

1 HOUR TECHNOLOGY MCLE CREDIT

Navigating the Digital Courtroom: Ethical Use of AI, Digital Evidence, and Remote Practice Tools

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Program Overview

- 1. Ethics at the Intersection of Technology**
- 2. Generative AI: What Lawyers Must Know**
- 3. ESI & Electronic Discovery: Rules, Risks & Practice**
- 4. Virtual Mediations & Remote Practice**
- 5. Best Practices for Technology in Legal Proceedings**

Generative AI: What Lawyers Must Know

Generative vs. Traditional Artificial Intelligence

Traditional AI

Trained on a data set to perform a specific task intelligently, but creates no new data.

Ex: computer chess

Generative AI

Trained on a data set to learn the underlying patterns, and generates new data that mirrors the training set.

Ex: Gemini, Open AI, ClaudeCasetext/CoCounsel, Relativity, Harvey

According to LexisNexis: 51%+ of lawyers are currently using or planning to use generative AI

Generative AI Platforms for the Practice of Law

- Platforms offer services such as legal research and writing, document summarization, discovery review, and even most recently AI mediation.

Risks of Sanctions and Reputational Harm in Using Generative AI

In 2025, the Court of Appeal issued four opinions sanctioning attorneys for improper use of Generative AI in writing briefs, naming the attorneys and firms.

- *Noland v. Land of the Free, L.P.* (2025) 114 Cal.App.5th 426
- *People v. Alvarez* (2025) 114 Cal.App.5th 1115 445
- *Schlichter v. Kennedy* (2025) 116 Cal. App. 5th 24
- *Shayan v. Shakib* (2025) 116 Cal. App. 5th 619



California State Bar's Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law

- <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Technology-Resources>
- Proposed legislation, SB 574, would codify the State Bar Guidelines



Source of Ethical Challenges in Using Generative AI

Ethical issues in the use of generative AI in the practice of law stem from two primary factors:

1. The platforms lack of clarity on how data is used for training and output, and on the limitations of the platform.
2. The output sounds authoritative, leading to overreliance.

Duty of Confidentiality (Bus. & Prof. Code, § 6068, subd. (a); Rule 1.6 Rule 1.8.2)

Practical Guidance:

- Consult with IT professionals or cybersecurity experts to determine whether the platform has adequate confidentiality and security protections and data retention protocols.
- Review the Terms of Use of the program to determine how the product utilizes inputs, and ensure that inputted information is not shared with third parties or used in any manner, including to train or improve the AI program.
- Anonymize client information and avoid details that can be used to identify the client.

Duties of Competence and Diligence (Rules 1.1, 1.3)



Practical Guidance:

- Scrutinize the outputs for accuracy and bias, and
- Use the outputs only as a starting point, to be supplemented by human-performed research and critical, human-performed analysis and review.

Duty to Comply with the Law (Bus. & Prof. Code, § 6068(a); Rules 8.4, 1.2.1)



Practical Guidance:

- Analyze AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity rules as applicable to the representation.

Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers (Rules 5.1, 5.2, 5.3)

Practical Guidance:

- Establish clear policies regarding the permissible uses of generative AI in keeping with professional responsibilities, and
- Make reasonable efforts to ensure that the firm adopts and implements those measures.



Communication Regarding Generative AI Use (Rules 1.4, 1.2)

Practical Guidance:

- Consider disclosure to the client that you intend to use generative AI in the representation.
- Explain how the technology will be used, and the benefits and risks of such use.
- Review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.

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

- You may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs).
- You may not charge hourly fees for the time saved by using generative AI.
- You may charge for the costs associated with generative AI.
- Your fee agreement, which explains the basis for all fees and costs, should also specifically explain those associated with the use of generative AI.

Candor to the Tribunal; and Meritorious Claims and Contentions (Rules 3.1, 3.3)

Practical Guidance:

- Familiarize yourself with any court rules or standing orders regarding disclosure of the use of generative AI.



Prohibition on Discrimination, Harassment, and Retaliation (Rule 8.4.1)

Practical Guidance:

- 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.

Professional Responsibilities Owed to Other Jurisdictions (Rule 8.5)

Practical Guidance:

- Analyze the relevant laws and regulations of each jurisdiction in which you are licensed to ensure compliance with such rules.



Generative Artificial Intelligence in Mediation

Generally speaking, AI mediation platforms work as follows:

1. The parties provide information about the case -- their arguments, evidence, and relevant laws or regulations.
2. The AI platform uses machine learning algorithms to analyze the information provided by the parties.
3. Based on its analysis, the AI platform generates a resolution, such as a summary of key findings, an evaluation of the parties' positions, or a proposed settlement.
4. A human mediator might then adjust the suggested resolutions.
5. The outcome and relevant information from the case is used by the AI platform to improve its algorithms and decision-making process.

Enhanced Ethical Risks in AI Mediation

- The need for ethical vigilance is enhanced in AI mediation, because autonomy over the decision-making in the mediation is being shared with the platform.
- This unique use presents unique ethical challenges under the practical guidelines.



Suggested Ethical Guidelines For AI Mediation

1. Fully explain the AI mediation process to the client.
2. Ensure that the parties in mediation have full control over decision-making about their dispute in the negotiating process, and the extent to which that AI decision making process might inhibit that decisional freedom.
3. Assess the AI suggestions for resolution and make independent decisions about their reliability and appropriateness.
4. Be particularly careful regarding the extent to which the AI-generated resolution is based on a legal analysis on the strengths and weaknesses of the case.
5. Ensure that the mediation process and the information exchanged within it are considered confidential.
6. Review the privacy rules and terms of the AI mediator before using it.
7. Make reasonable inquiry concerning whether the AI platform is truly neutral and balanced.

ESI & Electronic Discovery: Rules, Risks & Real- World Practice



The Ethical Duty of E-Discovery Competence

- CA Formal Opinion 2015-193 (Rule 1.1): Attorneys must have a "basic understanding of, and facility with, issues relating to e-discovery, including the discovery of ESI"
- The level of competence required depends on the e-discovery issues in the matter
- Even highly experienced attorneys may need to seek assistance
- Three options when lacking competence: (1) acquire skills, (2) associate with experts, or (3) decline the matter
- Consider using ESI vendors for large document productions — this is itself an ethical obligation. Smaller firms can inquire into vendors that will work on a more streamlined/economical basis.

Key ESI Terminology for the Meet & Confer

- Active Data — immediately accessible data on live systems
- Backup Data — preserved for disaster recovery; may require significant cost to restore
- Legacy Systems — ESI only accessible through obsolete software
- Metadata — "hidden" data: author, creation/modification dates, BCC fields in email
- Native Format — ESI in original form (Word, Excel, email); converting to PDF loses native format
- Load Files — used with e-discovery platforms (Summation, Concordance) to organize metadata and attachments
- PST File — Outlook email archive file
- Search Terms – Specific words, phrases, or combinations utilized to identify responsive, relevant or privileged documents
- TIFF/PDF — fallback formats; must be searchable (images are not searchable)

CA Rules of Court, Rule 3.724(8): Early Meet & Confer

- Counsel must meet and confer on ESI issues 30 days prior to the Initial Case Management Conference (ICMC)
- Topics include: preservation of ESI; production format; scope and timing of discovery; privilege claims and clawback procedures; confidentiality protections; cost allocation; and other ESI-specific issues
- Tip: Create a "junk terms" list with vendors before searching (newsletters, auto-replies, out-of-office) to reduce irrelevant data
- Explore whether information can be obtained from a more convenient, less burdensome source — courts will consider this
- Cost-saving strategies: Sampling (test database before full search), Keyword searching/Search Team Testing, Quick Peek (pre-review production with clawback)

Key Cases Sections Governing ESI

Production Format & Access

- CCP 2031.280: Produce ESI in ordinarily maintained form or reasonably usable form
- Paper copies are NOT reasonably useable — Vasquez (2014)
- Unsearchable PDF may not be reasonably usable — Ellis v. Toshiba (2013)
- CCP 2031.210(d): Reasonably accessible ESI must be produced; inaccessible sources require showing of burden
- Federal Rule 26: Inaccessible ESI need not be produced absent good cause

Costs, Privilege & Sanctions

- CCP 2031.280(e): Requesting party bears translation costs for inaccessible data
- Cost-shifting only for relatively inaccessible ESI (e.g., backup tapes) — Zubulake factors
- CCP 2031.285: "Clawback" procedure for inadvertently produced privileged ESI
- Safe harbor: No sanctions for ESI lost in routine, good-faith operations (CCP 2025.420 et al.)
- But: Safe harbor does NOT eliminate preservation obligations

Practical Tips: Requests for Production of ESI

- Specify in your RFD that you are seeking ESI and identify the required production format (e.g., native format with metadata, or searchable PDF/TIFF with load file)
- Request deduplication before production — without it, you may receive 20-30 copies of the same document
- Avoid "any and all documents" — craft requests tailored to the case; overbreadth invites cost-shifting
- Use vendors to manage large document productions — a practical and ethical necessity for complex cases
- Stage discovery where possible to avoid unnecessary expense before relevance is established
- Sampling: test a database for relevance before committing to full-scale review
- Be “surgical” in your ESI strategy to save time and money
- Be cautious about the use of AI in eDiscovery

Admitting ESI Evidence in Court

- General authentication rules (EC 702, 1410, 1413–1418) apply equally to ESI
- EC 1552: Rebuttable presumption that printed computer information accurately represents what it purports to show
- EC 1553: Rebuttable presumption that printed video/digital image representations are accurate
- EC 452.5: Judicial notice permitted for certified computer-generated court records of criminal convictions
- Be aware of specific authentication issues that can arise with ESI

Tip: There is extensive case law and guidance on laying foundation for emails, texts, and websites — research the specific ESI type before trial

Discovery Motions: Avoiding Court Intervention

- Judges dislike motions to compel — the Code is structured to minimize court involvement
- First: Determine if the judge allows an Informal Discovery Conference (IDC) — call the clerk
- Check local rules and individual judge's rules on ESI discovery (usually on the court website)
- Your declaration must show genuine, good-faith meet-and-confer efforts before filing
- Narrow the issues: show where parties agreed and what specific disputes remain
- Company declarations explaining how ESI is created, stored, and retrieved are more persuasive than counsel declarations
- Prepare a proposed Order with agreed and disputed provisions for the court's convenience
- Consider a Special Master or Discovery Referee for high-stakes ESI disputes

Virtual Mediations & Remote Practice

Zoom Best Practices for Attorneys

Preparation & Setup

- Test audio, video, and internet connection before every session
- Use a wired connection if possible — Wi-Fi is unreliable
- Professional, uncluttered background (or tasteful virtual background)
- Adequate lighting: face the light source, avoid backlighting
- Camera at eye level; use a quality microphone
- Have all documents and exhibits pre-loaded and organized

Security & Client Management

- Use waiting rooms and passcodes to control access
- Never share meeting links publicly; use unique links per session
- Confirm client identity before discussing confidential matters
- Advise clients on their setup and surroundings before the session
- Record only with full consent of all participants
- Use a secure, private location — no public Wi-Fi

Confidentiality in Virtual Settings & Digital Professionalism

- Use end-to-end encrypted platforms appropriate for sensitive legal communications
- Ensure clients understand that home environments may have unsecured networks or third parties present
- Online civility is not optional — the same professional standards apply in virtual proceedings
- Dress professionally; treat virtual hearings and mediations with the same formality as in-person
- Avoid multitasking, checking phones, or appearing distracted during remote proceedings – very important for depositions and deponents
- Tech-enabled delays (frozen screens, audio issues) can disrupt proceedings and reflect on counsel
- Communicate technology requirements to clients in advance; consider client access barriers – including as to the video-recording of virtual depositions



Best Practices for Technology in Legal Proceedings

Using Technology Effectively in Hearings & Mediations

What Works

- Pre-test all technology before the proceeding
- Prepare exhibits in digital format with clear labeling and bookmarks
- Have documents readily available to screen share – use separate computer folders, or similar, with the documents planned to be utilized
- Use screen sharing strategically — confirm opposing counsel and court can view
- Real-time collaboration tools for document markup in mediation
- Have a backup plan (printed exhibits, second device)

Common Pitfalls

- Poor audio/video setup in remote proceedings
- Fumbling with exhibits during testimony — practice beforehand
- Screen sharing private content accidentally
- Unsearchable or improperly formatted digital exhibits
- Over-reliance on technology without manual backup

Bringing Technology Into the Courtroom

- Confirm court's technology setup in advance — not all courtrooms have the same capabilities
- Coordinate with court clerk regarding equipment, exhibits, and display format
- Use presentation software (PowerPoint, TrialDirector, Sanction) for exhibits — not raw PDFs
- For ESI exhibits, ensure proper foundation has been laid before displaying to the jury/court
- Consider jury/mediator perspective — large, clear fonts; high-contrast visuals; simple layouts
- Technology delays can undermine credibility — practice, practice, practice

Thank You



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