

# 4 Do's And Don'ts For Trial Lawyers Using Generative AI

By **Nate Sabri** (February 20, 2025)

Another day, another embarrassing artificial intelligence misstep story — this time, by an expert on AI in a case involving deepfakes. Last month, in *Kohls v. Ellison*, a federal judge in the U.S. District Court for the District of Minnesota excluded an expert declaration based on its inclusion of AI-hallucinated citations.

This follows other similar stories from the last several years, including a Texas solo practitioner who was sanctioned a few months ago for submitting a brief with AI-generated hallucinations, and a widely discussed U.S. District Court for the Southern District of New York case in 2023 in which lawyers relied on hallucinated opinions and had asked ChatGPT itself if the cases were real.



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But we would be misguided if we overreacted by swearing off AI entirely. Broad statements like "I'm never going to rely on AI" or "AI is just a fad" are reminiscent of other skeptical takes on technological advances, such as "no online database will replace your daily newspaper," by astronomer Clifford Stohl, writing about the internet in *Newsweek* in 1995;<sup>[1]</sup> or then-Blockbuster Video CEO John Antioco passing up the opportunity to acquire a little known movie rental upstart called Netflix Inc.<sup>[2]</sup>

Below are some do's and don'ts for trial lawyers to keep in mind when using AI tools.

## 1. Do not get lulled into a false sense of security.

A general piece of advice, like "verify sources provided by AI before filing something with the court," is so obvious it's essentially useless. A reader of this article is unlikely to be asking AI to write briefs and filing them sight unseen.

The sneakier risk is a small error or misstatement surrounded by correct information, or something that has indicia of authority but is actually false.

That is, in fact, exactly the type of error that led to the sanction in *Kohls v. Ellison* last month. The expert explained that three propositions in his declaration should have cited other sources. He knew and agreed with the propositions. One of them was intended to cite an article that he himself had written. But he utilized GPT-4o to assist with a first draft, inserted "[cite]" into the prompts as a placeholder for himself to add citations later, and did not notice when GPT-4o filled in those placeholders for him with hallucinated information.<sup>[3]</sup>

In her order excluding the expert's testimony, U.S. District Judge Laura M. Provinzino did not fault the use of AI for research purposes, and even noted that AI "has the potential to revolutionize legal practice for the better."<sup>[4]</sup> But the court excoriated "attorneys and experts abdicat[ing] their independent judgment and critical thinking skills in favor of ready-made, AI-generated answers."

The takeaway: Do not fall into a sense of complacency because you know a proposition is correct, a case name looks correct<sup>[5]</sup> or the first five items you checked were correct. You must verify every single item.

## **2. Do be aware of bar association guidance on AI.**

The American Bar Association issued its first formal opinion on the use of generative AI in July 2024.[6] This 15-page opinion is worth a read for anyone utilizing AI in their practice. It advises on a variety of areas, including the following.

### ***Competence and Candor***

The ABA notes that lawyers must have a reasonable understanding of the AI technologies they are using and must make meritorious arguments with candor. This includes an awareness of the risks highlighted throughout the rest of this article.

### ***Confidentiality***

Lawyers must be aware that information input into an AI tool may not be kept confidential. One way to account for this risk is to use tools for idea generation without inputting information related to a representation.

### ***Communication***

The facts of each case determine whether lawyers are formally required to disclose AI practices to their clients, but disclosure "may serve the interest of effective client communication" whether formally required or not.

### ***Supervisory Responsibilities***

Supervising lawyers must consider not only their own personal use, but also create effective measures for lawyers they are supervising.

### ***Fees***

Lawyers who bill hourly may be able to work more efficiently using AI, but they may still only "bill for their actual time."

## **3. Do not assume AI prompts are nondiscoverable.**

U.S. Magistrate Judge Robert M. Illman, in the U.S. District Court of the Northern District of California, found last year in *Tremblay v. OpenAI Inc.* that AI prompts and results — even when conducted presuit, and arguably in anticipation of litigation or trial — were not protected from disclosure.

Among other reasons, the court did not agree that prompts and outputs would reveal counsel's analysis, stating that they were "more the nature of bare facts."

AI prompts may not be relevant in the majority of cases. But the court's opinion carries with it a broader lesson for this area: Do not make any solid assumptions as to the discoverability or admissibility of AI prompts or other AI-generated evidence.

Courts across the country are scrutinizing AI-related evidence, not only when it comes to discovery, but also when considering authenticity and reliability.

#### 4. Do stay updated on AI-related court rules.

Hand in hand with that scrutiny, a growing number of courts are evolving their rules on AI use in legal practice. For example:

- U.S. District Judge Rita F. Lin in the Northern District of California states in her standing order for civil cases that the use of generative AI "is not prohibited, but counsel must personally confirm ... accuracy," and they "bear[] ethical responsibility for all statements made in filings." [7]
- U.S. District Judge Araceli Martínez-Olguín, also in the Northern District of California, has a similar standing order that goes a step further and requires any submission with AI-generated content to "include a certification that lead trial counsel has personally verified the content's accuracy," and notes that "[f]ailure to include the certification ... [is] grounds for sanctions." [8]
- U.S. District Judge Arun Subramanian in the Southern District of New York has a similar standing order, and while he does not require a certification, he does state that lead trial counsel "bears responsibility for any filings." [9]
- U.S. District Judge Evelyn Padin in the U.S. District Court for the District of New Jersey goes a step further than a certification, requiring specific identification both of the generative AI program used and the portion of the filing drafted by AI. [10]

Ensure that you are aware of any specific requirements before using AI in any of your cases.

#### Conclusion

AI tools can provide powerful assistance, enhancing efficiency and insights. At the same time, used recklessly, they can jeopardize cases and reputations. Be mindful, and don't park your professional judgment at the door.

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[1] He later treated his own quote naysaying the internet with a sense of humor. <https://thenextweb.com/news/newsweek-1995-buy-books-newspapers-straight-intenet-uh>.

[2] <https://fortune.com/2023/04/14/netflix-cofounder-marc-randolph-recalls-blockbuster-rejecting-chance-to-buy-it/>

[3] Kohls v. Ellison, Case No. 24-cv-03754 (LMP/DLM), Dkt. 39 (D. Minn. Nov. 27, 2024) (Declaration in Support of Motion for Leave to File an Amended Declaration).

[4] Id. Dkt. 46 (Order Granting in Part and Denying in Part Motion to Exclude).

[5] In *Kruse v. Karlen*, 692 S.W.3d 43 (Mo. Ct. App. 2024), for example, the appellant included five case citations that used real case names but were fictitious citations (although they also included 17 other entirely false citations, so that similarity may have been purely coincidental).

[6] [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/ethics-opinions/aba-formal-opinion-512.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf).

[7] <https://www.cand.uscourts.gov/wp-content/uploads/judges/lin-rfl/2024-09-18-Civil-Standing-Order.pdf>.

[8] <https://cand.uscourts.gov/amo-civil-standing-order-11-22-2023-final/>.

[9] [https://www.nysd.uscourts.gov/sites/default/files/practice\\_documents/AS%20Subramanian%20Civil%20Individual%20Practices\\_0.pdf](https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices_0.pdf).

[10] <https://www.njd.uscourts.gov/sites/njd/files/EPPcedures.pdf>.