BARNES & THORNBURG LLP

RELATED PEOPLE

Jessica L. Brennan
Partner
New Jersey

P 973-775-6120
F 973-775-6102
Jessica.Brennan@btlaw.com

Kaitlyn E. Stone
Partner
New Jersey

P 973-775-6103
F 973-775-6102
Kaitlyn.Stone@btlaw.com

Veronica Kampfe
Associate
New Jersey

P 973-775-6116
F 973-775-6102
Veronica.Kampfe@btlaw.com

Michael C. Zogby
Partner
New Jersey, Philadelphia, New York

P 973-775-6110
F 973-775-6102
Michael.Zogby@btlaw.com

ALERTS

New Jersey Judiciary Releases Preliminary Guidelines For 'Unavoidable' Use Of AI By Attorneys

February 2, 2024

Highlights

The New Jersey Supreme Court Committee on Artificial Intelligence released preliminary guidelines for the use of artificial intelligence on Jan. 25, 2024

The committee acknowledged the technology's "significant capabilities as well as significant risks" and its aim to strike a balance between AI's benefits and potential harms

The guidelines, which take effect immediately, function as a reminder regarding compliance with the court's existing Rules of Professional Conduct

The New Jersey Supreme Court's Committee on Artificial Intelligence issued preliminary guidelines on Jan. 25, 2024, regarding "the ethical use of [artificial intelligence] AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks." The guidelines aim to strike a balance between harnessing the advantages of innovation and mitigating the potential risks of misuse.

The guidelines, which take immediate effect, specifically address the use of AI to assist lawyers in their legal practices.

The preliminary guidelines do not set forth new obligations, but instead highlight New Jersey Rules of Professional Conduct (RPCs) implicated in the use of AI. The committee that issued the guidelines consists of private and public lawyers, judges, judiciary leaders, technologists, and experts in academia and media.

Seven Key Takeaways From the Preliminary Guidelines

Key takeaways from the committee's guidance include:

1. Ethical Concerns

The guidelines state, "While AI potentially has many benefits, it also presents ethical concerns." Although the preliminary guidelines do not clarify the benefits of AI, they do give examples of ethical concerns, including "hallucinating," whereby AI generates "convincing, but false, information." The guidelines emphasize ethical use of AI and urge lawyers to adapt their practices mindfully in the evolving landscape. The guidelines also emphasize that AI does not change the fundamental duties outlined in the RPCs for lawyers, namely lawyers' "core ethical responsibilities." Diligence, confidentiality, honesty, and client advocacy must be maintained when utilizing AI tools, the committee said.

2. Accuracy and Truthfulness

Lawyers using AI have a duty to verify information generated by AI to ensure accuracy, as AI can generate false information. Citing RPCs 3.1, 4.1(a)(1) and 8.4(c), the guidelines stress that failure to do so may result in violations of the RPCs.

3. Honesty, Candor, and Communication

Lawyers remain responsible for the validity of legal submissions, including those generated using AI, the guidelines noted. Lawyers must not submit false, fake, or misleading content, and they are prohibited from manipulating or creating evidence using AI. The use of AI will not excuse false, fake, or misleading content, and lawyers must uphold candor to the tribunal. Further, the RPCs do impose an obligation on attorneys to inform the client of the lawyer's use of AI "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."

4. Confidentiality

Lawyers must ensure the security of AI systems to prevent inadvertent or unauthorized disclosure of confidential client information. Noting that the market is "replete with an array of AI tools," the preliminary guidelines urge lawyers to "ensure the security of an AI system before entering any non-public client information." Failure to do so may be a violation of RPC 1.6.

5. Prevention of Misconduct

Lawyers must avoid misconduct, including dishonesty, fraud, deceit, misrepresentation, and discrimination. Those duties are addressed by the preliminary guidelines' "ongoing requirements to ensure accuracy (and avoid falsification)." Accuracy in communication with clients and the court is crucial to fulfilling these duties.

6. Oversight

The guidelines serve as a reminder that under RPC 5.1, 5.2 and 5.3, law firms and lawyers are responsible for overseeing worked performed by "other lawyers and non-lawyer staff, as well as law students and interns." The guidelines thereby impose a duty on lawyers to ensure the ethical use of AI systems by others.

7. What the Guidelines Do Not Require

Lawyers are not expressly required to disclose the use of AI in a legal pleading, arguments, or evidence. This means lawyers may likely utilize AI without having to add a certification that the lawyer did or did not use AI in their preparation. This may vary, however, depending on the facts and circumstances of each individual case. Additionally, the preliminary guidelines "do not impose an affirmative obligation on lawyers to tell clients every time that they use AI," unless the client asks or cannot make an informed decision without knowing the lawyer is using AI.

Takeaways

The notice to the bar announcing the preliminary guidelines encourages attorneys to seek direction from the Attorney Ethics Hotline or from the court's "Court Use of AI" mailbox. In this same section, the court previewed "future, more detailed guidance" to come by advising lawyers that their inquiries may inform the development of such future guidance.

These guidelines aim to assist lawyers in complying with existing RPCs, providing preliminary guidelines that may be supplemented with more detailed guidelines as AI's capabilities, limits, and risks become clearer.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Jessica Brennan at 973-775-6120 or jessica.brennan@btlaw.com, Kaitlyn Stone at 973-775-6103 or kaitlyn.stone@btlaw.com, Veronica Kampfe at 973-775-6116 or veronica.kampfe@btlaw.com, or Michael Zogby at 973-775-6110 or michael.zogby@btlaw.com.