



ALSTON & BIRD

The Ethical Use of AI in Litigation

Practical Guidance for In-House Teams Using AI Across the Litigation Lifecycle

Gillian H. Clow and Kaitlin H. Owen

January 27, 2026

© Alston & Bird LLP 2026

Presenters



Gillian H. Clow
Partner
Alston & Bird

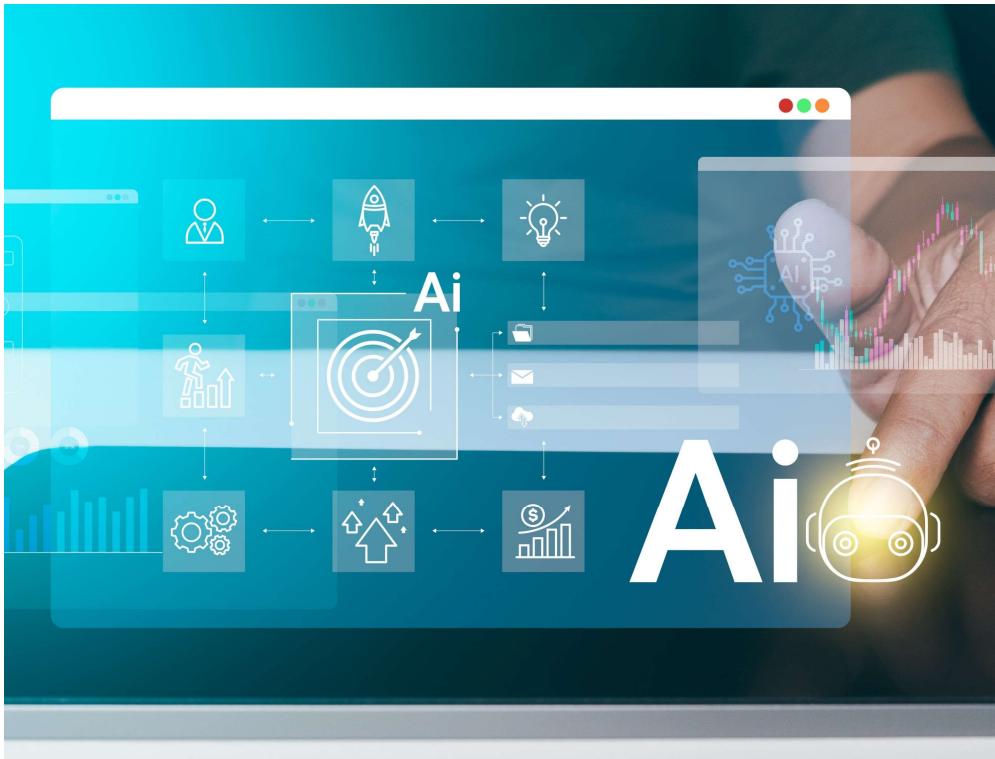


Kaitlin (Katie) H. Owen
Partner
Alston & Bird

Today's Agenda

- 01 What We Mean When We Say “AI”
- 02 How AI is Used in Litigation
- 03 The Current Risk Landscape
- 04 The Model Rules, CA State Bar Guidance, and Standing Orders
- 05 Cautionary Tales and Takeaways

Our Goals Today



- Help you to better supervise outside counsel.
- Provide guidance on the risk landscape so you can spot red flags.
- Give you concrete and practical guidance that you can use everyday.

What is “Artificial Intelligence”?

- “Artificial Intelligence” – term coined in 1956
- Practical working definition: AI is any technology that can perform tasks that previously required human intelligence by:
 - Receiving an input
 - Providing an output
 - Via a process that replicates or replaces human cognition.



The Litigation Lifecycle AI

■ **Written Work Product**

- Memoranda/Briefs, Pleadings, Correspondence (with clients and opposing counsel).

■ **Research**

- Natural-language search summaries, identifying similar cases, summarizing documents/pleadings, citation-checking.

■ **Discovery**

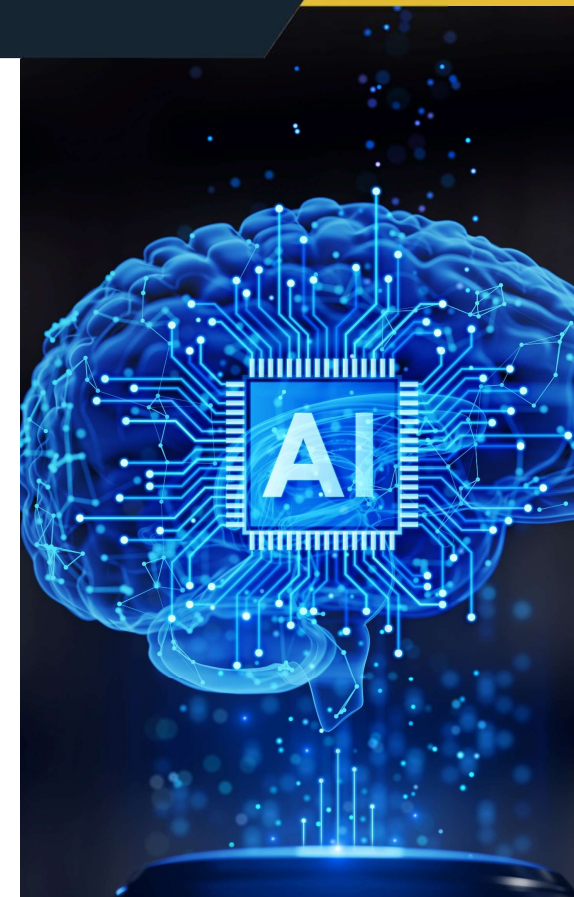
- Sort, tag, and identify key documents from large datasets, identify privileged documents, automate redactions, sort potentially relevant documents and bring them to the top of the review pile.

■ **Investigation**

- Deposition summaries, preparation of timelines/key themes.

■ **Expert Work & Witness Preparation**

- Prepare outlines/talking points; identify key themes or areas of weakness.



AI in Litigation: Risky Business?

- **Hallucinations**

- Non-existent authorities; wrong or made-up quotes; misapplied or misinterpreted holdings.

- **Confidentiality & Privilege**

- Prompt Leakage

- **Accuracy & Bias**

- Skewed data sets based on biases
- Opaque reasoning
- Reproductivity failure

- **Copyright/IP**

- Derivative work/content

- **Transparency/Disclosure**

- Judge or court-specific standing orders; Compliance with FRCP Rule 11(b).

ABA Formal Opinion 512: Generative Artificial Intelligence Tools



- Issued July 29, 2024.
- Attorneys must observe their **duty of competence** by undergoing requisite training before using any Gen AI tool on any client matter.
- **Protection of client confidential information** is paramount, and attorneys must take appropriate steps to avoid inadvertent disclosure of such information when using Gen AI tools.
- **Informed client consent** to use Gen AI tools involves intentional, forthright communication/discussion of the tools in question – not just boilerplate language in an engagement letter.

ABA Formal Opinion 512: Generative Artificial Intelligence Tools

Written informed client consent is required where Gen AI output will influence a significant decision in a representation.

Consult with IT and AI professionals where necessary to fully understand the Gen AI tools to be used.

Check standing orders to ensure compliance and candor to tribunals and courts in connection with the use of any Gen AI tool.

Managerial attorneys have **a duty to supervise subordinates** in the use of Gen AI tools and must establish effective measures to ensure subordinates are trained and comply with the rules of professional conduct.

Fees may only be charged for the actual time involved in obtaining and reviewing work product using a Gen AI tool.

Existing Applicable Rules

- **Fed. R. Civ. P. 11(b) and Rule 26(g)**: the “reasonable inquiry” requirement for court submissions and discovery requests/responses.
- **ABA Model Rule 1.1**: Duty of Competency.
- **ABA Model Rule 1.4**: Duty of Communication.
- **ABA Model Rule 1.5**: Duty to Charge Reasonable Fees.
- **ABA Model Rule 1.6**: Duty of Confidentiality.
- **ABA Model Rules 2.1, 3.1, 3.3 & 8.4**: Duties of Independence, Candor, Advancement of Meritorious Claims, and Honesty.
- **ABA Model Rules 5.1(b) & 5.3(b)**: Duty of Supervision.

California State Bar Guidance Duty of Confidentiality

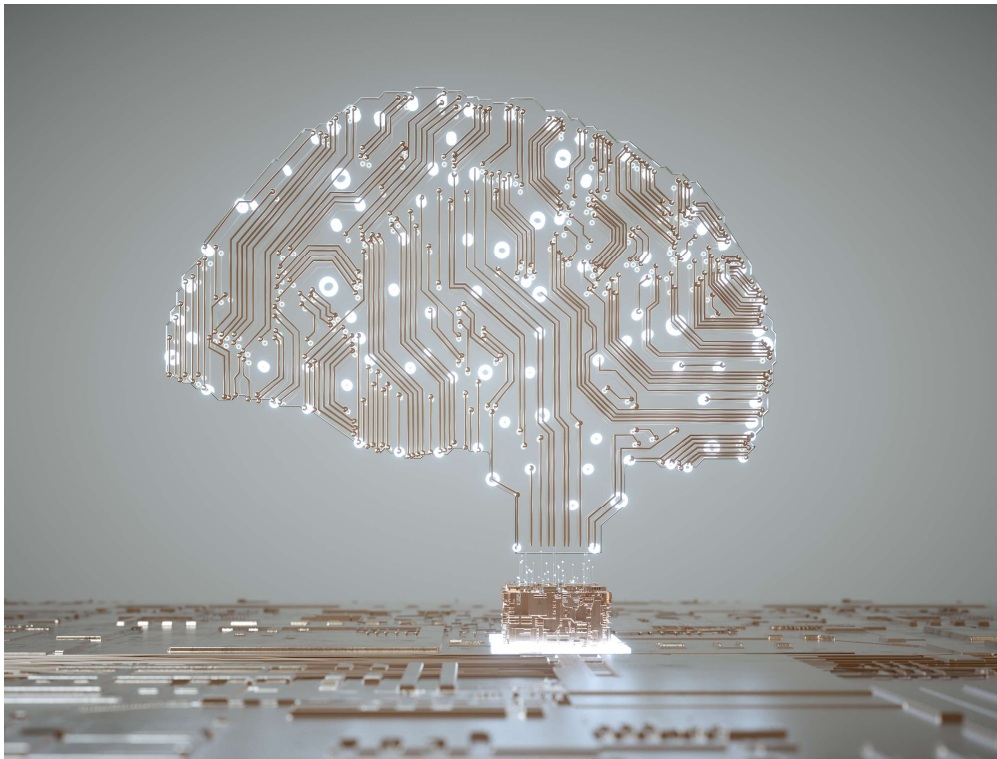
Bus. & Prof. Code, § 6068(e); Rule 1.6 and Rule 1.8.2

- Security protections to safeguard client communications.
- Anonymize client information.
- Consult with IT professionals/experts.
- Review Terms of Use/Privacy Policy.



California State Bar Guidance – cont'd

Duties of Competence and Diligence: Rule 1.1 and Rule 1.3



- Ensure competent use of the technology.
- Understand how the technology works, including any limitations.
- Cautions against overreliance on AI tools.
- AI-generated outputs must be scrutinized.
- A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times.

California State Bar Guidance – cont'd

Duty to Comply with the Law: Bus. & Prof. Code, § 6068(a); Rule 8.4 and Rule 1..2.1

- A lawyer must comply with the law.
- Cannot assist a client in violating any law when using generative AI tools.
- A lawyer should analyze relevant laws and regulations applicable to the attorney or the client.



California State Bar Guidance – cont'd

Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers: Rules 5.1 - 5.3



- Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI.
- Provide training on the ethical and practical aspects.
- A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's ethical obligations.

California State Bar Guidance – cont'd

Communication Regarding Generative AI Use: Rule 1.2 and Rule 1.4



- Communication obligations depend on the facts and circumstances.
- Disclosure to his/her client that they intend to use generative AI in the representation.
- Disclosure should include how the technology will be used, and any risks/benefits.
- Review any client instructions or guidelines that may restrict or limit the use of generative AI.

California State Bar Guidance – cont'd

Charging for Work Produced by Generative AI and Generative AI Costs: Bus. & Prof. Code, §§ 6147 – 6148; Rule 1.5

- Use generative AI to create work product more efficiently.
- May charge for actual time spent.
- Must not charge hourly fees for the time saved.
- Costs may be charged to the clients.
- A fee agreement should explain the basis for all fees and costs.



California State Bar Guidance – cont'd

Candor to the Tribunal; and Meritorious Claims and Contentions: Rule 3.1 and Rule 3.3



- A lawyer must review all generative AI outputs.
- Also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI to the court.

California State Bar Guidance – cont'd

Prohibition of Discrimination, Harassment, and Retaliation: Rule 8.4.1



Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI.



Lawyers should engage in continuous learning about AI biases and their implications in legal practice.



Firms should establish policies and mechanisms to identify, report, and address potential AI biases.

California State Bar Guidance – cont'd

Professional Responsibilities Owed to Other Jurisdictions: Rule 8.5

- A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.



California Rules of Court, Rule 10.430: Generative AI Use and Policies



Santa Barbara Superior Court Policy for Use of Generative Artificial Intelligence



- **10.430(b): Generative AI Use Policies**
 - Any court that does not prohibit the use of generative AI by court staff or judicial officers must adopt a generative AI use policy by December 15, 2025. This rule applies to the superior courts, the Courts of Appeal, and the Supreme Court.
- **10.430(c): Policy Scope**
 - A use policy created to comply with this rule must cover the use of generative AI by court staff for any purpose and by judicial officers for any task outside their adjudicative role.

Relevant Standing Orders

- Judge Araceli Martínez-Olguín of the Northern District of California

4. **Artificial Intelligence (AI).** Counsel is responsible for providing the Court with complete and accurate representations in any submission (including filings, demonstratives, evidence, or oral argument), consistent with Federal Rule of Civil Procedure 11, the California Rules of Professional Conduct, and any other applicable legal or ethical guidance. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any content generated by these tools. At all times, counsel—and specifically designated lead trial counsel—bears responsibility for any submission made by the party that the attorney represents. Any submission containing AI-generated content must include a certification that lead trial counsel has personally verified the content’s accuracy. Failure to include this certification or comply with this verification requirement will be grounds for sanctions. Counsel is responsible for maintaining records of all prompts or inquiries submitted to any generative AI tools in the event those records become relevant at any point.

Relevant Standing Orders

- Judge Michael J. Newman of the Southern District of Ohio

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, Internet search engines, such as Google or Bing, or Microsoft Suite products or the equivalent, such as Word. 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 or an opponent’s case. The purpose of this provision is not to prevent parties from using

13

AI tools, such as legal search engines or Microsoft Suite products but, rather, to prevent counsel and *pro se* parties from citing false, misleading and/or hallucinated cases and law.

The background of the slide features a dark, blurred image of a hand holding a smartphone. Overlaid on this are several semi-transparent icons in rounded squares, connected by thin lines to a central square containing the letters 'AI'. The icons include a camera, a document, a musical note, a speech bubble, a microscope, and a circuit board. A large, bright yellow diagonal stripe runs from the top right corner towards the bottom right.

Cautionary Tales

Cautionary Tales

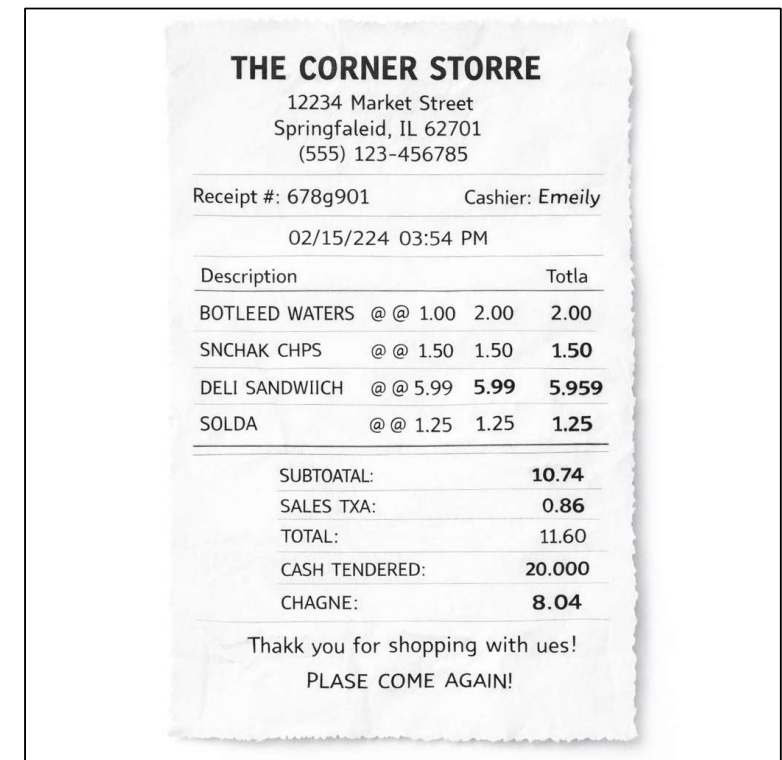
- *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023) :
 - Attorneys for the plaintiff used ChatGPT to generate and submit fictitious case citations in a court filing, failed to verify their accuracy, and then misrepresented their actions to the court. The court found this conduct violated Rule 11 and imposed sanctions, including a \$5,000 fine and orders to notify affected parties and judges.
- *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489 (D. Wyo. 2025) :
 - An attorney used artificial intelligence to draft a motion in limine that cited non-existent cases, resulting in the court revoking the attorney's pro hac vice status, imposing a \$3,000 fine on the drafting attorney, and sanctioning two other attorneys who signed the filing with \$1,000 fines each. The court emphasized that attorneys are responsible for verifying the accuracy of their filings, regardless of whether AI tools are used.

Cautionary Tales

- Brandon Monk (Texas)
 - \$2,000 sanction for submitting AI-generated nonexistent citations
 - Attorney ordered to attend a class on the use of AI in legal work
- Ellis George LLP & K&L Gates
 - Used AI tools resulting in hallucinated citations
 - Corrected brief *still* contained fake citations; filings struck

Evidentiary Issues – Smoking Gun Or Deepfake?

- Asked plaintiff to prove he bought the product at issue.
- Plaintiffs' counsel sent over photographs of the packaging and receipt.
- At first blush, photos and receipt looked legitimate.
- We noticed some inconsistencies with the text on the receipt.
- The “evidence” that was the basis for his lawsuit was entirely created by AI.



Hypothetical No. 1

- Sally is Deputy General Counsel for Litigation at a publicly traded company. She oversees a portfolio of outside counsel at several firms.
- One firm handles a high-stakes antitrust matter. Throughout discovery and motion practice, outside counsel appears highly efficient in drafting briefs quickly, turning around discovery responses overnight, and uncovering persuasive argument structures.
- After a partial summary judgment loss, the CEO asks whether the company's litigation costs could have been lower if the case had been approached differently. During an internal review, legal learns that the outside firm relied heavily on AI tools for drafting, legal research, generating proposed privilege logs, and drafting expert cross-examination outlines.
- None of this AI usage was disclosed to Sally. The engagement letter is silent on AI. What should Sally do?

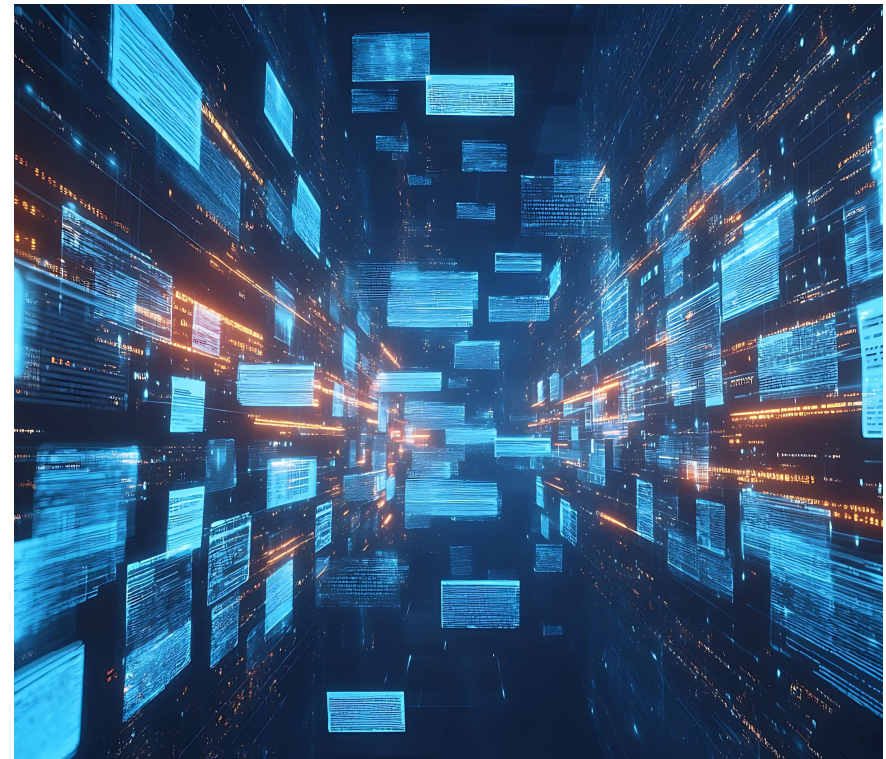


Hypothetical No. 2

- Mary is Vice President & Associate General Counsel at a multinational company facing a product-liability MDL with roughly 1,000 pending cases across the country.
- Midway through discovery, outside counsel presents a sharply revised settlement recommendation. Where prior estimates placed full global settlement at roughly \$400-450 million, the firm now recommends settling immediately for \$650 million.
- When Mary asked what has changed, outside counsel explains that they deployed a proprietary AI-litigation analytics platform to analyze past verdicts and settlements; model likely bellwether outcomes; and predict a jury response.
- No disclosure of AI was made earlier in the engagement. What should Mary do?

Senate Bill 574

- A bill introduced in the California state Senate seeks to regulate attorneys' use of generative artificial intelligence statewide, including banning lawyers from entering private client information into public AI systems and prohibiting arbitrators from utilizing AI in decision-making.
- If passed, will require lawyers to take “reasonable steps” to ensure the accuracy of AI-generated content.
- As of January 10, 2026, when the initial bill analysis was entered into the public record, SB 574 had no known opponents. The legislation is now before the judiciary, appropriations and rules committees.



Key Takeaways Part I

- Develop outside counsel guidelines for the use of AI in litigation.
- Prohibit entry of confidential data into public AI tools.
- Overcommunicate with outside counsel about your expectations for the use of AI in litigation.
- Review outside counsel's work product for AI red flags (*e.g.*, hallucinations).
- Add AI-use provisions to engagement letters.



Key Takeaways Part II

- Understand that while AI may enhance productivity, it is not a substitute for professional judgement.
- Treat AI analytics like expert input – not dispositive authority.
- Human verification is mandatory.

Contact Us



Gillian H. Clow, *Partner*
+1 213 576 1054
gillian.clow@alston.com



Kaitlin H. Owen, *Partner*
+1 213 576 2673
kaitlin.owen@alston.com



Thank you!