AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

CONCURRENT SESSION

A Brave New World: Use of Technology and Ethical Considerations in Post-Pandemic Practice

Hosted by the Emerging Industries & Technology and Young & New Members Committees

Jarret P. Hitchings, Moderator
Bryan Cave Leighton Paisner LLP; Charlotte, N.C.

Hon. Martin R. Barash
U.S. Bankruptcy Court (C.D. Cal.); Woodland Hills

Nathan M. Crystal
Crystal & Giannoni-Crystal, LLC; Charleston, S.C.

Mark G. McCreary
Fox Rothschild LLP; Philadelphia

2024

AMERICAN BANKRUPTCY INSTITUTE
2024 ANNUAL SPRING MEETING

A Brave New World: The Use of Technology and Ethical Considerations in Post-Pandemic Practice
Saturday, Aril 20, 2024 at 10:00 a.m.

Presented by the Young & New Member and the Emerging Industries & Technology Committees

Panellists:

Hon. Martin R. Barash (Bankr. C.D. Cal)
Prof. Nathan Maxwell Crystal (NYU Law)
Mark McCreary, Esq. (Fox Rothschild LLP)
Jarret P. Hitchings (Bryan Cave Leighton Paisner, LLP - Moderator)

Presentation Outline:

This panel will consider and discuss practice points, deployment of technology, and ethical considerations for attorneys following the COVID-19 pandemic.

I. Introduction

  A. Panels Backgrounds

II. A Brave New (Post-Pandemic) World

  A. Hybrid and Remote Practice

  B. Data Security and Privacy

    i. Threats and Bad Actors

    ii. Best Practices

    iii. Liability Issues

  C. New Ethical Issues

    i. Duty to Understand Technology

    ii. Cross-jurisdictional practice and licensing

    iii. Supervision of junior attorneys and staff

III. Practical Impact of Technology

  A. Artificial Intelligence [*Note*: Unavoidable topic but will not be covered in-depth]

  B. Remote Appearances

    i. Judicial Conference Guidelines for Remote Appearances

    ii. Trial Issues

1. Fed. R. Civ. P. 43 and witness testimony
2. Subpoena Practice
3. Proctoring and Security

iii. Pros and Cons

1. Judge's view
2. Practioner's view
3. Public's view

C. Client Demands and Court Requirements

D. Looking to the Future

i. New and Developing Tools

ii. Safeguards?

What are Artificial Intelligence Tools? (Legal Industry)

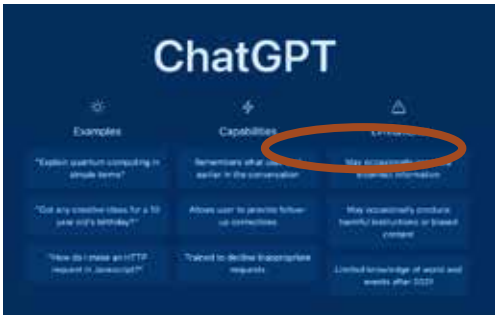
- E-discovery tools such as review of documents for discoverable or otherwise relevant information
- AI-powered legal research software
- contract and legal document analysis
- proofreading, error correction and document organization

Benefits of AI Tools

- Quick information
  - Don't have to sift through millions of hits
- Often a great first draft
  - "Draft" is a great description
- Unparalleled knowledge
  - With some limitations
- Free
  - For now
  - ChatGPT already has a paid model

Concerns with AI Tools

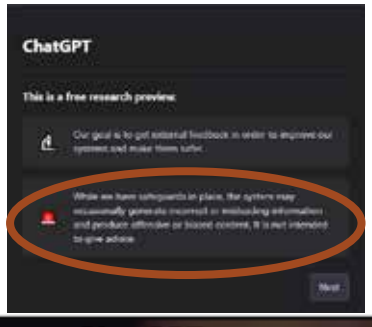
- With ChatGPT, data cut-off in 2021
  - Does not have the most recent data
  - This will change, but will come at a huge cost
- Often wrong but overly confident

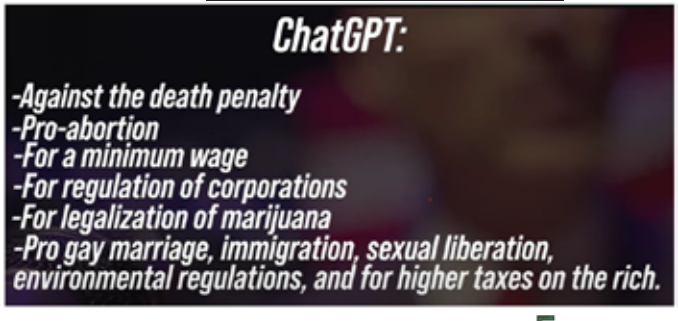


Fox Rothschild

Concerns with AI Tools

- Bias
  - Technology is powered by human generated information, which is inherently biased
  - Some technology (ChatGPT) is also trained by humans training what those humans think is the "best" answer
- The publication Reason scientifically analyzed ChatGPT responses and found it to be left leaning

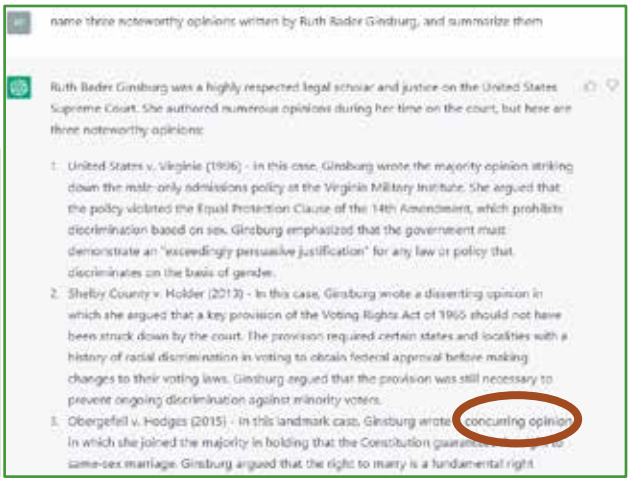




Fox Rothschild

- The SCOTUS Blog tested ChatGPT, and it gave bad information
- But it also learned (or was trained) that it was wrong

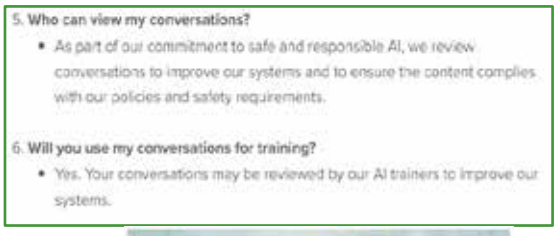
Concerns with AI Tools



Fox Rothschild

Concerns with AI Tools

- What happens to data input?
  - Depends on tools
  - May end up training the AI
  - We know it can be viewed
- Used for nefarious purposes
  - Like all disruptor technologies, bad people will find bad uses
- Coming for your job?
  - How many video store employees do you know?
  - What's the last time you bought a CD?
  - How close is the Fotomat to your house?



Fox Rothschild

Concerns with AI Tools

- In AI, a hallucination or artificial hallucination is a confident response by an AI that does not seem to be justified by its training data

Fox Rothschild

Concerns with AI Tools

- Man sued the airline Avianca, injured when a metal serving cart struck his knee during a flight to JFK International Airport
- Martinez v. Delta Air Lines, Zicherman v. Korean Air Lines, and Varghese v. China Southern Airlines, discussing federal law and "the tolling effect of the automatic stay on a statute of limitations"

The New York Times

Here's What Happens When Your Lawyer Uses ChatGPT

A lawyer representing a man who sued an airline relied on artificial intelligence to help prepare a court filing. It did not go well.

Anyone who has worked designing products knows that users don't read *anything*—warnings, footnotes, any form of microcopy will be studiously ignored. This story indicates that even lawyers won't read that stuff!

People **do** respond well to stories though. I have a suspicion that this particular story is going to spread far and wide, and in doing so will hopefully inoculate a lot of lawyers and other professionals against making similar mistakes.

- Simon Willison, Programmer

Fox Rothschild

Concerns with AI Tools

- In March 2023, more than 1,000 tech leaders and researches signed an open letter calling for six month moratorium on the development of AI
- Days later the Association for Advancement of Artificial Intelligence published a letter warning of the risks of AI, including Microsoft's Chief Scientific Officer
- May 29, 2023, Center for AI Safety released a statement signed by executives from OpenAI and DeepMind, Turing Award winners, and other AI researchers

'The Godfather of A.I.' Leaves Google and Warns of Danger Ahead

For half a century, Geoffrey Hinton nurtured the technology at the heart of chatbots like ChatGPT. Now he worries it will cause serious harm.

"I think it's quite conceivable that humanity is just a passing phase in the evolution of intelligence.

- Geoffrey Hinton

Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war.

Fox Rothschild

Concerns with AI Tools

- AI is likely to reduce income going to low-skilled labor, increasing inequality in society
- AI-induced productivity growth would cause employment redistribution and trade restructuring, leaving to increased inequality both within countries and between them
- "What humans can do in the AI era is just to be human beings, because this is what robots or AI cannot do."

– Jeffrey Sachs, economist

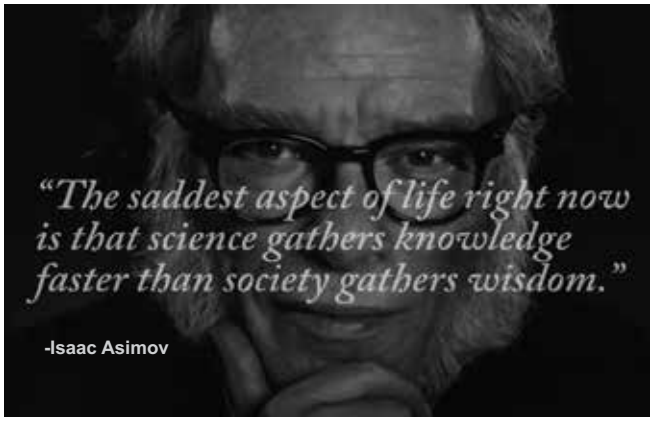
Fox Rothschild

Impact on Business Use of AI

- Under no circumstance can an AI tool be used with:
  - any client data
  - data that identifies a client
  - personally identifiable information
  - trade secrets
  - confidential business information
- Work-provided tools that have been properly vetted and understood may be an exception in the future

Fox Rothschild

Questions



Fox Rothschild

Contact with Questions

Mark McCreary, CIPP/US, CIPP/E, CIPT
Partner, Chief AI &
Information Security Officer
(215) 299-2010
mmccreary@foxrothschild.com

Fox Rothschild

2024 Privacy and Security Training

Obligations of Confidentiality and Safekeeping

Mark McCreary, CIPP/US, CIPP/E, CIPT
Partner, Chief AI &
Information Security Officer

Fox Rothschild

Security Best Practices Apply Beyond Work

Good Security Practices apply to:

- computers and devices connected to the Firm network
- personal computers and devices unrelated to the Firm

Fox Rothschild

Rules of Professional Conduct

Rule 1.6 Confidentiality Of Information

(a) 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 permitted by paragraph (b).

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

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

"Reasonable Precautions" Standard

Remote Work Security

Secure Your Home Network

- Ensure your home Wi-Fi network is secure by using a strong, unique password and enabling encryption (WPA2 or WPA3). Regularly update your router firmware and avoid using default network names and passwords

Keep Devices Secure

- Secure your work devices (laptops, tablets, smartphones) with strong passwords or biometric authentication methods. Enable automatic software updates and install reputable antivirus and anti-malware software to protect against security threats

Remote Work Security

Follow Firm Policies

- Do not leave laptop unattended
- Be mindful of prying eyes and ears
- Destroy paper client data

Use Secure Communication Tools

- Do not send documents to, or communicate with, personal email
- Do not store client documents in personal third-party file share services
- Only agree to use reputable virtual meeting solutions
- Avoid communication with clients by text message, WhatsApp, Signal, Telegram, and similar personal services

5

Fox Rothschild

Remote Work Security

Be Cautious of Phishing Attempts

- Stay vigilant against phishing emails, text messages, and phone calls that attempt to trick you into revealing sensitive information or downloading malware. Verify the authenticity of requests for personal or financial information before responding

Protect Physical Work Environment

- Maintain a secure and private workspace free from distractions and potential security risks. Lock your devices when not in use, avoid leaving them unattended in public places, and store sensitive documents securely

Stay Connected and Communicate

- Maintain open communication with your colleagues, managers, and IT support team while working remotely. Report any security incidents, technical issues, or concerns promptly and seek assistance when needed

6

Fox Rothschild

Mobile Device Security

- **Use Strong Passwords or Biometric Authentication**
- **Keep Software Updated**
- **Enable Remote Location and Wipe**
- **Be Cautious of App Permissions**
- **Backup Data Regularly**
- **Enable Multi-Factor Authentication (MFA)**
- **Educate Yourself on Mobile Security Best Practices**

Fox Rothschild

Best Password Practices

Use Strong and Unique Passwords

- Create passwords that are at least 12 characters long and include a mix of uppercase and lowercase letters, numbers, and special characters. Avoid using easily guessable passwords like "password" or common phrases

Avoid Dictionary Words

- Avoid using common words or phrases found in the dictionary, as these are easier for attackers to guess using brute-force methods or dictionary attacks

How Long Would It Take To Crack Your Password?

# of Characters	Lowercase Letters Only	At Least 1 Uppercase Letter	At Least 1 Uppercase Letter + Number	At Least 1 Uppercase Letter + Number + Symbol
1	Instantly	Instantly	-	-
2	Instantly	Instantly	Instantly	-
3	Instantly	Instantly	Instantly	Instantly
4	Instantly	Instantly	Instantly	Instantly
5	Instantly	Instantly	Instantly	Instantly
6	Instantly	Instantly	Instantly	Instantly
7	Instantly	Instantly	1 Minute	6 Minutes
8	Instantly	22 Minutes	1 Hour	8 Hours
9	2 Minutes	19 Hours	3 Days	3 Weeks
10	1 Hour	1 Month	7 Months	5 Years
11	1 Day	5 Years	41 Years	400 Years
12	3 Weeks	300 Years	2,000 Years	34,000 Years

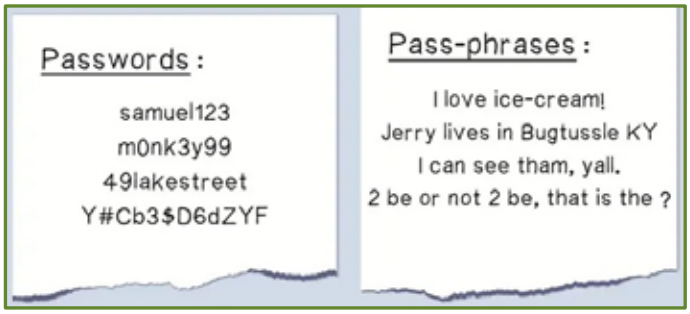
Fox Rothschild

Best Password Practices

Use Passphrases
- Consider using passphrases instead of passwords
- Passphrases are longer, easy-to-remember phrases made up of multiple words, such as "PurpleElephant$JumpingHigh#"

Avoid Personal Information
- Avoid using passwords that include personal information such as your name, birthdate, or common words associated with your hobbies, interests, or family members

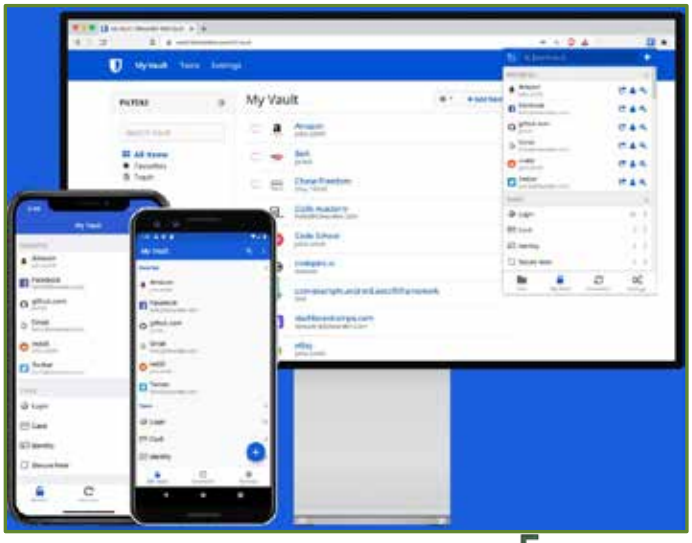
Enable Multi-Factor Authentication (MFA)
- Whenever possible, enable multi-factor authentication (MFA) for your accounts
- MFA adds an extra layer of security by requiring a second form of verification, such as a code sent to your mobile device, in addition to your password



Best Password Practices

Change Passwords Regularly
- Regularly change your passwords, especially for accounts that contain sensitive information or have access to financial transactions

Use a Password Manager
- Consider using a reputable password manager to securely store and manage your passwords. Password managers can generate strong, unique passwords for each of your accounts and automatically fill them in when needed, reducing the need to remember multiple passwords



Best Password Practices

Be Careful with Security Questions

- Avoid using common security questions for password recovery, as the answers may be easily guessable or obtainable through social engineering tactics. Instead, consider using unique answers or selecting more secure authentication methods

Don't Share or Reuse Passwords

- Never share your passwords with others or reuse the same password for multiple accounts. Each account should have its own unique password to prevent a single breach from compromising multiple accounts

Public Wi-Fi Risk

Man-in-the-Middle Attacks

- Attackers can intercept and eavesdrop on unencrypted data transmitted over public Wi-Fi networks, allowing them to intercept sensitive information such as usernames, passwords, and financial details

Wi-Fi Spoofing

- Cybercriminals can set up rogue Wi-Fi hotspots with names similar to legitimate networks to trick users into connecting to them

Malware Distribution

- Public Wi-Fi networks are often targeted by attackers for distributing malware to unsuspecting users

Credential Theft

- Hackers can launch phishing attacks on public Wi-Fi networks to steal login credentials for email accounts, social media accounts, online banking, and other sensitive services

External Hard Drives/USB Drives

Security Risks
- External hard drives are susceptible to loss, theft, or damage, potentially leading to data breaches or loss of sensitive information

Data Backup Concerns
- Employees may forget to regularly back up data on external drives, risking data loss in case of device failure or corruption

Version Control
- Managing multiple versions of documents on external drives can lead to confusion and errors, whereas document management systems often offer version control features

Collaboration Challenges
- Sharing files stored on external drives can be cumbersome and inefficient, especially for collaborative projects

Compliance Issues/Ethical Walls/Client Requirements
- Some industries have strict regulations regarding data storage and management

External Hard Drives/USB Drives

Centralized Storage
- Document management systems provide centralized storage, making it easy to organize and access files from anywhere, at any time

Version Control
- These systems often include version control features, allowing employees to track changes, revert to previous versions, and avoid confusion over document updates

Collaboration
- Document management systems streamline collaboration by enabling multiple users to access, edit, and comment on documents simultaneously

Security
- These systems typically offer robust security measures, including user authentication, access controls, and encryption, reducing the risk of data breaches

Compliance
- Many document management systems are designed with compliance in mind, helping organizations adhere to industry regulations and standards

Think Before You Share Cloud Storage

Data Breaches

- Third-party file sharing services may be susceptible to data breaches or security vulnerabilities that could result in unauthorized access to sensitive information

Fox Rothschild

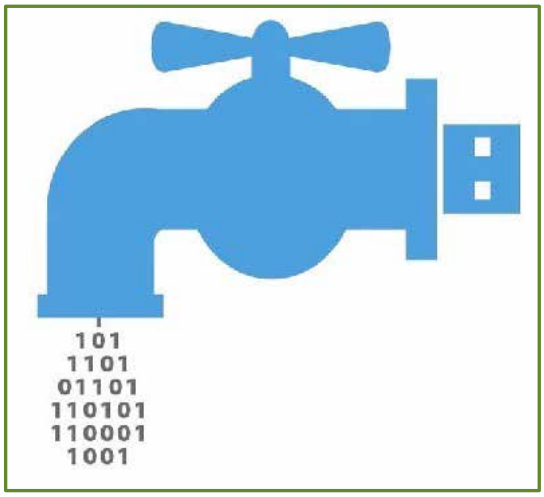
Think Before You Share Cloud Storage

Data Leakage

- Employees may inadvertently share sensitive or confidential information with unintended recipients by using third-party file sharing services. Misconfigured sharing settings, accidental file sharing, or human error

Loss of Control

- When using third-party file sharing services, organizations relinquish control over their data to the service provider. This can lead to uncertainty regarding data ownership, access controls, and data retention policies



Fox Rothschild

Think Before You Share Cloud Storage

Compliance Violations

- Using third-party file sharing services may result in non-compliance with industry regulations or data protection laws, such as GDPR, HIPAA, or PCI DSS. Organizations may inadvertently expose sensitive data or violate data privacy regulations

Fox Rothschild

Reporting Security Incidents

Early Detection and Mitigation

- Reporting security incidents promptly allows for early detection and mitigation of potential threats

Identification of Vulnerabilities

- The Firm can identify vulnerabilities in its systems, processes, or infrastructure

Compliance Requirements

- Client industries have regulatory requirements mandating the reporting of security incidents

Learning and Improvement

- Reporting incidents provides valuable insights into the nature and tactics of attackers

Preservation of Evidence

- Properly reporting security incidents helps preserve digital evidence

Maintaining Trust and Reputation

- Promptly addressing security incidents demonstrates the Firm's commitment to protecting sensitive information and maintaining the trust of clients

Fox Rothschild

Court Ordered/Client Requested Deletions

Not Possible to Delete All Data
- Easy to delete from Outlook
- Easy to delete from iManage
- Easy to delete from Relativity and SharePoint
- Not possible to delete from Mimecast
- Not possible to delete from backup systems

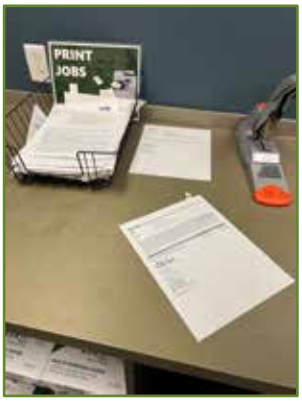
Why Would We Delete
- Systems are secure
- We can limit access to data instead of deleting
- We/You cannot defend work product without data
- Clients often ask for prior work product

Can Agree with Appropriate, Limiting Language
- Notwithstanding the foregoing, Client agrees that deletion of electronic copies of the Confidential Information of Client shall be subject to Law Firm's routine data backup and retention policies, and that the actual deletion of such Confidential Information may occur as such backup media is overwritten and as part of such retention policies; provided that at all times in Law Firm's possession such Confidential Information will be treated in accordance with the terms of this Order

Fox Rothschild

Proper Handling of Printed Documents

Limit Printouts
- Print only what is necessary
- Paperless ≠ cannot printout proofread!



Secure Retrieval
- Collect printouts promptly from printer

Avoid Leaving Printouts Unattended
- Avoid leaving printed documents unattended on printers

Dispose of Documents Securely
- Shred or dispose of printed documents securely when no longer needed

Report Missing Documents
- Immediately report any missing or misplaced printed documents

Fox Rothschild

Contact with Questions

Mark McCreary, CIPP/US, CIPP/E, CIPT
Partner, Chief AI &
Information Security Officer
(215) 299-2010
mmccreary@foxrothschild.com

Fox Rothschild

Guide to Judiciary Policy

Vol. 10: Public Access and Records

Ch. 4: Cameras in the Courtroom

---

§ 410 Overview

This chapter provides the Judicial Conference policy on the use of cameras in courtrooms.

§ 410.10 Authority

(a) Except as authorized in this chapter, Judicial Conference policy does not allow either civil or criminal courtroom proceedings in the district courts to be broadcast, televised, recorded, or photographed for the purpose of public dissemination. JCUS-SEP 1990, pp. 103-104; JCUS-SEP 1994, pp. 46-47; JCUS-SEP 1996, p. 54; JCUS-SEP 2023, p. __.

(b) In addition, Rule 53 of the Federal Rules of Criminal Procedure prohibits taking photographs in the courtroom during judicial proceedings or broadcasting of judicial proceedings from the courtroom.

(c) Subject to the Federal Rules of Practice and Procedure and any applicable statutes, Judicial Conference policy permits a judge to allow remote public audio access to some civil and bankruptcy proceedings (**see:** § 420(b)). JCUS-SEP 2023, p. __.

(d) In March 1996, the Judicial Conference adopted a policy that allows each court of appeals to determine whether appellate proceedings before it will be broadcast. JCUS-MAR 1996, p. 17.

§ 410.20 Applicability

This policy is applicable to all U.S. district and appellate courts, including bankruptcy courts, which are units of the district courts, and applies when a federal judge uses a state facility to conduct a federal court proceeding and when a state judge uses a federal facility to conduct a state proceeding.

§ 420 Judicial Conference Policy

(a) A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:

(1) for the presentation of evidence;

(2) for the perpetuation of the record of the proceedings;

(3) for security purposes;

(4) for other purposes of judicial administration;

(5) for the photographing, recording, or broadcasting of appellate arguments; or

(6) consistent with pilot programs approved by the Judicial Conference (e.g., JCUS-SEP 2010, pp. 11-12).

(b) In addition, a judge presiding over a civil or bankruptcy non-trial proceeding may, in the judge's discretion, authorize live remote public audio access to any portion of that proceeding in which a witness is not testifying. This policy does not create any right of any party or the public to live remote public audio access to any proceeding. JCUS-SEP 2023, p. __.

(c) When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will:

(1) be consistent with the rights of the parties;

(2) not unduly distract participants in the proceeding;

(3) include measures, consistent with the parties' responsibilities, to safeguard confidential, sensitive, or otherwise protected information; and

(4) not otherwise interfere with the administration of justice.

§ 430 Judicial Conference-Adopted Commentary

The Judicial Conference adopted the following commentary (as well as the policy in § 420) to reflect the Conference policy decisions of September 1994 and March 1996:

(a) Technology that permits the reproduction of sound and visual images provides our courts with a valuable resource to assist in their efforts to improve the administration of justice. That resource should be utilized, however, for purposes and in a manner consistent with the nature and objective of the judicial process.

(b) The general policy of the Conference recognizes a distinction between ceremonial and non-ceremonial proceedings. Cameras and electronic reproduction equipment may be used in the courtroom during ceremonial proceedings for any purpose. During non-ceremonial proceedings, they may be utilized only for the limited purposes specified in the policy statement: presentation of evidence, perpetuation of the record, security, other purposes of judicial administration, and the photographing, recording, or broadcasting of appellate arguments.

(c) During non-ceremonial proceedings, audio and audio-visual recording equipment may be utilized to make the official record of the proceedings. **See also:** Guide, Vol. 6 (Court Reporting). The authority to use such equipment for the perpetuation of the record does not include the authority to make a record of the proceedings for any other purpose.

(d) Presentation of evidence through electronic means can take many forms. Closed circuit television, for example, can be used to present the testimony of witnesses who are available at a remote location such as a hospital or correctional facility, but who cannot conveniently attend the trial. A further example is provided by a long, complex case in which the judge authorized videotaping of the evidence so that the trial would not have to be interrupted in the event a juror or lawyer became ill or was otherwise required to be absent for a short period of time; the evidence taken during such absences was thus available on videotape to be presented to the juror or lawyer on his or her return.

(e) The use of electronic means for purposes of courtroom security is illustrated by a closed-circuit video system that allows a marshal to

maintain a security surveillance of one or more trials from a remote location.

(f) The policy statement also authorizes a trial judge to make use of electronic means for other purposes of judicial administration. This is intended to provide the necessary flexibility for experimentation with new uses of technology so long as those uses directly assist the judge and other judicial personnel in the performance of their official responsibilities. This "judicial administration" authorization, for example, would permit closed circuit television linking the courtroom with a special room where a disruptive defendant is being held.

(g) Except with respect to ceremonial proceedings and appellate proceedings, the Conference policy does not authorize the contemporaneous photographing, recording, or broadcasting of proceedings from the courtroom to the public beyond the courthouse walls. The Judicial Conference remains of the view that it would not be appropriate to require all non-ceremonial proceedings to be subject to media broadcasting. Following a three-year experiment with cameras in the courtroom, the Judicial Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern. Accordingly, the Judicial Conference policy does not permit the taking of photographs and radio and television coverage of court proceedings in the United States district courts.

(h) In March 1996 the Judicial Conference authorized each court of appeals to decide locally whether or not to permit cameras in the appellate courtrooms, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt. JCUS-MAR 1996, p. 17.

(i) Except in connection with the enumerated exceptions, the Conference policy does not authorize audio or video taping in the courtroom for the purpose of later public dissemination. Where an audio or video taping is used to perpetuate the official record, that record will be available to the public and the media to the same extent that an official transcript record is currently available to them.

(j) The Conference has assigned a supervisory role to the circuit councils. Circuit councils are urged to adopt orders under 28 U.S.C. § 332(d)(1), reflecting the September 1994 decision of the Judicial Conference not to permit the taking of photographs and radio and television coverage of court proceedings in the U.S. district courts, and to abrogate any local rules of court that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1). A circuit council may elect to establish guidelines, or require pre-clearance, for such permitted uses of cameras and other electronic

means in the courts of its circuit. Even in the absence of an applicable pre-clearance requirement, judges should consult their circuit council when such a proposed use of cameras or other electronic means will make a significant demand on judicial resources or will require coordination with other elements of the judiciary. For example, since the equipment necessary to review a video record of a trial is not currently available to all courts of appeals, it is contemplated that trial judges will authorize the use of video tape to perpetuate a record only with circuit council approval. However, in the absence of such special considerations or an applicable circuit pre-clearance requirement, and subject to any relevant circuit guidelines, judges will determine if, when, and how cameras and other electronic means will be utilized in their courtrooms.

§ 440 Use of Closed-Circuit Cameras for Victim Participation

(a) Under 34 U.S.C. § 20142, closed-circuit television coverage of criminal trials is required for victims of crime when the venue of the trial:

(1) is moved out of state and

(2) is more than 350 miles from the place where the prosecution would have originally taken place.

(b) The statute, a provision of the Antiterrorism and Effective Death Penalty Act of 1996:

(1) contains several safeguards against public transmission of the closed-circuit televising, and

(2) provides the trial court with substantial authority to set conditions.

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

Notes

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 30, 2007, eff. Dec. 1, 2007.)

Notes of Advisory Committee on Rules—1937

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, [former] §635 (Proof in common-law actions), §637 [see 2072, 2073] (Proof in equity and admiralty), and [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark actions, the practice under [former] Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *Subdivision (b)* on contradiction and cross-

examination modify U.S.C., Title 28, §725 [now 1652] (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callihan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure* , 45 Yale L.J. 622 (1936), and *Same: 2*, 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, [former] §631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2d ed., 1923) §1885 *et seq.*

Note to Subdivision (c). See [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v. Lochren*, 143 Fed. 211 (C.C.A.8th, 1906). See also *Blease v. Garlington*, 92 U.S. 1 (1876); *Nelson v. United States*, 201 U.S. 92. 114 (1906); *Unkle v. Wills*, 281 Fed. 29 (C.C.A.8th 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d). See [former] Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, §1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

Notes of Advisory Committee on Rules—1946 Supplementary Note Regarding Rules 43 and 44

These rules have been criticized and suggested improvements offered by commentators. 1 *Wigmore on Evidence* (3d ed. 1940) 200–204; Green, *The Admissibility of Evidence Under the Federal Rules* (1941) 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v. United States* (C.C.A.2d, 1941) 117 F.(2d) 387, cert. den. (1941) 313 U.S. 587; *Mosson v. Liberty Fast Freight Co*. (C.C.A.2d, 1942) 124 F.(2d) 448; *Hartford Accident & Indemnity Co. v. Olivier* (C.C.A.5th, 1941) 123 F.(2d) 709; *Anzano v. Metropolitan Life Ins. Co. of New York* (C.C.A.3d, 1941) 118 F.(2d) 430; *Franzen v. E. I. DuPont De Nemours & Co*. (C.C.A.3d, 1944) 146 F.(2d) 837; *Fakouri v. Cadais* (C.C.A.5th, 1945) 147 F.(2d) 667; *In re C. & P. Co*. (S.D.Cal. 1945) 63 F.Supp. 400, 408. But *cf. United States v. Aluminum Co. of America* (S.D.N.Y. 1938) 1 Fed.Rules Serv. 43a.3, Case 1; Note (1946) 46 Col.L.Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure* , 4 F.R.D. 124, 137–138.

Notes of Advisory Committee on Rules—1966 Amendment

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

Notes of Advisory Committee on Rules—1972 Amendment

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (b). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 601 and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

Subdivision (c). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

Notes of Advisory Committee on Rules—1987 Amendment

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on Rules—1996 Amendment

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness

at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Committee Notes on Rules—2007 Amendment

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

References in Text

The Federal Rules of Evidence, referred to in subd. (a), are set out in this Appendix.

Effective Date of Amendments Proposed November 20, 1972, and December 18, 1972

Amendments of this rule embraced by orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of this title.

‹ Rule 42. Consolidation; Separate Trials up Rule 44. Proving an Official Record ›

NOTICE OF VIDEO AND TELEPHONIC APPEARANCE PROCEDURES FOR JUDGE MARTIN R. BARASH'S CASES

Effective October 2, 2023, Judge Barash will resume in-person hearings. However, parties in interest (and their counsel) may continue to participate in most hearings remotely using ZoomGov audio and video.

ZoomGov connection information for each hearing is provided on Judge Barash's publicly posted hearing calendar, which may be viewed online at: http://ecf-ciao.cacb.uscourts.gov/CiaoPosted/?jid=MB

Unless otherwise ordered by Judge Barash, no party or witness may appear remotely for any trial or evidentiary hearing.

MEMBERS OF THE PUBLIC AND THE PRESS MAY ONLY CONNECT TO THE ZOOM AUDIO FEED, AND ONLY BY TELEPHONE. ACCESS TO THE VIDEO FEED BY THESE INDIVIDUALS IS PROHIBITED. IN THE CASE OF A TRIAL OR EVIDENTIARY HEARING, NO AUDIO ACCESS WILL BE PROVIDED. HOWEVER, MEMBERS OF THE PUBLIC AND THE PRESS MAY OBSERVE SUCH PROCEEDINGS IN PERSON.

A ZoomGov account is not necessary for remote access, and no pre-registration is required. Remote access through ZoomGov is free of charge. The audio portion of each hearing will be recorded electronically by the Court and constitute its official record.

ALL PERSONS (OTHER THAN AUTHORIZED COURT STAFF) ARE STRICTLY PROHIBITED FROM MAKING ANY AUDIO OR VIDEO RECORDING OF COURT PROCEEDINGS, BY ANY MEANS. VIOLATION OF THIS PROHIBITION MAY RESULT IN THE IMPOSITION OF MONETARY AND NON-MONETARY SANCTIONS.

Remote access is a privilege. Judge Barash reserves the right to suspend or discontinue any party's remote access privileges in his discretion. Further, although Judge Barash is pleased to make this accommodation available, any party or counsel that elects to appear remotely bears the risk of malfunction or disconnection from the hearing.

Revised September 2023

Tips for a Successful ZoomGov Court Experience

1. Test the video and audio capabilities of your computer or mobile device in advance of the hearing (i.e., at least one day in advance).

    a. You can do this by clicking on the ZoomGov meeting link posting for the hearing and/or check your video and audio using the ZoomGov app.

2. If you intend to speak at the hearing, please find a quiet place from which to participate.

3. If you are connecting to the hearing using a wireless device, you should situate yourself in a location with a strong wireless signal.

4. Unless and until it is your turn to speak, please mute your audio to minimize background noise.

    a. If connected to ZoomGov audio by telephone, you can mute or unmute your connection by pressing *6 on your phone.

5. When you first speak—and each time you speak after someone else has spoken—please say your name. This may seem awkward but is essential to making a good court record. The only part of the hearing being recorded is the audio. If a transcript is requested, it is sometimes difficult for the transcriber to know who is speaking.

6. If you are participating by video, try to avoid having a window or bright background behind you. (You may, as a result, appear on video as a shadow.) If you cannot avoid the bright background, try using a desk lamp or other light source to brighten your face.

7. If you are participating by video using a personal computer, you may separately connect to the audio feed by telephone (for improved audio) using the call-in information provided for the hearing.

    a. If you do this, please connect to the video feed first. In the ZoomGov app, you will be assigned a Participant Code. Use this code to associate your video and audio feeds.

8. If available, a headset-microphone often provides better sound quality for listening and speaking.

Revised September 2023

9. Remote participants should at all times remember that although conducted remotely, these hearings are official court proceedings, and individuals should act accordingly.

    a. If video is enabled, please wear attire consistent with the decorum of court proceedings.

    b. ZoomGov permits the use of virtual backgrounds to safeguard your privacy. If you choose to use a virtual background, please avoid backgrounds that are offensive or distracting.

10. ZoomGov video participants are permitted to specify a display name. If using video, please specify your complete name to assist the Court in creating a record of the proceedings.

Comment on Issues Arising if a Jurisdiction Abolishes the
"Butt in the Seat" Rule

The traditional "butt-in-the-seat" rule provides that a lawyer is treated as engaged in the practice of law in the jurisdiction in which the lawyer performs legal services. The butt-in-the-seat rule is obviously outmoded in the post-pandemic technologically-oriented world in which lawyers now practice.

Suppose a jurisdiction abolishes the rule, as South Carolina has done with the addition of the following comment to South Carolina Rule of Professional Conduct 5.5

> A lawyer admitted in another jurisdiction does not establish an office or other systematic presence in this jurisdiction for the practice of law by engaging in remote work in this jurisdiction, provided the lawyer's legal services are limited to services the lawyer is authorized to perform by a jurisdiction in which the lawyer is admitted, and the lawyer does not state, imply, or hold out to the public that the lawyer is a South Carolina lawyer or is admitted to practice law in South Carolina.

However, some questions may arise about the application of the new comment. The new comment clearly allows a lawyer vacationing in South Carolina to perform remote services for clients involving the jurisdiction where the lawyer is admitted to practice so long as the lawyer does not engage in any "holding out" as a South Carolina lawyer or admitted to practice in South Carolina.

Would the rule allow a lawyer who is admitted to practice in another jurisdiction to move to South Carolina permanently and do only remote work here? It seems so since the rule does not have a time limit or a residence test. Moreover, other parts of Rule 5.5 specifically refer to temporary practice while this comment does not.

Could such a permanent remote lawyer have an actual office (to get away from home, for example) where the lawyer only performs remote services? This method of practice in South Carolina seems proper if the lawyer's work is limited to remote services and there is no "holding out."

Could the lawyer meet clients from the lawyer's home state at this office? The answer is "No." In this case the lawyer would not be performing remote services. Instead, the lawyer should conference with the client through Zoom or other remote conferencing platform, or travel to meet with the client in the lawyer's home jurisdiction.

Suppose the lawyer works for a firm that has an office in South Carolina, can the lawyer go into the office but only practice remotely? The answer is probably yes, but with some uncertainty. If the lawyer does nothing but remote practice, that is probably in compliance with the rule, but suppose the lawyer meets with other members of the firm to discuss legal matters? If the discussions are limited to the law of the jurisdiction where the lawyer is admitted to practice, that is probably permissible; similarly discussion of firm

business matters should also be permissible since that is not practicing law. Participation in meetings with clients or South Carolina lawyers would not be proper.

Suppose a lawyer has been hired by a South Carolina firm, has moved to the state, and is in the process of seeking bar admission. Could the lawyer continue to handle matters remotely in his former jurisdiction of practice and residence? Probably so if the "go into the office" reasoning above is correct. Could this same lawyer do a combination of work – remote work for clients in the lawyer's former jurisdiction and legal work for South Carolina clients under the supervision of a member of the firm (a South Carolina lawyer) until the lawyer is admitted to practice in South Carolina. So long as the lawyer complies with the dual requirements for remote working and work under the supervision of a South Carolina lawyer, this combination is probably ethically permissible but the combination increases the risk of a disciplinary complaint/inquiry, which may slow up the bar admission process.

Finally, it should be noted that the new comment only deals with the part of Rule 5.5 that prohibits a lawyer not admitted to practice in South Carolina from opening an office or having a systematic presence in the state for the practice of law. The comment does not limit the ability of an out-of-state lawyer to practice temporarily in South Carolina under one of the subdivisions of Rule 5.5(c). In addition, the comment would not affect the ability of lawyer not admitted in South Carolina to open an office in South Carolina and provide legal services to the lawyer's employer or its affiliates or when authorized by federal law, for example, immigration practice. See SCRPC 5.5(d).

COLUMN: ETHICS WATCH: THE DUTIES OF COMPETENCY AND CONFIDENTIALITY IN THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE

March, 2024

Reporter
35 S. Carolina Lawyer 12 *

Length: 2646 words

Author: By Nathan M. Crystal & Francesca Giannoni-Crystal

Text

[*12] Almost all lawyers have heard about Generative Artificial Intelligence ("GAI"), many have experimented with its use, and some employ GAI extensively in their practice. "Generative artificial intelligence (AI) describes algorithms (such as ChatGPT) that can be used to create new content, including audio, code, images, text, simulations, and videos." (What is generative AI? McKinsey & Company, available at www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai. Last visited Feb 6, 2024). Various governmental institutions are investigating the use and risks involved in GAI, and some have taken steps to regulate GAI. For example, the United States Court of Appeals for the Fifth Circuit has issued a proposed rule that would require filers to certify that they have either not used generative AI in drafting a document presented for filing or "to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human." Proposed Amendment to 5th Cir. R. 32.2. The Florida Board of Governors Review Committee on Professional Ethics has issued Proposed Advisory Opinion 24-1. The California State Bar Standing Committee on Professional Responsibility and Conduct has issued a report, *Practical Guidance for the Use of Generative Artificial Intelligence in the of Law*. Other bar associations have established special committees to investigate the benefits and risks associated with GAI. While the development of GAI is still in its early stages, it is necessary to consider at least tentatively some of the ethical issues that this new technology raises. Some are quite obvious and have received substantial publicity, while others are much less identified. Even at this relatively early stage, one general point can be made: While the legal profession has in the last few decades encountered and benefited from many technological changes, these changes have not undermined basic ethical obligations but instead have presented new circumstances for application of fundamental ethical concepts. However, it is also true that context matters for ethical issues; for example, application of basic ethical principles to social media and to cloud computing pose some special problems, and the same is true with GAI. For example, use of cloud computing almost always involves disclosure of client confidential information to the cloud

provider, but such disclosure is ethically permissible if certain requirements are met. By contrast, use of GAI does not necessarily involve the disclosure of client data.

A number of law firms have restricted lawyers from utilizing specific AI tools like ChatGPT, citing concerns about potential data breaches and the risk of AI-generated content being misleading. *See e.g.*, Justine Henry, *Big Law, Nixing ChatGPT for Legal Work, Seeks Secure AI Solution*, available at www.law.com/americanlawyer/2023/08/03/big-law-nixing-chat-gpt-for-legal-work-seeks-secure-ai-solution/?slreturn=20240018233452. Last visited February 7, 2024. Some Am Law 200 firms have prohibited the use of these tools in client services, highlighting concerns related to data breaches and the potential for generating inaccurate information.

Additionally, certain firms have opted to prohibit the internal use of open-source generative AI tools, a decision made in consultation with clients. *See e.g.*, Sam Skolnik, *Big Law's AI Challenge Drives New Conversation About Training*), available at https://news.bloomberglaw.com/business-and-practice/big-lawsai-challenge-drives-new-conversation-about-training. Last visited February 7, 2024.

However, several authors predict that industries slow in embracing AI will soon be out of the market. *See e.g.*, Malcolm Frank, Paul Roehrig, Ben Pring, *What to Do When Machines Do Everything*. Experts point to legal occupations among the sectors that are projected to lose hundreds of thousands of jobs, predominantly because of the advancement of AI or alternative forms of automation. *See e.g.*, Rachel Pelta, *What Jobs Will AI Replace and What Can You Do About It?* available at www.theforage.com/blog/careers/what-jobs-will-ai-replace. Last visited Feb 6, 2024.

We believe that prohibiting the use of GAI shows a lack of commercial vision and is unnecessary to comply with ethical requirements. Technology, in itself, is neither **[*13]** inherently good nor bad; it is a tool whose impact is shaped by how it is wielded. Technology's ethical implications rest in the hands of its users. The responsibility lies in the choices made by lawyers to use the technology ethically. This Ethics Watch focuses on the application of two fundamental ethical duties -- competency and confidentiality -- in the use of GAI.

Competency

Rule 1.1 establishes a basic duty of competency, which can be punished by disciplinary proceeding, malpractice action, or depending on the type of case, other remedy such as ineffective assistance of counsel in a criminal case. *See* *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the constitutional standard for ineffective assistance of counsel).

Some lawyers might prefer to avoid using GAI either because of lack of knowledge of the technology or fear of the risks. As said, several Am Law 200 firms have prohibited the use of these tools in client services or opted to prohibit the internal use of open-source generative AI. Such limitations are hopefully short-lived once the firms work their way through the various ethical, legal, and practical issues surrounding GAI. However, technology evolves quickly, and if lawyers do not swiftly embrace it, there is a risk that non-lawyers will utilize it to provide legal services, potentially pushing lawyers out of the market. Ultimately, clients may bear the consequences, as the provision of legal services by lawyers, who are bound by professional

conduct regulations, serves as a safeguard, ensuring the protection of clients, unlike non-lawyers, who are not held to the same regulatory standards.

In addition, lawyers have an obligation of making themselves knowledgeable regarding technology. Indeed, the duty of competency requires lawyers and law firms to become knowledgeable about the application of GAI to their practices. Comment 8 to Rule 1.1 states that

> a lawyer should keep abreast of changes in the law and its practice, including a reasonable understanding of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit information related to the representation of a client.

Perhaps a lawyer or firm could justify avoiding use of GAI because the comment is only a comment and the wording of the comment refers to technology the lawyer "uses to provide service," but we think that is too narrow a reading, inconsistent with the purpose of the comment, not to mention the competitive disadvantage a lawyer or firm faces by adopting a Luddite-approach to GAI (which as said, would ultimately result in a detriment to clients).

Courts themselves should embrace the use of AI because that would mean improving the speed of proceedings, but guidelines should be imposed. In the UK **[*14]** The Courts and Tribunals Judiciary recently granted judges permission to utilize artificial intelligence in crafting rulings. While acknowledging AI's potential in drafting opinions, the directive emphasizes refraining from employing it for research or legal analyses due to its capacity to generate fabricated, misleading, inaccurate, and biased information. The Master of the Rolls Geoffrey Vos (the second-highest ranking judge in England and Wales) asserts that judges should not shy away from the judicious use of AI. However, he emphasizes the need for ensuring the protection of confidences and taking full personal responsibility for their AI-assisted outputs. Brian Melley, The Associated Press, U.K. judges can use AI in writing legal opinions, but with strict limits, https://nationalpost.com/news/judges-in-england-and-wales-are-given-cautious-approval-to-use-ai-in-writing-legal-opinions. last visited February 6, 2024. Several recently reported decisions sanctioning lawyers for citing false citations produced by GAI ("hallucinations") have high-lighted this aspect of the duty of competency. In one recent case the court fined the responsible lawyers and their firm $ 5,000. The judge determined that the attorneys demonstrated bad faith based on "acts of conscious avoidance and false and misleading statements to the Court." See *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965 (S.D.N.Y. June 22, 2023). The issue did not stem from the utilization of technology but rather from neglecting the duty of competence.

Adoption of court rules, like the Fifth Circuit's proposed rule, will make this obligation more specific. But compliance with the citation-checking alone would be inadequate to comply with the duty of competency in using GAI. As the California Guidelines state: "The duty of competence requires more than the mere detection and elimination of false AI-generated results." The Guidelines suggest that lawyers should supplement GAI generated research with human-performed research and supplement GAI produced analysis with critical analysis performed by humans. Ironically, the standard in the Fifth Circuit's proposed Rule may be too narrow and may lead lawyers to a cite-checking rather than an analytical mode.

Confidentiality

The duty of confidentiality found in Rule 1.6 is broad, applying to any information that lawyer obtains relating to the representation of a client regardless of form or source. The duty of confidentiality clearly applies to a lawyer or law firm's use of GAI, just as the duty applies to other technologies, such as cloud computing or social media. In fact, the Florida Bar's Proposed Opinion draws on many prior opinions dealing with the application of the duty of confidentiality (and the duty of competence) to the use of other technologies or methods of providing legal services (outsourcing, for example) to conclude that lawyers using GAI in their practice should:

[*15] - Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuance of services or asserts propriety rights to the information.

Without adopting these specific recommendations the California Guidelines warn lawyers that GAI systems generally use inputted data, often share the data with third persons, and may lack reasonable security measures. Based on these restrictions, we think it would be practically impossible for a lawyer to communicate with many open-source GAI providers, such as ChatGPT, and receive answers to questions regarding the operation of GAI and its protection of confidential information that would enable the lawyer to share confidential information with the GAI provider. Moreover, even if a lawyer or law firm were able to obtain assurances from a GAI provider that it had in place proper procedures for handling confidential client information, the assurances might not be sufficient for the client (some clients may be particularly sensitive about the confidentiality of their data and others may be institutions that have legal and fiduciary obligations regarding protections of data).

How then can lawyers or law firms use GAI and comply with their duty of confidentiality? We can think of several options: (1) Use readily available GAI products such as ChatGPT but without revealing any client information when formulating questions. For example, if a lawyer is drafting a covenant not to compete, the lawyer could ask ChatGPT to provide a general template of a covenant not to compete, which would give the lawyer both language and a checklist to consider using in drafting the covenant. The California Guidelines warn that a lawyer "must anonymize client information and avoid entering details that can be used to identify the client." (2) Same as # 1 but using a GAI product provided by a vendor that has an extensive legal data base not available to an open source provider. Using this source, the lawyer must still comply with the duty of confidentiality but this source provides the lawyer with a richer data base for forms and information. Obviously, there will be some expense associated with this option. (3) Use a closed-source GAI product drawing on the data in the law firm (and perhaps data provided by clients). Large law firms are already working on such systems. Developers will undoubtedly create off-the-rack products that smaller firms can use to access their own data. Assuming **[*16]** these products only use the data of the firm (and data provided by clients with informed consent) and do not share the data with third parties, the duty of confidentiality would be respected. The Florida Opinion recognizes the consistency of this option with the duty of confidentiality: "It should be noted that confidentiality concerns may be mitigated by use of an in-

house generative AI rather than an outside generative AI where the data is hosted and stored by a third party."

The duty to communicate material information to clients, found in Rule 1.4, interfaces with the duty of confidentiality under Rule 1.6. If a lawyer wishes to use either open source or closed source third party vendors for GAI analysis, and the lawyer would be conveying to the vendor confidential client information, the lawyer could only comply with these duties by obtaining the informed consent of the client. However, we think it would be very difficult, if not impossible, and in any event highly risky, for lawyers to seek client consent to disclose confidential information to third party GAI suppliers because the complexity, novelty, and uncertain development of GAI at this time makes informed consent problematic. Instead, we think it would be desirable -- although perhaps not ethically required -- for lawyers to disclose to clients in their engagement agreements their use of GAI while protecting client confidentiality. Consider the following clause:

> This firm makes use of modern technology in providing services to you, including generative artificial intelligence. Use of such technology increases the efficiency of our work on your behalf and helps us to keep legal costs as low as possible. In using such technology we are always mindful of our ethical obligations, including the duty of confidentiality of your information. You should be aware, however, that any third party system poses a risk of disclosure of confidential client information. By signing this engagement you consent to our use of these technologies consistent with our ethical obligations. Please feel free to contact the undersigned if you have any questions about the firm's use of technology.

Note that this clause does not seek or authorize the disclosure of client confidences to GAI, it merely informs clients of the firm's use of GAI to the extent that such use is consistent with the duty of confidentiality.

While this column has concentrated on competency and confidentiality, GAI poses a number of other ethical issues, including supervision of lawyers and nonlawyers using GAI, reasonable fees associated with the use of GAI, unauthorized practice and choice of law, and compliance with other laws, such as those involving intellectual property. We plan to discuss some of these issues in future columns. No doubt other significant issues will arise as this major technology continues to develop.

South Carolina Lawyer

Prospective Client Consultations – The Firm Disqualification Dilemma Resulting from ABA Formal Opinion 510

Ethics Watch
May 2024
Nathan Crystal

Who would think that prospective client consultations could cause such problems, but alas the problems are only growing with the recent release of ABA Formal Opinion 510 (March 20, 2024). However, I am getting ahead of myself, so let's trace the evolution of this problem.

The Structure of ABA Model Rule 1.18 -- Duties to Prospective Clients

The ABA adopted Model Rule 1.18 in 2002 as part of the Ethics 2000 revisions; prior to 2002 the rules of ethics did not have a specific provision on prospective clients. ABA Formal Op. 492 ("ABAFO 492") at 1, nn. 3-4. Model Rule 1.18 rejects the idea that lawyers do not have duties to prospective clients. Instead, the rule generally treats prospective clients like former clients. A lawyer is not allowed to reveal or use information gained from the prospective client to the same extent as former clients. Model Rule 1.18(b). The rule for prospective clients, however, then departs from the rule for former clients. For former clients, a lawyer may not undertake representation against the former client if the matters are the same or are substantially related. Model Rule 1.9(a). Disqualification of the lawyer who represented the former client is imputed to all members of the firm, and the firm may not avoid disqualification by screening the disqualified lawyer. The disqualification rules for lawyers who had consultations with prospective clients are less demanding. A lawyer who had a prospective-client relationship with a person is only disqualified from representation of a client against the former prospective client if the matters are the same or are substantially related and the lawyer "received information from the prospective client that could be significantly harmful to that person in the matter." Even if the lawyer did receive such information, the lawyer's firm is not disqualified from representing the new client against the former perspective client if it complies with the screening requirements of Model Rule 1.18(d)(2).

Disqualification of the Lawyer Based on Consultation with the Prospective Client

A lawyer conducting a consultation with a prospective client—which could take place in a variety of ways, including in person, virtual, chat, or email exchange—faces at least two possible disqualification situations as a result of the consultation. First, the lawyer and the lawyer's firm could be disqualified from representing a new client against the lawyer's former prospective client. Second, the lawyer might have gained information from the prospective client that would disqualify the lawyer and the lawyer's firm from representing an existing client. The first possible type of disqualification turns on whether the lawyer acquired information from the prospective client that could be significantly harmful to the prospective client in the matter involving the new client. When is information "significantly harmful" to the former prospective client? The ABA Ethics Committee addressed this issue in Formal Opinion 492 (June 9, 2020). The opinion quoted with approval the following test:

> Information may be "significantly harmful" if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies or potential weakness. "Significantly harmful" may also be the premature possession of information that could have a substantial impact on settlement proposals and trial strategy; the personal thoughts and impression about the facts of the case; or information that is extensive, critical, or of significant use. ABAFO 492 at 9.

Significantly harmful information must relate to the specific matter in which disqualification is sought, rather than causing embarrassment or inconvenience. *Id.* Ultimately, the determination of whether information is significantly harmful is fact specific. *Id.* at 11.

Opinion 492 points out that lawyers can avoid disqualification by warning clients against disclosing detailed information, by limiting the initial consultation to information reasonably necessary for the purpose of deciding whether to take on the new matter, or by obtained informed client consent that nothing disclosed in the initial interview will prevent the lawyer from representing a different client in the matter. *Id.* at 9-10. The opinion also notes that if a lawyer is disqualified, that disqualification will not be imputed to the lawyer's firm if the firm complies with the screening procedures of Rule 1.18(d).

The second type of disqualification arising from a lawyer-client consultation can arise if the lawyer in the consultation learns from the prospective client information that is material to an existing (as opposed to a future) client of the lawyer or the lawyer's firm. That was the situation in ABAFO 90-358. While this opinion was issued before the adoption of Rule 1.18, its analysis is still relevant because it focuses on the application of Rule 1.7 to the lawyer's representation of the existing client based on the information that lawyer obtained in a consultation with the prospective client. The committee concluded that (1) the prospective client was entitled to the protections of Rule 1.6, (2) in some cases the information obtained from the prospective client could materially limit the representation of an existing client, (3) informed consent of the existing client under Rule 1.7(b) would then be necessary for the lawyer to continue the representation of the existing client, but (4) such consent from the existing client could not be obtained without the prospective client giving informed consent to allow its confidential information to be revealed to the existing client, (5) consent from the prospective client would often be impossible to obtain, leading to the necessity of the lawyer withdrawing from representation of the existing client.

Availability of Screening

Model Rule 1.18, ABAFO 90-358, and ABAFO 492 all recognize the possibility of screening the lawyer who consulted with the prospective client to avoid disqualification of the lawyer's firm from representing either a new client against the former prospective client or an existing client. Under Model Rule 1.18(d), if a lawyer is disqualified from representing a client against a former prospective client because the lawyer acquired information that may be significantly harmful to the former prospective client, the lawyer's disqualification is not imputed to the entire firm if

> the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. Model Rule 1.18(d)(2).

The ABA Committee first discussed when information obtained from a prospective client was "reasonably necessary to determine whether to represent the prospective client." Information that meets this standard principally falls into two categories: information necessary to comply with the lawyer's professional obligations and information that relates to the lawyer's general business decisions. The first category could include information relating to whether the lawyer could handle the matter competently (Rule 1.1), communicate effectively with the client (Rule 1.4), avoid conflicts of interest (Rules 1.7, 1.8, and 1.9), avoid assisting the client in criminal or fraudulent conduct (Rules 1.2(d) and 1.16(a)), and not engage in frivolous proceedings (Rule 3.1). Information in the second category (business considerations) could involve the amount of time the matter would take, the expected compensation, anticipated expenses, the lawyer's abilities and interests as they relate to the matter, and firm policies. ABAFO 510 at 3.

The committee recognized that a detailed inquiry into the expected matter, whether a transaction or litigation, might well be permissible but might not be "reasonably necessary":

> Once a lawyer has sufficient information to decide whether to represent the prospective client, further inquiry may be permissible, but it will no longer be "necessary."

Even if the information obtained by the lawyer meets the standard of being reasonably necessary, the lawyer must have taken reasonable measures to avoid exposure to no more information than was reasonably necessary. The committee cautioned that "free flowing" interviews were unlikely to meet this standard. The committee also emphasized the importance of the lawyer warning the prospective client that the lawyer has not agreed to take the case and that the information should be limited to what is necessary for the lawyer and client to decide whether to move forward with the representation.

> Putting it All Together – The Risk of Firm Disqualification Arising From Prospective Client Consultations

Based on the text of Rule 1.18 and the ABA's interpretation of the rule, to avoid disqualification of the interviewing lawyer and the lawyer's firm, the interviewing lawyer must not obtain information that "could be significantly harmful" to the prospective client, the interviewing lawyer should obtain no more information than is reasonably necessary to determine whether to represent the prospective client, and the interviewing lawyer must have adopted reasonable measures to avoid exposure to more information than is reasonably necessary to decide whether to accept the representation. All three aspects are fact specific. The committee also strongly urged lawyers to warn prospective clients to avoid sharing more information than is necessary to determine whether to go forward with the relationship.

The result of this structure is that lawyers must be extremely cautious in obtaining information from prospective clients, particularly about the matter that caused the client to seek the lawyer's services, and should seriously consider warnings about disclosing significant information and perhaps even a written waiver of confidentiality. All of this is likely to be off-putting to prospective clients, particularly sophisticated clients with significant matters. Of course, the recent opinion points out that lawyers are not required to adopt such a restrained approach; they simply must recognize that a more free-flowing communication with prospective clients is almost certain to disqualify the interviewing lawyer and more importantly the entire firm because of the limitations on when screening is available. ABAFO 510 at 6.

Moreover, opinion 510 creates another issue not addressed by the opinion. Suppose a new client comes to the firm and seeks to retain the firm's services against a former prospective client in a matter that is substantially related to the one the former prospective client brought to the firm. The firm does a conflict check. Will the conflict check identify the former prospective client or the nature of the matter that person discussed with the firm? Perhaps I am wrong but I do not think that firms enter prospective clients in their data base for conflict analysis. If they don't, should they start to do so to detect possible conflicts between new prospective clients and former prospective clients?

More generally, in my opinion Rule 1.18 is defective in its screening mechanism. Screening was introduced to avoid disqualification of a firm when a lawyer in the firm is disqualified. See ABA Model Rules 1.10(a)(2) and 1.11(b), However, the screening structure of Rule 1.18 increases the risk of disqualification of the entire firm because the requirements for screening condition the availability of screening on what the screened lawyer did in the initial consultation.

Proposed Solutions

There are solutions to this problem: one formal and the other pragmatic. The formal solution is a revision of Rule 1.18 to allow screening of the disqualified lawyer without the requirement that the screened lawyer took reasonable measures to avoid obtaining more information than was reasonably necessary to determine whether to take the case. Such a revision of the rule is sound as a matter of policy. The current rule unnecessarily hampers lawyers in their discussions with prospective clients creating formalism that is contrary to the natural inclinations of both lawyers and clients. In addition, the current rule is too protective of prospective clients. After all, the prospective client is not a client and, as Rule 1.18 recognizes, a prospective client is not entitled to the full protections that flow from being a client. This change in the rule would allow lawyers to have wide-ranging interviews with prospective clients without endangering the firm from disqualification in other substantially related matters if the standard requirements for screening are met. Of course, a firm could as a matter of policy adopt standards for interviewing like the ones recommended in the ABA opinions, but it would not be required to do so and would not face disqualification risks if it chose not to do so.

Rule changes are not easy to make, and we must live with the Rule as it exists and as it has been interpreted by the ABA Committee. However, courts are not bound by ethics rules in making disqualification decisions. Disqualification decisions are equitably based and require

analysis of a number of factors, not just the confidentiality interest of a prospective client. See Nathan M. Crystal & Francesca Giannoni-Crystal, *Choice of Law and Risk Management for Conflicts of Interest*, 16 Char. L. Rev. 1, 20-28 (2022). A court could decide that even if the disqualified lawyer obtained more information than was reasonably necessary to determine whether to take the prospective client's case, a balancing of interests does not require disqualification of the entire firm. The court could examine factors such as the effectiveness of the screening that was used, the interest of the client against whom the disqualification motion is filed in retaining the client's choice of counsel, the timing of the motion, and the extent to which the motion interferes with the orderly administration of justice.

Faculty

Hon. Martin R. Barash is a U.S. Bankruptcy Judge for the Central District of California in Woodland Hills and Santa Barbara, sworn in on March 26, 2015. He brings more than 20 years of legal experience to the bench. Prior to his appointment, Judge Barash had been a partner at Klee, Tuchin, Bogdanoff & Stern LLP in Los Angeles since 2001, where he represented debtors and other parties in chapter 11 cases and bankruptcy litigation. He first joined the firm as an associate in 1999. Earlier in his career, Judge Barash worked as an associate of Stutman, Treister & Glatt P.C. in Los Angeles. He also has served as an adjunct professor of law at California State University, Northridge. Following law school, Judge Barash clerked for Hon. Procter R. Hug, Jr. of the U.S. Court of Appeals for the Ninth Circuit from 1992-93. He is a former ABI Board member, for which he served on its Education Committee and currently serves on its Committee for Diversity, Equity, and Inclusion, and he is a judicial advisor to ABI's annual Southwest Bankruptcy Conference and its Consumer Practice Extravaganza. Judge Barash is a former member of the Board of Governors of the Financial Lawyers Conference and currently serves a judicial director of the Los Angeles Bankruptcy Forum, where he is a member of its Committee on Diversity, Equity and Inclusion. He also is a volunteer for the Los Angeles chapter of Credit Abuse Resistance Education (CARE) and was recognized nationally as the CARE Volunteer of the Year for 2022. Judge Barash has served on numerous committees of the U.S. Bankruptcy Court for the Central District of California and currently serves as chair of its Education Committee, which is responsible for conducting educational programs for judges, law clerks and externs. He is a frequent panelist and lecturer on bankruptcy law and a co-author of the national edition of the *Rutter Group Practice Guide: Bankruptcy*. Judge Barash received his A.B. *magna cum laude* in 1989 from Princeton University and his J.D. in 1992 from the UCLA School of Law, where he served as member, editor, business manager and symposium editor of the *UCLA Law Review*.

Nathan M. Crystal is the managing partner of Crystal & Giannoni-Crystal, LLC in Charleston, S.C., and New York, which focuses on professional ethics, international business and litigation, and data privacy. He also is an adjunct professor of professional responsibility at NYU and a retired chaired professor at the University of South Carolina School of Law. Mr. Crystal has written several books on professional ethics and contract law, including *Professional Responsibility: Problems of Practice and the Profession* (Aspen 8th ed. 2024 coauthored with Professor Grace Giesel), along with numerous articles. He also has written a bimonthly column for the South Carolina Bar, "Ethics Watch," for more than 15 years. Mr. Crystal has served as an expert witness, ethics advisor, disciplinary defense counsel, and internal investigator in hundreds of cases involving lawyers and law firms in all major areas of practice. In addition, he serves as outside ethics counsel for several major law firms. Mr. Crystal received his undergraduate degree from the University of Pennsylvania Wharton School, his J.D. from Emory Law School, where he was second in his class and editor-in-chief of the *Journal of Public Law* (now the *Emory Law Review*), and his LL.M. from Harvard Law School.

Jarret P. Hitchings is counsel with Bryan Cave Leighton Paisner LLP in Charlotte, N.C., and a member of the firm's Corporate and Finance Transactions Department, with experience in restructuring, insolvency and special situations. In particular, his practice focuses on distressed-asset litigation, including federal bankruptcy and state court liquidation proceedings. Mr. Hitchings is active in matters across the country and internationally on behalf of debtors, creditors, fiduciaries and foreign

representatives in the U.S. He has significant experience practicing in the country's principal business courts, including the U.S. Bankruptcy Courts for the District of Delaware, Southern District of New York and the Southern District of Texas, as well as Delaware's Court of Chancery. Prior to joining the firm, Mr. Hitchings was a litigation and restructuring partner in the Delaware office of another large international law firm. He is a member of the INSOL International and a member of Class X of the International Insolvency Institute's NextGen Leadership Program. Since 2016, Mr. Hitchings has authored or co-authored numerous articles that have been published in *The Legal Intelligencer*, *Law360*, *ABI Journal*, *Delaware Business Court Insider* and *INSOL World*. He received his B.A. from Pennsylvania State University and his J.D. *magna cum laude* from Villanova University Charles Widger School of Law, where he was admitted to the Order of the Coif.

Mark G. McCreary, CIPP, CPT is a partner at Fox Rothschild LLP in Philadelphia and serves as the firm's Chief Artificial Intelligence and Information Security Officer, as well as co-chair of the firm's Privacy & Data Security Practice. He also is the firm's former Chief Privacy Officer. Mr. McCreary advises businesses on a wide range of data-privacy and security issues, helping clients protect their critical information and comply with state, federal and international privacy laws. He earned the rigorous CIPP/US, CIPP/E, and CPT certifications from the International Association of Privacy Professionals and has been named a Trailblazer in cybersecurity law by *The National Law Journal*. Mr. McCreary is a member of the Attorneys' Liability Assurance Society (ALAS), for which he co-chairs its GenAI Working Group; the Philadelphia Bar Association, for which he co-chairs its Risk Management Committee, the International Association of Privacy Professionals and the Villanova University Paralegal Studies Advisory Committee. He received his B.A. in 1995 from Villanova University and his J.D. in 1998 from Southern Methodist University School of Law.