time necessary to review the resulting draft for accuracy and completeness. But the lawyer should not charge a client to learn about the tool.

# **AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

## **Formal Opinion 512**

“Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.”



West Virginia JIC Advisory Opinion 2023-22  
Issued October 13, 2023

Rule 1.2–  
Confidence in the  
Judiciary

Rule 2.1– Giving  
Precedence to  
the Duties of  
Judicial Office

Rule 2.2–  
Impartiality and  
Fairness

Rule 2.4(B)–  
External  
Influences on  
Judicial Conduct

Rule 2.5(A)–  
Competence,  
Diligence, and  
Cooperation

Rule 2.7–  
Responsibility to  
Decide

# KEY POINTS



# WHAT DOES THE USE OF AI MEAN FOR JUDGES?

Judges have a duty to remain competent in technology, including AI. The duty is ongoing.

A judge may use AI for research purposes. Still ultimately responsible for the accuracy.

A judge **SHOULD NEVER** use AI to reach a conclusion on the outcome of a case.

A judge alone is responsible for determining the outcome of the proceedings.

A judge alone is responsible for the finished product.

“Gray area” revolves around the use of **GENERATIVE** AI to prepare an opinion and the judge is advised this use should be met with “extreme caution.”

There is a distinction made for the use of **NON-GENERATIVE** AI in the preparation of opinions and orders which is characterized as “perfectly reasonable.”

Concerns about confidentiality.



Michigan Judicial Ethics Opinion 115

Issued October 27, 2023

AI does not understand the world as humans do, and unless instructed otherwise, its results may reflect an ignorance of norms or case law precedent.

Legal knowledge, skills, thoroughness, and preparation are required for judicial officers to perform their duties. This includes knowing the benefits and risks associated with the technology that judicial officers and their staff use daily, as well as the technology used by lawyers who come before the bench.

As the legal community has seen, there are times when AI may be used improperly, i.e., when a lawyer submits AI-generated filings that are found to be incorrect.

Judicial officers have expressed the need to parse cases and rules to ensure that filed pleadings are accurate for them to rely on and to ensure their judgments and orders are issued based on truthful pleadings and arguments.

To ensure this, some courts have issued rulings or orders regarding the use of AI, such as requiring attorney review, placing the responsibility on lawyers to notify the court when using AI, and provide confirmation of the accuracy of the work done by the AI tool.

Other judges have gone further and required that attorneys certify that confidential information was not disseminated to an AI tool and that lawyers outline each section that uses generative AI.

Judges must not only understand the legal, regulatory, ethical, and access challenges associated with AI, but they will need to continually evaluate how they or parties before them are using AI technology tools in their own docket.



U.S. District Judge Brantley Starr of the Northern District of Texas was the first federal judge to issue a standing order that required lawyers to certify they did not sue artificial intelligence to draft their filings without a human checking their accuracy. The Judge reasoned that the AI platforms in their current states are prone to hallucinations and bias.

The judge also said that while attorneys swear an oath to uphold the law and represent their clients, the AI platforms do not.

"Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle," the Court notice said.

#### Sample Certification:

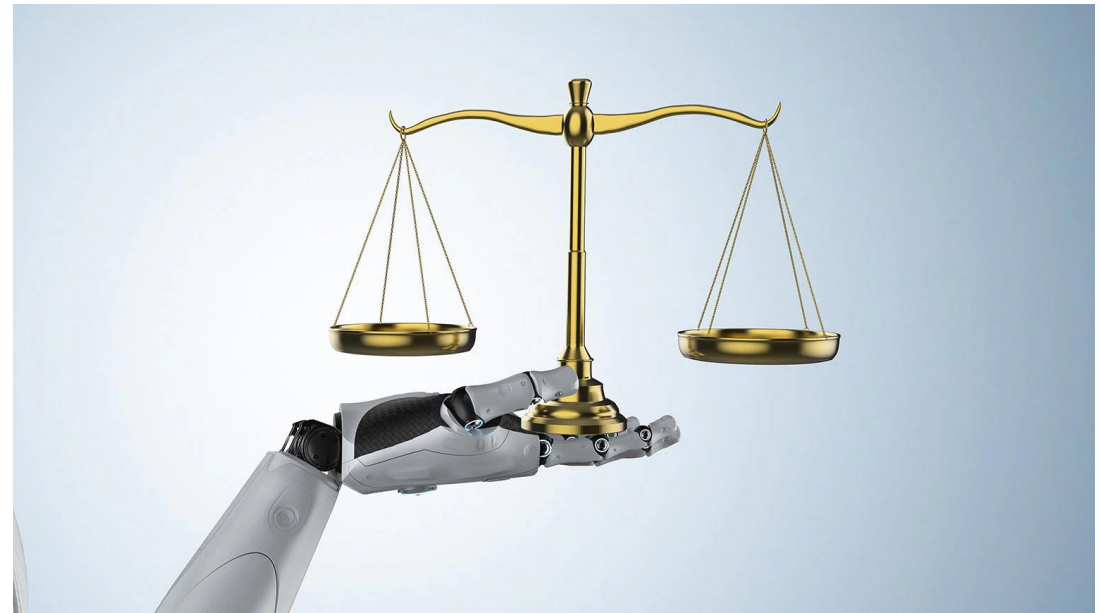
I, the undersigned attorney, hereby certify that I have read and will comply with all judge-specific requirements for Judge Brantley Starr, United States District Judge for the Northern District of Texas. I further certify that no portion of any filing in this case will be drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence—including quotations, citations, paraphrased assertions, and legal analysis—will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court. I understand that any attorney who signs any filing in this case will be held responsible for the contents thereof according to applicable rules of attorney discipline, regardless of whether generative artificial intelligence drafted any portion of that filing.



- AI can be potentially used for the public good. AI offers the potential solutions to reduce the justice gap.
- It could make legal information readily available to people who lack access to a lawyer.
- It could simplify court forms and processes.
- Its utility will depend on its accuracy, its ability to preserve privacy and confidentiality, and its avoidance of biases.
- Access to justice and access to legal information are closely intertwined.

Technology such as AI can be used as a complement to a lawyer's work and while there is nothing inherently improper in using AI or generative AI, a lawyer's duties to their clients, the courts, and the profession under the Rules of Professional Conduct remain unaltered.

While AI can streamline time-consuming and mundane tasks, lawyers must still utilize their skills in conjunction with their individual professional and moral judgment and in short, continue to *be the lawyer*.

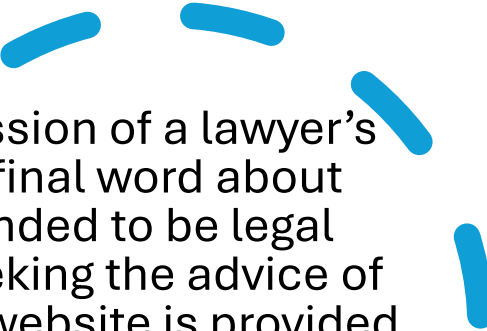




PHONE-A-FRIEND

## Informal Ethics Advice

And, when you have questions about your conduct....



This presentation has been a general discussion of a lawyer's ethical duties and is not intended to be the final word about these subjects. The presentation is not intended to be legal advice or intended to be a substitute for seeking the advice of counsel. The information contained in this website is provided only as general information which may or may not reflect the most current legal developments.

The Supreme Court has held that “lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith.” Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006).

Rules and regulations governing legal ethics may vary across jurisdictions, so please contact your State Bar or Office of Disciplinary Counsel for informal advice before your contemplated action.



# Disclaimer





Thank you and have a  
great day!

