

Guidelines on Use of Generative Artificial Intelligence by NSW Barristers

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NEW SOUTH WALES
BAR ASSOCIATION

NSW Bar Association – Issues arising from the use of generative artificial intelligence software in legal practice

Approved by Bar Council on 27 November 2025.

This document assists NSW barristers to understand their duties and professional obligations under the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) (**Barristers Rules**) in relation to the use in their legal practice of artificial intelligence (AI), and particularly generative artificial intelligence (Gen AI). Barristers fulfill an important role in the administration of justice. Decisions about the use of any form of AI should be made with reference to the Barristers Rules, and in particular a barrister's fundamental duty to the court and the administration of justice, as well as applicable legislation, contractual and tortious duties and practice notes.

These Guidelines may be considered by the Bar Council in relation to any complaint received regarding a barrister's use of Gen AI in their legal practice.

What is generative artificial intelligence?

Gen AI comprises software that is 'pre-trained' on a large data set to generate human-like text responses. One common form in which Gen AI is available to the public is as a 'chatbot' that users can ask questions of, and with which they can carry on a conversation in the form of further questions or requests for clarification. The user's questions are called 'prompts', and they may also contain instructions to the chatbot about what to consider or how to answer the user's questions. Users can also upload a wide variety of content to the chatbot, and can request that the chatbot generate documents that the user can download, or material that the user can copy and paste into their own document. Gen AI functionality is now also commonly incorporated into other software, including software targeted at legal professionals, and online tools (such as Google Search), which may operate without the need to use prompts.

Gen AI software can be used to conduct legal research, analyse existing documents such as cases, contracts or submissions, review discovered documents, refine or give suggestions for the improvement of legal writing, summarise lengthy material, produce chronologies, and generate documents in the form of submissions, opinions, or evidence.

These Guidelines are current as at 19 December 2025.

Responsible use of Gen AI may assist practitioners to work more efficiently, and increase access to justice by lowering the costs of litigation. However, barristers need to be aware that, due to the way Gen AI is programmed, Gen AI can generate false information in its responses and in documents it creates. These errors are commonly called 'hallucinations', and in the legal context, they can include references to cases that do not exist, creation of propositions or facts that are not supported by the material or evidence, mis-stating the content of legislation, altering the substance of material uploaded, and incorrectly ascribing arguments or propositions to real cases. The nature of Gen AI-created content is such that this false information is often expressed in a plausible form, and the language used may suggest that the software is asserting that what it has produced is correct.

This means that, if a barrister uses Gen AI-created content, that content may contain errors that could mislead a court or an opponent, cause a barrister to take an incorrect forensic step, or cause a document or advice to be materially incorrect.

There are several additional risks inherent in the way that Gen AI works. First, Gen AI may retain a copy of prompts, information and documents provided to it by a user, as well as the corresponding outputs, and may later reproduce some or all of it when generating material for other users.

Secondly, the material that Gen AI outputs will depend on the data on which it has been 'trained'. A Gen AI model may only have been trained on data as at a certain date and may not contain relevant material such as cases or legislation decided after the date or may include or be restricted to the law of a jurisdiction other than Australia. The data may include material posted online by users that contains biases or offensive propositions or viewpoints, and these may be reproduced in the Gen AI's output.

Thirdly, both the training data and the programming of Gen AI are usually proprietary and kept confidential, which means that limitations may not be evident to a user, and the manner in which the software produces its answers will not be verifiable (and, in some cases, may change over time).

These aspects of Gen AI require barristers to consider various duties in the Barristers Rules, which will be considered below. Barristers also need to consider legislation and duties outside the Barristers Rules, the most common of which are also identified below.

Barristers Rules: Duties to the court

Perhaps the most important duty that may be affected by a barrister's use of Gen AI is the duty owed by the barrister to the court.

Rule 24 provides:

A barrister must not deceive or knowingly or recklessly mislead the court.

As set out above, it is possible that material produced by Gen AI will contain false, incomplete, or outdated information. If such material is put to a court, a barrister is at risk of breaching this rule.

This has already occurred in Australian courts, including as a result of using Gen AI modules of legal practice software to generate lists of authorities. The responses have included referral or potential referral of a practitioner to a disciplinary body (*Dayal* [2024] FedCFamC2F 1166; *Handa & Mallick* [2024] FedCFamC2F 957), and orders that practitioners pay on an indemnity basis costs incurred by their opponents due to false information produced by the use of Gen AI (*Murray v State of Victoria* [2025] FCA 731).

The Court of Appeal has confirmed that practitioners who use AI to conduct research have a professional duty to check the accuracy of such research by reference to authoritative sources before using it, and the profession can expect the court to inquire whether that duty has been breached if incorrect or misleading material has been provided to the court: *May v Costaras* [2025] NSWCA 178 at [12]-[13], [49], [95].

Guidance: Gen AI is not reliable in providing accurate legal information. That includes Gen AI functionality packaged within software targeted at legal practitioners. As a minimum first step, a barrister should always verify the accuracy, reliability, relevance and currency of all AI-generated material, and ensure it is consistent with their own legal knowledge and research before relying on it for any purpose. All references to cases and legislation, and all propositions ascribed to cases or legislation, must be independently verified by the barrister.

There is an 'absolute necessity for practitioners who do make use of Generative AI in the preparation of submissions – something currently permitted under the Practice Note – to verify that all references to legal and academic authority, case law and legislation are only to such material that exists, and that the references are

accurate, and relevant to the proceedings.': *May v Costaras* [2025] NSWCA 178 at [17].

Given the increasingly widespread (and often undisclosed) use of Gen AI within society, barristers should remain vigilant that material provided to or obtained by them might need to be more carefully verified than was the case previously. Material supplied to barristers by clients or instructors, or downloaded from the internet, may contain material produced by Gen AI, or even be wholly the creation of Gen AI. Documents such as submissions, articles, or case notes may contain errors or even be fictitious. In particular, it is possible that documents purporting to be judgments obtained from non-authoritative sources may be fictitious. A barrister is expected to develop a practice which checks the accuracy and legitimacy of any such material they rely upon.

Barristers Rules: Independence, competence and diligence

A number of the Barristers Rules require that a barrister act with competence and diligence, exercise independence, and act in the interests of justice.

Rule 4 provides:

(c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely and with competence and diligence.

(e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients.

Rule 23 provides:

A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.

Rule 35 provides:

A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.

Rule 42 provides:

A barrister must not act as the mere mouthpiece of

the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable.

These rules reflect the expectations of the community of barristers as specialist advocates. The requirement to act with diligence and competence may be breached if a barrister fails to check the accuracy of Gen AI material. It may also be breached if a barrister causes a client to lose privilege or confidentiality in material due to uploading it to Gen AI.

The requirement to apply the barrister's own skill and exercise their own independent judgment when performing work for a client may be breached if a barrister delegates all or part of their independent decision-making (including evaluative judgments) to Gen AI. The requirement to act in the interests of the administration of justice may be breached if a barrister causes unnecessary delay or expense by inappropriately relying on material produced by Gen AI.

In addition to the duties owed under the Barristers Rules, barristers also owe a duty to exercise reasonable care and skill in providing professional legal services to their clients, requiring them to demonstrate the competence and skill reasonably expected of barristers practising their profession and taking proper care.

Guidance: Clients are entitled to expect that any work that is done on a brief is a barrister's own work and reflects the application of the barrister's own skill, knowledge, experience and judgment. Barristers are expected to use any technology responsibly. The use of AI tools is no exception. If AI tools are to be used, the barrister must ensure that the use supplements, and does not substitute, the barrister's own legal skills and knowledge.

Barristers should only release work under their name to a client or a decision-making body in relation to which they: (i) have exercised independent forensic judgment; (ii) have advised independently; (iii) have reviewed and edited where necessary; (iv) believe is correct and reliable based on their training, experience, and research; and (v) can therefore independently explain and support.

The requirement of diligence and competence is likely to include verifying the correctness of all material produced by Gen AI tools, whether or not it is put to a

court. It is also likely to include ensuring that any biases or offensive material that is contained in AI-generated material (as a result of the text on which a Gen AI was 'trained') are detected and removed.

A barrister's duty of independence requires them to ensure that the work they deliver is the product of their own professional judgment. A corollary of that requirement is that they must be in a position to defend the professional judgment embodied in that work. The standard expected of barristers can easily be eroded by reliance on Gen AI if the barrister substitutes it for exercise of their own judgment.

A barrister should be transparent with clients about any use of AI tools. Barristers should consider the extent of any disclosure and consent required, in particular for the use of any privileged or confidential information. A barrister always remains entirely accountable for any legal work based on AI-generated information. Where a barrister uses Gen AI for any purpose, it may be prudent to keep a record of the prompts used, any choices made, and the material generated by the tool used, as well as steps they have taken to verify the correctness of that material.

Barristers Rules: Confidentiality and legal professional privilege

It is common for providers of Gen AI to retain in their systems, and to make use of, any information entered into their software by users, including prompts, and any documents uploaded. This is commonly the case when a user uses the 'free' version of software, but may also occur when using paid versions of software, depending on the terms of service. If that occurs, it may be possible for material entered by a user (including confidential or privileged information) to be reproduced in output provided to other users.

Rule 114 provides:

A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:

(a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the

barrister to the first person and who does not give the information confidentially to the barrister, or

- (b) the person has consented to the barrister disclosing or using the information generally or on specific terms.*

Guidance: The requirement that barristers protect confidential information applies in full when using any form of AI tool. Such duties may arise under the barrister's retainer, under the principles of equity, under legislation, under the *Hearne v Street* obligation (previously known as the *Harman* or implied undertaking), or by express confidentiality agreements covering documents produced or discovered in litigation.

Barristers should check the terms of service for any Gen AI software they use and consider what material may or should not be uploaded accordingly. As a general rule, barristers should be careful before entering any confidential, privileged or sensitive information into Gen AI. For example, before uploading any information, a barrister should check whether the AI model is being trained on information that is uploaded to it. If so, confidential or sensitive information should not be uploaded. Similarly, copyright issues may arise if documents are uploaded without the consent of the owner of the relevant copyright (see below).

If a barrister handles any data that is subject to any requirements as to the jurisdiction(s) in which that data must be, or must not be, stored, barristers must take steps to identify where any data they enter into Gen AI may be stored. Barristers should be aware that references to storage 'in the cloud' are not sufficient to identify where the data may be stored; every 'cloud' in truth involves data storage in some physical location(s). If necessary, a barrister must check with the provider of any software tool where their data will be stored, and whether that is compatible with obligations binding them.

Barristers Rules: Avoiding bias and discrimination

It is common for Gen AI to be trained on material available on the internet, including posts on forums, blog pages, and social media. That material may contain biased, discriminatory and/or offensive statements, and the Gen AI software may reproduce

that material in content it produces to users. That reproduction may be overt (for example, in July 2025, Grok AI made inappropriate posts on social media that included referring to itself as 'MechaHitler') or subtle.

Rule 8 provides:

A barrister must not engage in conduct which is:

- (a) dishonest or otherwise discreditable to a barrister;*
- (b) prejudicial to the administration of justice; or*
- (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.*

Rule 123 provides:

- (1) A barrister must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:*
 - (a) discrimination,*
 - (b) sexual harassment, or*
 - (c) bullying.*
- (2) For the purposes of subrule (1), conduct in connection with a barrister's profession includes, but is not limited to:*
 - (a) conduct at social functions connected with the bar or the legal profession, and*
 - (b) interactions with a person with whom the barrister has, or has had, a professional relationship.*

Guidance: When engaging with Gen AI, barristers should be conscious of the fact that it might produce material containing inappropriate language or views. If such material is put to a court, an opponent, a client, or a member of the public, the barrister may be in breach of rule 8 or rule 123. Barristers are expected to identify and remove any such inappropriate content.

Practice notes

Most NSW State courts have now adopted practice notes that regulate the use of Gen AI software. Practitioners must be aware of the operation of those notes in all

jurisdictions in which they appear. As of the date of these guidelines, the following State court practice notes apply:

- Supreme Court: [Practice Note SC Gen 23 – Use of Generative Artificial Intelligence](#)
- Land and Environment Court: [Practice Note – Use of Generative Artificial Intelligence](#)
- Industrial Relations Commission: [Practice Note N. 33 – Use of Generative Artificial Intelligence](#)
- District Court of New South Wales: [General Practice Note 2 – Generative AI Practice Note](#)

Guidance: Non-compliance with a practice note is likely to be relevant to the consideration by a court or the Bar Association of any complaint received about a barrister. As at the date of these guidelines, the Supreme Court practice note imposes a general prohibition on the use of Gen AI to produce material that may become evidence (paras 10-14), with the ability to apply for leave in exceptional cases (para 15) and for some forms of expert evidence (paras 20-23). Verification obligations are imposed if Gen AI has been used in the preparation of written submissions, summaries, skeletons of argument (paras 16-17), but ultimate professional and ethical responsibility for the correctness of material put to a court remains with the author(s) of that material (para 18). Barristers must familiarise themselves with and comply with these obligations.

The Supreme Court practice note also prohibits entering or uploading information to Gen AI software (with limited exceptions) if it is subject to non-publication or suppression orders, or the implied (*Hearne v Street / Harman*) undertaking, unless satisfied of three stated matters (paras 9A-9B). These are that the information:

- (a) will remain within the controlled environment of the technological platform being used and that the platform is the subject of confidentiality restrictions on the supplier of the relevant technology or functionality to ensure that the data is not made publicly available and is not used to train any large language models;*
- (b) is to be used only in connection with that proceeding (unless otherwise required or permitted by law to be disclosed or required to*

be reviewed by a law enforcement agency for policy purposes);

- (c) is not used to train the Gen AI program and/or any large language model.*

A barrister should take steps to assure themselves that these matters are satisfied for any Gen AI they propose to use, and should keep a record of those steps (including any terms of service consulted, and any statements made by the provider of the software on a webpage or in correspondence).

The practice notes in the other State courts listed above are currently to the same effect as the Supreme Court, but should be consulted when appearing in any of those jurisdictions. All of the practice notes state that they will be periodically reviewed due to the rapidly-developing nature of Gen AI, and it is essential to ensure that the barrister is consulting the current form of a practice note.

As of the date of these guidelines, the Federal Court of Australia is undertaking a consultative process as to whether it should issue a practice note, or guidelines, concerning the use of Gen AI.

Intellectual property considerations

Barristers should be aware that there is litigation on foot in the United Kingdom, United States and elsewhere alleging copyright infringement by various Gen AI software providers, including infringement during the course of training of their respective AI models. There is a possibility that material produced by Gen AI may contain copyright material, and barristers should be aware that if their use of an AI tool generates a document that reproduces a substantial part of copyright material without consent of the copyright owner, use of that document by the barrister may involve liability for infringement.

A ‘defence’ to infringement of copyright work is available under sections 43 of the *Copyright Act* 1968 (Cth), provided that the relevant act is for the purpose of (a) a judicial proceeding; or (b) the giving of professional advice by a legal practitioner, but in the case of (b), only if the use of the copyright work is a ‘fair dealing’. This is likely to be informed by various factors including those set out in the Copyright Act in relation to other exceptions to infringement.

Barristers should also be aware that if the critical elements of any work provided by the barrister, such as a written

advice or submission, are generated directly by Gen AI (rather than being drafted by the barrister from information provided by the software), it is likely that the barrister will not be the ‘author’ of the relevant work and thus will not own any copyright in it. For copyright to subsist in a literary work, there is a requirement that the ‘author’ of the work is human: see *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142.

Conclusion

The critical point in relation to all forms of technology, including Gen AI, is that it cannot be used as a substitute for the proper exercise of a barrister’s professional judgement in matters of law or in ignorance of their professional and ethical obligations. Technology is not a substitute for a barrister’s own work.

Barristers should note that the AI field is changing very quickly, and new developments may occur that are not referred to in these Guidelines. It appears likely that Gen AI technology is likely to become prevalent, and the responsible use of Gen AI software will become a necessary part of a barrister’s practice, particularly where it can be used to reduce the cost of legal services and to increase access to justice.

In the interim, barristers are best served by familiarising themselves with Gen AI technology, its limitations, the risks inherent in its use, and preparing for the opportunities it will increasingly create to better serve both clients and the courts.

If any further guidance is required, please contact the Professional Conduct Department at pcd@nswbar.asn.au or the Policy and Law Reform Department at dppa@nswbar.asn.au or by phone on (02) 9232 4055.



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