



2026 CAAF CLE – Ethics Block #2: Professional Responsibility for Litigators



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Agenda



- I. Overview and Purpose
- II. Professional Responsibility for Litigators
- III. Professional Responsibility and Artificial Intelligence



WHY?



- Compliance with these Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and, finally, when necessary, upon enforcement through disciplinary proceedings
- These Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. These Rules simply provide a framework for the ethical practice of law.

AR 27-26, 7d. (and Similar Sister Service
Regs/Instructions)



What should we get out of PR Training?



- PR training is a journey
- PR training is not for answers, it's for ideas
- Facts in the real world will drive the answer
- AR 27-26 (MPRC, et al.), para. 7c:
 - These Rules of Professional Conduct are rules of reason.
 - Some of these Rules are imperatives, cast in the terms “shall” or “shall not.”
 - Others, generally cast in the term “may,” are permissive and define areas under these Rules in which the lawyer has discretion to exercise professional judgment.
 - Comments do not add obligations to these Rules but provide guidance for practicing in compliance with these Rules.



APPLICABILITY



AR 27-26 (and Similar Service Rules) Applicability



- All Regular Army Judge Advocates with military occupational specialty (MOS) 27A, regardless of whether serving in a legal MOS billet.
- All U.S. Army Reserve and Army National Guard/Army National Guard of the United States Judge Advocates, regardless of whether serving in a legal MOS billet and not just when performing duty in a Title 10 or Title 32 status.
- All other military personnel who are lawyers and are called upon to deliver legal services within the Department of the Army as a part of their duties.



IS PR TRAINING OPTIONAL?



Training PR



the honor and maintain the dignity of our profession of law. You can meet these expectations only if you have a clear understanding of our ethical rules and apply them in your daily practice. Training, vigilance, and direct supervision are key.

as appropriate. At a minimum, each lawyer should receive three hours of professional responsibility training each year. The training should focus on ethics issues relevant to the lawyer's practice and be designed to educate Army lawyers regardless of their experience. Supervisory lawyers are required to ensure this training takes place. I

nonlawyers should take account of the fact that they do not have legal training. At a minimum, however, each nonlawyer should receive one hour of professional responsibility training each year. The training should focus on ethics issues relevant to the nonlawyer's duties. Lawyers having direct supervisory authority over nonlawyers are required to ensure this training takes place.



Training PR

- If you are not training, then PR issues might be passing you by
- Training needs to be tailored to the practice
- Simply putting up a generalized slide deck will not engage your personnel. This is a lost opportunity
- Ideally your training utilizes AR 27-26 and realistic, engaging hypotheticals to explore the nuances of this issue
- This is a leader's obligation but can be delegated with proper oversight
 - Does the delegee have a breadth of experience to explore the topic?
 - Is the delegee prepared to engage in an intelligent unstructured conversation?



PR FOR LITIGATORS



PR Rules for Litigators



- Rule 1.1 Competence
- Rule 1.3 Diligence
- Rule 1.6 Confidentiality of Information
- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.3 Candor Toward the Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 3.8 Special Responsibilities of a Trial Counsel
- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.2 Communication with Persons Represented Counsel
- Rule 4.3 Dealing with Unrepresented Person
- Rule 8.4 Misconduct



PR Rules for Litigators



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AI & PR



1.3 Diligence

- A lawyer shall act with reasonable diligence and promptness in representing a client.
- commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.
- a lawyer should carry through to conclusion all matters undertaken for a client.

(3) Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.



Rule 1.6 Confidentiality of Information

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(a) [Modified] A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b)(1) or permitted by paragraph (b)(2).

(b) [Modified and Augmented] A lawyer:

(1) shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(i) to prevent reasonably certain death or substantial bodily harm; or

What does “reasonably certain” mean to you?



Rule 1.6 - Nuance

(17) Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)(i) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take the necessary action to eliminate the threat. Under paragraph (b)(1)(i), a lawyer's duty to disclose ("shall reveal information") is not limited to acts of commission or omission by the client. Thus, a lawyer must report a client's threat to harm a judge. Similarly, a lawyer must report information from a divorce client regarding the client's spouse's history of and interest in soliciting minors for sex, which constitutes "substantial bodily harm" within the meaning of Rule 1.6



Rule 1.6 – Confidential

What
and

Comparison of Legal Privileges and Protections

Aspect	Attorney-Client Privilege	Confidentiality	Attorney Work Product Doctrine
Primary Source	A rule of evidence developed in law to protect client communications.	A rule of professional ethics.	A legal doctrine developed to protect fairness in litigation.
Scope of Protection	Protects confidential communications between a lawyer and client made for the purpose of obtaining legal advice.	Protects all information relating to the representation of a client , regardless of the source. This is the broadest protection.	Protects documents and other tangible materials prepared by the lawyer in anticipation of litigation .
Context of Application	Applies in judicial and other proceedings where a lawyer may be compelled to provide evidence, such as through testimony or subpoena.	Applies in situations other than those where a lawyer is compelled by law to provide evidence (e.g., social settings, public discussions).	Applies in judicial and other proceedings to protect the lawyer's trial preparation materials from being discovered by the opposing party.
Who Holds It	The client . The lawyer asserts it on the client's behalf.	The lawyer has a duty to the client to maintain confidentiality. The right to confidentiality belongs to the client.	The lawyer , to protect their mental impressions and strategy, but the protection ultimately benefits the client's case.
Primary Purpose	To encourage clients to communicate fully and frankly with their lawyer.	To build trust in the client-lawyer relationship and encourage the client to seek legal assistance.	To allow lawyers to prepare for litigation without fear of their work being used against their client, thus promoting fairness in the adversary system.



Rules 1.7 Conflicts of Interest: Current Clients



Rule 1.7 Conflict of Interest: Current Clients

(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) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law or regulation;
- (3) 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; and
- (4) each affected client gives informed consent, confirmed in writing.

Identifying Conflicts of Interest: Material Limitation

(7) Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, loyalty to a client is impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. These conflicting responsibilities or interests can be professional, commercial, or personal. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.



Rule 1.9 Duties to Former Clients

Rule 1.9 Duties to Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person'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 had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (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.

(2) The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Thus, the reassignment of military lawyers between defense, prosecution, court-martial review, claims, and legal assistance functions within the same military jurisdiction is not precluded by this Rule. See, for example, *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987). The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. When an Army lawyer is representing the Department of the Army (for example, as Staff Judge Advocate or Trial Counsel), the lawyer must take reasonable steps to avoid participating in decision-making or information-sharing that would have an adverse effect on a former client (for example, a former defense client). See also 18 USC 207 (for related post-government service employment restrictions).



Rule 3.3: Candor to the Tribunal

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) 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;
- (3) [Modified] offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of an accused in a criminal matter, that the lawyer reasonably believes is false; or
- (4) [Augmented] disobey an order imposed by a tribunal unless done openly before the tribunal in a good faith assertion that no valid order should exist.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.



Rule 3.3: Candor to the Tribunal

- What if the Accused wants to lie?
 - Knowledge v. reasonable belief
 - Consider circumstances, tie goes to the client, don't put your head in the sand
 - Advise against it
 - May seek to withdraw
 - May disclose to the tribunal (DANGER!!!!!!)



Rule 3.3: Candor to the Tribunal

- Consider *US v. Baker*, 58 M.J. 380 (CAAF 2003)
 - “Firm Factual Basis”
 - Haircut, Printer Cartridges, and Federal Convictions
 - Court walks through 11 paragraphs describing the defense counsels’ thought process and actions, finds they had a firm factual basis and were not ineffective when counsel would not participate during the time the Accused made his statement



Rule 3.4 Fairness to Opposing Party and Counsel



Rule 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. A lawyer shall not 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 a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request 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.

confidential material generally, including computerized information.

(4) A lawyer who receives (that is, in the lawyer's possession) an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities when required by law or court order. Thus, if a lawyer receives contraband, the lawyer has no legal right to possess it and must always surrender it to lawful authorities. If a lawyer receives stolen property, the lawyer must surrender it to the owner or lawful authority to avoid violating the law. The appropriate disposition of such physical evidence is a proper subject to discuss confidentially with a supervisory lawyer. When a client informs the lawyer about the existence of material having potential evidentiary value adverse to the client or when the client presents but does not relinquish possession of such material to the lawyer, the lawyer should inform the client of the lawyer's legal and ethical obligations regarding evidence. Frequently, the best course for the lawyer is to refrain from either taking possession of such material or advising the client as to what course of action should be taken regarding it. See Rules 1.6 and 1.7. If a lawyer discloses



Rule 3.8 Special Responsibilities of a Trial Counsel



Rule 3.8 Special Responsibilities of a Trial Counsel and Other Army Counsel [Modified Title]

[Modified] A Trial Counsel in a criminal case shall:

- (a) [Modified] recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn;
- (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) [Modified] not seek to obtain from an unrepresented accused a waiver of important pretrial rights;
- (d) [Modified] make timely disclosure to the defense of all evidence or information known to the Trial Counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the Trial Counsel, except when the Trial Counsel is relieved of this responsibility by a protective order or regulation;
- (e) [Omitted]; and
- (f) [Modified] except for statements that are necessary to inform the public of the nature and extent of the Trial Counsel's actions 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 Trial Counsel in a criminal case from making an extrajudicial statement that the Trial Counsel would be prohibited from making under Rule 3.6 or this Rule.

ABA Formal Opinion 09-454 Prosecutor's Duty to Disclose



Rule 3.8 Special Responsibilities of a Trial Counsel



	Due Process – <i>Brady v. Maryland</i>	Rule 3.8 ABA Formal Op 09-454 Prosecutor's Duty to Disclose
Evidence	Exculpatory Evidence = any information that tends to show the defendant is not guilty or that could lead to a reduced sentence. Also includes evidence that could be used to challenge the credibility of a W for the prosecution.	Evidence and information favorable to the defense. Not limited to admissible “evidence”
Materiality	The evidence must be material , meaning there is a reasonable chance that if the evidence had been disclosed, the outcome of the trial would have been different.	Evidence or information favorable to the defense, without regard to the anticipated impact of the evidence or information on a trial's outcome.
Timeliness	With sufficient time for the defense to make effective use of the evidence at trial.	With sufficient time for defense to decide on its utility and effectively use the information.



Rule 4.1 Truthfulness in Statements to Others



Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Do you have a duty to correct a clients lie or misrepresentation?

Crime or Fraud by Client

(3) Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) of this Rule (Rule 4.1) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation, or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing the information, then under paragraph (b) of this Rule the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Is this applicable to SVCs and their clients?



Rule 5.1 Responsibilities of Supervisory Lawyers

- A lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
 - Does a STC have “direct supervisory authority over” a TC sitting second-chair?

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) [Augmented] A supervisory Army lawyer is responsible for making appropriate efforts to ensure that a subordinate lawyer is properly trained and is competent to perform the duties to which a subordinate lawyer is assigned.



Rule 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; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Is Rule 8.4 Misconduct the same as Prosecutorial Misconduct?



Prosecutorial Misconduct



Prosecutorial misconduct occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.

- *United States v. Leipart*, 85 M.J. 35 (C.A.A.F. 2023).

Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an **applicable ethics canon**.

- *United States v. Hasan*, 84 M.J. 181 (C.A.A.F. 2023).



Prosecutorial Misconduct



- Improper Argument
 - *United States v. Leipart* “ . . . trial counsel committed clear error when he used Appellant’s guilty plea and providence inquiry to bolster the Government’s argument that Appellant was guilty of the contested sexual offenses.”
 - *United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 3021) “The trial counsel at the [CM] . . . made numerous arguments that were, at best, impassioned.”
 - Personally vouched for the victim’s credibility, disparaging comments about the accused, and inflammatory hypothetical scenario—to consider how the members would be perceived by others based on their decision.



IS THE COURTROOM THE PLACE FOR “ETHICAL” ALLEGATIONS?



What do we say in motions/court?



- Can the trial or appellate court do anything for you or your client, do anything against the other attorney based on “ethics”?
- Actual bases:
 - Brady/Giglio
 - Violation of RCM 701, Discovery
 - Failure to meet a burden



ARTIFICIAL INTELLIGENCE & PR:

COURTROOM-SPECIFIC ISSUES



Artificial Intelligence and PR

- Rule 1.1 Competence
- Rule 1.3 Diligence
- Rule 1.6 Confidentiality of Information
- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.3 Candor Toward the Tribunal



ABA Formal Opinion 512



- Rule 1.1 Competence
 - A lawyer has a duty to provide competent representation, which includes understanding the “benefits and risks associated with relevant technology.”
 - With AI, this means a lawyer must have a reasonable understanding of a AI tool's capabilities and limitations. They cannot uncritically accept AI-generated output, as it may be inaccurate, biased, or contain “hallucinations.”
 - The lawyer is ultimately responsible for the accuracy and quality of all work product.



ABA Formal Opinion 512



- Rule 1.6 Confidentiality
 - A lawyer must protect all information related to a client's representation.
 - Inputting confidential client information into an AI tool, especially a public or “self-learning” one, risks unauthorized disclosure.
 - The opinion states that because these tools may use input data to train their models, a lawyer must get the client's informed consent before using their information in such a tool.



Rule 1.6 GenAi.Mil



Can GenAI.mil be used for privileged legal work?

If you or your team would like to use GenAI.mil for privileged legal work, please reach out to us at osw.genai@mail.mil. We will provide you with the email addresses of the users on your team who are authorized to use GenAI.mil for any privileged legal work until you receive email confirmation from the Department of Defense.

Request for Privileged Legal Work - [UNCLASSIFIED]



Eisenberg, Melissa A MAJ USARMY HQDA TJAGLCS (USA)

To 'osw.genai@mail.mil'



Uncontrolled\General



Tue 8:45 PM

UNCLASSIFIED

Good evening,

I am requesting a profile on GenAI.mil for work that is subject to attorney-client privilege and/or work which would constitute attorney work-product. I am not requesting any other members or users in my team.

Thank you!

V/R,

Melissa A. Eisenberg

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UNCLASSIFIED

attorney work-product, page, please include the mil for any privileged legal



ABA Formal Opinion 512



- Rule 3.1 Meritorious Claims
 - A lawyer cannot assert frivolous claims.
 - Relying on unverified AI output can lead to citing non-existent legal authority or making arguments without a basis in fact, which violates this duty.



ABA Formal Opinion 512



- Rule 3.3 Candor Toward the Tribunal
 - A lawyer cannot knowingly make a false statement of fact or law to a court.
 - Submitting AI-generated legal briefs or documents that contain false citations or misrepresent the law, even if unintentional, can violate this rule.
 - The lawyer has a duty to review and verify the accuracy of all information before presenting it to a court.



ABA Formal Opinion 512



- Rules 5.1 & 5.3 Supervisory Responsibilities
 - Supervising lawyers must ensure that subordinate lawyers, and nonlawyer staff comply with the Rules of Professional Conduct.
 - This includes establishing clear policies for the permissible use of AI, providing training on its ethical use, and ensuring that any third-party AI tools used can adequately protect client confidentiality.



DJAG PM 26-01



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON, DC 20310-2200

DAJA-ZB

10 FEB 2026

MEMORANDUM FOR JUDGE ADVOCATE LEGAL SERVICE PERSONNEL

SUBJECT: **DJAG POLICY MEMORANDUM 26-01** – *Interim* Artificial Intelligence Governance Policy

1. Artificial Intelligence (AI) technology is advancing rapidly throughout the profession of arms and the profession of law. The U.S. Army Judge Advocate General's Corps (JAGC) will seize this opportunity and harness AI to strengthen our practice to meet the evolving demands of the Army and the warfighter. We will exploit AI responsibly – with the highest standards of integrity and accountability grounded in our four constants: principled counsel, stewardship, mastery of the law, and servant leadership.¹

2. To that end, this policy establishes the framework and foundational principles for the responsible and effective use of AI by all Judge Advocate Legal Services (JALS) personnel.² This policy empowers the JAGC to strengthen legal services by leveraging AI, consistent with the American Bar Association (ABA), *Model Rules of Professional Conduct* and the references outlined below (see Enclosure).

3. **Policy Objectives.** As the Department of War (DoW) and the Department of the Army integrate AI capabilities, the JAGC must ensure its personnel can (1) responsibly leverage AI consistent with our professional responsibility obligations and (2) effectively advise our clients on their development and use of AI systems.³ Therefore, the JAGC adopts the following as foundational principles for the use and development of AI:

- Promote the effective use of AI tools for legal purposes.
- Mitigate risks that legal AI generates false or misleading outputs.
- Maintain the confidentiality and integrity of government and client data.
- Comply with emerging laws, regulations, and guidelines concerning AI.
- Stay informed about developments in AI as these technologies evolve.
- Encourage informed communication with clients and within the JAGC about AI use.

¹ The guidelines in this document are for internal use by the JAGC and do not create any enforceable rights for any other person or entity.

² This policy applies to all JALS personnel as defined in AR 27-1, paragraph 3-1. This includes members of the JAGC, civilian attorneys under TJAG's qualifying authority, contractors, and any other individuals who have access to JAGC systems, software, and hardware.

³ MIT MEDIA LAB, AI Glossary/Dictionary, <https://www.media.mit.edu/tools/ai-glossary-dictionary/>. For the purposes of this policy, Artificial Intelligence refers to systems that can perform tasks typically requiring human intelligence, such as reasoning, learning, and problem-solving. AI encompasses a broad range of technologies, including but not limited to machine learning, natural language processing, and generative AI models.

DAJA-ZB

SUBJECT: DJAG POLICY MEMORANDUM 26-01 – *Interim* Artificial Intelligence Governance Policy

4. **User Responsibility.** All JALS personnel must comply with the Rules of Professional Conduct and any applicable state licensing legal and ethical guidelines.⁴ Care shall be taken to comply with legal ethical issues discussed in reference (b), including the implications on an attorney's duties of competent representation, confidentiality, communications, and candor in all legal matters.⁵ Moreover, supervisory lawyers must ensure that their personnel understand and adhere to these rules.

a. *Each member of the JALS is responsible for their use of AI systems and their legal advice.*⁶ Improper use of or reliance on AI may result in false or misleading content (e.g., hallucinations and bias), the disclosure of confidential or proprietary information (e.g., privileged information), or the unauthorized release of private data (e.g., personally identifiable information). The JAGC's use of AI will fully comply with Army policy guidance, professional responsibility obligations, and information security standards. See Rules 1.1, 1.4, 1.6, 3.3, 5.1, 5.2, and 5.3.

b. JALS personnel will carefully analyze AI inputs before uploading data to AI models. They must comply with stringent information security and cybersecurity practices, taking appropriate measures to protect Controlled Unclassified Information (CUI) and other protected data sets, including Personally Identifiable Information (PII) and Protected Health Information (PHI).⁷ Additionally, JAGC personnel must safeguard confidential communications and not compromise privileged information. No CUI, PII, PHI, privileged material, client information, or sensitive/classified data may be entered into any GenAI tool unless the platform is explicitly authorized for that type of data.⁸ See Rule 1.6.

c. JALS personnel will critically review AI outputs before official use – human review is mandatory. AI outputs should serve as supportive tools for your work. Independent verification of legal theories, factual assertions, supporting research, and conclusions remains necessary. Any content generated by AI technology must be considered an initial draft only. Always review and cross-check AI outputs against reliable sources, including citations. See Rules 1.1, 1.3, 5.1, 5.2, and 5.3.

5. **Training and Education.** To competently leverage AI, JALS personnel will develop a reasonable understanding of the capabilities and limitations of the specific AI technology they intend to use. This includes understanding the uses of AI systems and their associated benefits and risks. JALS personnel may pursue competency through

⁴ Army Regulation 27-26, *Rules of Professional Conduct for Lawyers*, 26 March 2025, para. 7a(1).

⁵ American Bar Association Formal Opinion 512, *Generative Artificial Intelligence Tools*, 29 July 2024.

⁶ Army Chief Information Officer, *Guidance on Generative Artificial Intelligence and Large Language Models*, 27 June 2024, para. 5b(1). "Users have sole responsibility for their input and acceptance of output from Gen AI tools."

⁷ *Id.*, para. 5b(2). "Users are responsible for information inputted into publicly accessible Gen AI tools and are subject to existing legal, cybersecurity, information, operational security, ... classification (and Gen AI) policies."

⁸ Chief Digital and Artificial Intelligence Officer Memo, *Interim Guidance on the Use of Generative Artificial Intelligence*, 5 October 2023. "Any input into publicly accessible Gen AI tools is analogous to a public release of that information. DoD personnel are prohibited from entering CUI, such as PII or PHI, as inputs to publicly accessible Gen AI tools."



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self-study and consulting with other attorneys.⁹ Additionally, supervisors will ensure that subordinate lawyers and non-lawyers are educated and trained on the responsible use of AI tools relevant to their work. Legal functions and JAGC organizations may develop additional AI training modules tailored to their unique practice. See *Rules 1.1, 5.1, and 5.2*.

6. **Client Authorization for Use of AI Systems.** JALS personnel are required to maintain the confidentiality of information related to client representation – this duty extends to the use of AI systems. *JALS attorneys representing individual clients must consider whether to obtain informed consent before inputting information relating to the representation of a client into an AI system.* This determination will be based on a fact-specific assessment as described in ABA Formal Opinion 512.¹⁰ When counsel determine that consent is appropriate, they will clearly explain that AI will be used to assist in the legal services provided, the types of tasks it will be used for, and the measures in place to protect the client's confidential information. Additionally, they will provide their client with a written disclosure, and the client will be informed that, if they elect to proceed with the representation, they will be deemed to have consented to the use of AI tools as described in the disclosure. Organizational leaders and supervisors may establish broader requirements and more stringent standards. Where the Army is the client, informed consent is implied. An example written disclosure follows. See *Rules 1.4, 1.6, and 7.1*.

Consent to Use of Technology. *The JAGC employs various technologies to assist in providing our services to our clients. These may include digital, on-site, and cloud-based systems for the storage, handling, and transmission of client materials and data. They may also include digital legal research services such as Westlaw or LexisNexis and generative or artificial intelligence platforms to conduct research, develop work product, or otherwise assist in providing services. The JAGC employs reasonable measures to protect against the improper disclosure of client confidential information when using these technologies and will not knowingly include identifiable client confidential information in any interaction with an AI system, such as an open Large Language Model. The JAGC conducts training on the proper and effective use of these technologies, engages knowledgeable technology contractors, and employs protective adjacent technologies, such as firewalls, encryption, and malware screening. Recognizing that there are risks in any method of storage, transmission, and management of client materials and data, the client consents to the JAGC's use of these technologies and acknowledges that the JAGC is taking reasonable precautions comparable to those of similarly situated law*

⁹ As a starting point, JALS personnel may refer to JAGC standard training packages as they develop (<https://jagc.army.mil/en/resources/stp>).

¹⁰ American Bar Association Formal Opinion 512, *Generative Artificial Intelligence Tools*, 29 July 2024, para II-B.

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firms, and according to any applicable advisory opinions published by the American Bar Association governing the use of such technologies. By electing to proceed with this representation, you are deemed to have consented to the use of AI tools as described above.

7. The JAGC will exploit AI's transformative potential and empower its leaders to innovate. To that end, this policy establishes the JAGC's framework for employing AI, guided by its four constants. This policy is a living document, designed to evolve with the rapid pace of AI advancement. By responsibly leveraging AI, the JAGC will modernize our legal practice and strengthen our support to the Army and the warfighter.

8. Proponent. The Office of The Judge Advocate General is the proponent for this policy. The point of contact is the Assistant Executive Officer at 703-697-5151.

Encl
References


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Your Client's Use of AI



Client Alert

Privilege in the Age of AI:
**SDNY Holds AI-Generated
Documents Are Not Privileged**





Your Client's Use of AI



You Told a Robot, Not Your Lawyer: SDNY Says Client AI Prompts Aren't Protected

by Michael B. Stevens

DS
BC





SDNY Judge's Analysis

- Judge Rakoff's Ruling on **AI and the Attorney-Client Privilege:**

Reason for Privilege Failure	Judge's Rationale (as described in the article)
1. The AI Tool is Not an Attorney	The judge determined that the AI tool, Claude, is not a licensed attorney and therefore owes no duties of loyalty or confidentiality. All recognized privileges require a 'trusting human relationship' with a professional who has fiduciary duties, which does not exist between a user and an AI platform.
2. Lack of Confidentiality	The client communicated with a 'third-party AI platform' and, in doing so, consented to its privacy policy. This policy stated that the company collects user data (inputs and outputs), uses it to train its models, and reserves the right to disclose that data to third parties. This meant the client had 'no reasonable expectation of confidentiality.'
3. Not for the Purpose of Obtaining Legal Advice	The judge found that the client did not use the AI at the 'suggestion or direction of counsel.' The AI tool itself included a disclaimer that it is not a lawyer and cannot provide legal advice. Therefore, the communication was not for the purpose of obtaining legal advice.



SDNY Judge's Analysis

- Judge Rakoff's Ruling on **AI and the work product doctrine:**

Reason for Work Product Failure	Judge's Rationale (as described in the article)
1. Not Prepared by or at the Direction of Counsel	The judge stated that the core purpose of the work product doctrine is to "protect the mental strategies of counsel in anticipation of litigation." Even assuming the documents were prepared in anticipation of litigation, they were created by the client "on his own volition." Because they were not "prepared by or at the behest of counsel," they did not reflect the defense counsel's strategy and were therefore not protected.



Professional Responsibility Rules





Questions?



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