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# *Navigating the AI Landscape: Ethical Insights and Considerations for Lawyers*



Presented by  
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# *LCL's AI Series*

## Part 1

Demystifying AI: Core  
Concepts for Legal  
Professionals

## Part 2

Exploring ChatGPT and  
Prompts for Legal  
Professionals New to  
Generative AI

## Part 3

Navigating the AI Landscape:  
Ethical Insights and  
Considerations for Lawyers

## Part 4

AI Applications for  
the Legal Community  
October 16th  
12:00 p.m.

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# *Today's Discussion*

Office of the Bar Counsel

American Bar Association

The Wild West of Artificial  
Intelligence Ethical  
Considerations for the Use  
of A.I. in the Practice of Law

Formal Opinion 512



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# *Competence & Diligence*

## Mass. R. Prof. C. 1.1

Competent representation requires “the legal **knowledge, skill, thoroughness, and preparation** reasonably necessary for the representation.”

Comment 8: maintaining competence involves “**keep[ing] abreast of changes** in the law and its practice, including the **benefits and risks associated with relevant technology.**”

## Mass. R. Prof. C. 1.3

A lawyer shall act with **reasonable** diligence and promptness in representing a client.

# *Competence, Diligence & AI (OBC)*

- Familiarize yourself with the associated **risks and limitations** of AI technology
- Have a general understanding of how AI technology operates, including what **information (if any) it is collecting**
- Read **terms and conditions**
- Consult **reliable sources** of information
- Seek the **expertise** of others if you have questions
- Take adequate measures to maintain **authority, oversight, and control** over any AI employed
- Keep up with **advances and changes** in AI technology

# *Competence & AI (ABA)*

- Not engaging in appropriate degree of **independent verification or review** of AI outputs could violate R. 1.1
- AI cannot replace the **judgment and experience** necessary for lawyers to competently advise clients or to craft the legal documents or arguments required to carry out representations
- Lawyers **may not abdicate their responsibilities** by relying solely on a Generative AI tool to perform tasks that call for the exercise of professional judgment
- Lawyers should **become aware** of the Generative AI tools relevant to their work so that they can make an **informed decision**, as a matter of professional judgment, **whether to avail themselves of these tools** or to conduct their work by other means

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# *Mass. R. Prof. C. 1.6 (Confidentiality)*

1.6

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent...

(c) A lawyer shall make **reasonable efforts** to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client

OBC

- Do not enter confidential information into non-private AI systems/tools
- Even in the context of private A.I. applications you must ensure that adequate confidentiality protections are in place
- Lawyers using a third-party to incorporate AI into their legal practice, must employ reasonable care in maintaining confidentiality

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# *OBC Guidance*

1

Mass. R. Prof. C. 1.6, cmt. 18-19

2

It's 2024, Are You  
Technology Competent?

3

Revisiting the  
Confidentiality of "Public  
Information"

# *Confidentiality & AI (ABA)*

- Lawyers must **evaluate the risks** that the information will be improperly disclosed to or accessed
- Lawyers must employ a **fact-driven risk analysis** that depends on the client, the matter, the task, and the Generative AI tool used to perform it
- As a **baseline**, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any Generative AI tool they use
- Lawyers may need to **consult** with IT professionals or cyber security experts to fully understand terms and policies as well as the manner in which Generative AI tools utilize information

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# *Confidentiality & AI (ABA)*

## No Informed Consent

A client's informed consent is not required when the lawyer will not be inputting information into a Generative AI tool relating to the representation

Using AI for idea generation/not inputting information relating to the representation

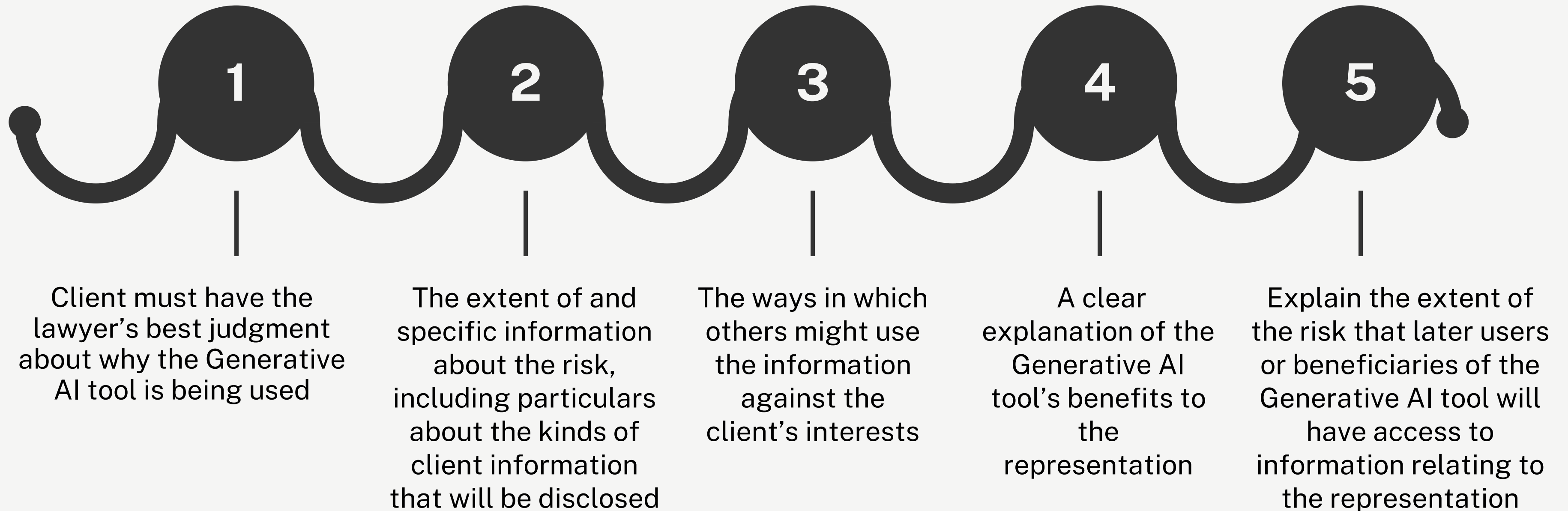
## Informed Consent

A client's informed consent is required prior to inputting information relating to the representation into a Generative AI tool

To obtain informed consent, merely adding general, **boiler-plate provisions** to engagement letters purporting to authorize the lawyer to use Generative AI is **not sufficient**

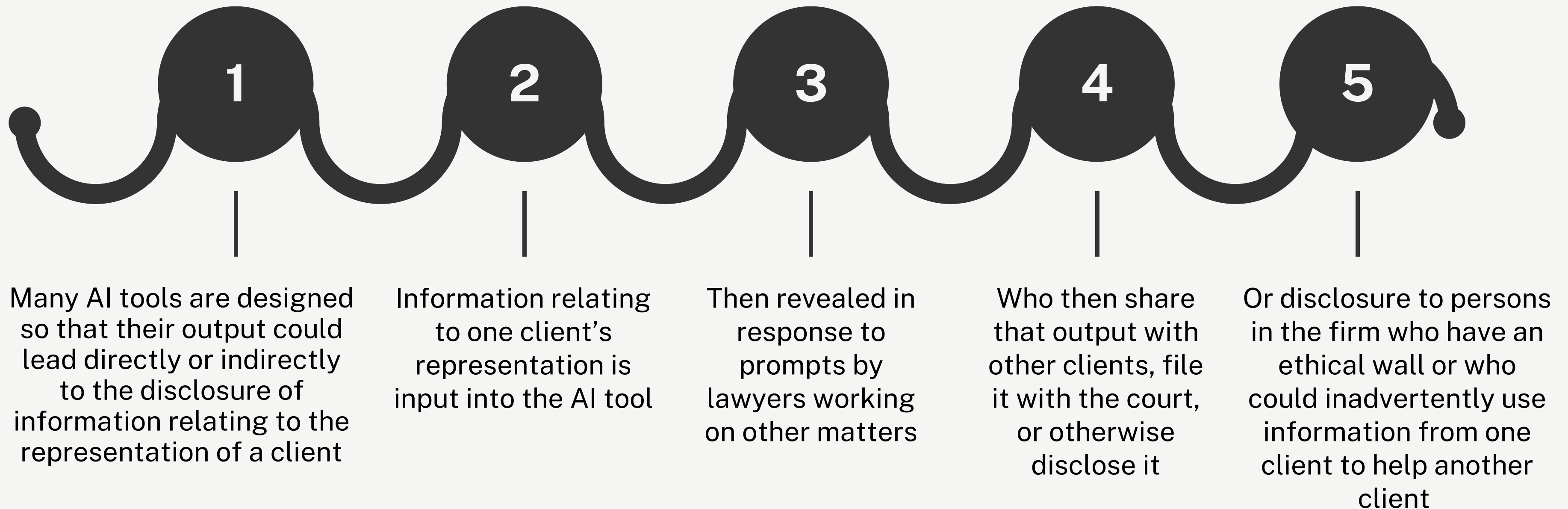
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# *Informed Consent (ABA)*



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# *Why Informed Consent? (ABA)*



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# *Conflicts & AI* *(OBC)*

**Rules 1.8 and 1.9** forbid lawyers from using confidential information relating to a representation to the disadvantage of the current/former client, to the lawyer's advantage, or to the advantage of a third person, unless the client has provided informed consent in writing.

Lawyers should beware of potential conflicts of interest if using an AI tool that is trained with or otherwise incorporates current and/or former clients' confidential information

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# *Communication & AI*

## Mass. R. Prof. C. 1.4

Duty to communicate with clients includes **reasonable consultation** about the means by which the client's objectives are to be accomplished

Consultation should be in a manner that allows clients to make **informed decisions** regarding the representation

## OBC

- Duty to communicate usage of AI may vary
- Usually do not need to consult with your client about your choice to use LexisNexis legal research software, even though the system may incorporate A.I. elements

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# *Communication & AI (OBC)*

1

Client accused of second-degree murder and vacillating between a jury trial and a bench trial.

2

You want to use a new, predictive AI program to determine likelihood of acquittal in each scenario, and plan to base your recommendation upon the results

3

AI program carries risks and is not being used by any other colleagues

4

Client should be consulted on and informed about the use of the AI program, including the associated risks and benefits

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# *Communication & AI (ABA)*

The **facts of each case** will determine whether Rule 1.4 requires lawyers to disclose their Generative AI practices to clients

*I.e.*, when output will influence a **significant decision** in the representation

Must disclose Generative AI practices **if asked by a client**

Lawyers should consider the **client's needs and expectations**, the **scope of the representation**, and the **sensitivity of the information** involved

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# *Communication & AI (ABA)*

## *Potential Considerations on Whether to Communicate AI Use*

**1**

The Generative AI tool's importance to a particular task

**3**

How the Generative AI tool will process the client's information

**2**

The significance of that task to the overall representation

**4**

The extent to which knowledge of the lawyer's use of the Generative AI tool would affect the client's evaluation of or confidence in the lawyer's work

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# *Fees & AI*

## Mass. R. Prof. C. 1.5

Fees must be reasonable; can charge for certain office costs but these charges must be reasonable as well.

Comment 1B: Can charge a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the costs incurred

Remember writing requirement

## OBC

- If you choose to bill for technology-related costs, take care when determining the fees, as the charges should reasonably reflect the costs for the services rendered.

# *Fees & AI (ABA)*

- If a lawyer uses a Generative AI tool to draft a pleading and expends 15 minutes to input the relevant information into the Generative AI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness
- **Flat or contingent fees:** It may be unreasonable (or clearly excessive in MA) to charge the same flat fee when using a Generative AI tool as when not using it if tasks are completed much more quickly with a Generative AI tool
- A lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients
- If a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively

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# *Supervision & AI*

## **Mass. R. Prof. C. 5.1**

Responsibilities of Partners,  
Managers, and Supervisory  
Lawyers

## **Mass. R. Prof. C. 5.3**

Responsibilities Regarding  
Nonlawyer Assistance

## **OBC**

Have clear policies and  
procedures in place for  
technology use

Must make **reasonable efforts** to ensure that the firm has measures giving **reasonable assurance** that all lawyers' and nonlawyers' **conduct is compatible** with the managerial lawyer's professional obligations

Must make sure that lawyers and nonlawyers are **trained, monitored, and provided with adequate resources** to ensure compliance with the Rules of Professional Conduct

# *Supervision & AI (ABA)*

- **Training** could include the basics of Generative AI technology, the capabilities and limitations of the tools, ethical issues in use of Generative AI and best practices for secure data handling, privacy, and confidentiality
- When **outsourcing** legal and nonlegal services to third-party providers (Generative AI), lawyers must ensure, that the third party will do the work capably and protect the confidentiality of information relating to the representation

# *Third-Party Vendors/AI (ABA)*

- Do reference checks and verify vendor credentials
- Understand vendor's security policies and protocols
- Be familiar with vendor's hiring practices
- Use confidentiality agreements
- Understand the vendor's conflicts check system to screen for adversity among firm clients
- Check for availability and accessibility of a legal forum for legal relief for violations of the vendor agreement

# *Supervision & AI (ABA)*

## *Additional Guidance*

- Ensure that tool is configured to preserve **confidentiality & security** of information, that the **obligation is enforceable**, and that the lawyer will be notified in the event of a **breach** or **service of process** regarding production of client information
- Investigate the tool's reliability, security measures, and policies, including **limitations** on the tool's **liability**
- Determine whether the tool retains information submitted by the lawyer before and after the **discontinuation of services** or asserts proprietary rights to the information
- Understand the risk that the **tool servers** are subject to their own failures and may be an attractive target of cyber-attacks

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# *Fake AI Cases (ABA)*



1

Mass. R. Prof. C. 3.1  
(Meritorious Claims and  
Contentions)

2

Mass. R. Prof. C. 3.3  
(Candor Towards the  
Tribunal)

3

Mass. R. Prof. C.  
8.4(c)  
(Engaging in  
conduct involving  
dishonesty, fraud,  
deceit or  
misrepresentation)

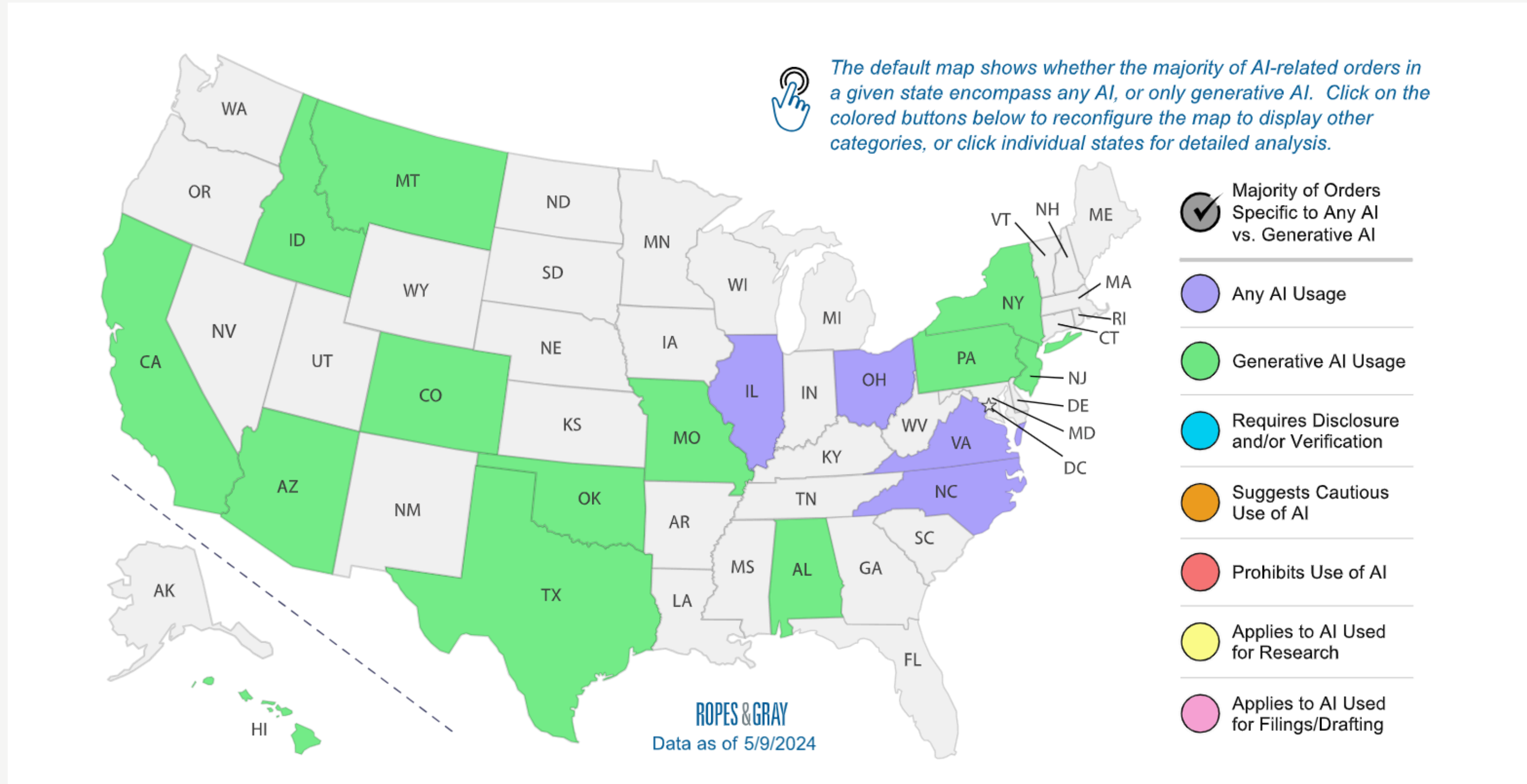
4

Output from a GAI  
tool must be  
carefully reviewed  
to ensure that the  
assertions made  
to the court are  
not false

5

*Matta v. Avianca* (NY)  
*People v. Crabill* (CO)  
*Smith v. Farwell* (MA)

# Ropes & Gray's Standing Orders & Local Rules on the Use of AI



<https://www.ropesgray.com/en/sites/artificial-intelligence-court-order-tracker>

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*Thank you*

**For your attention**

Schedule a Consultation

[www.lclma.org](http://www.lclma.org)

617-482-9600

