

AI and Higher Education: What You Need to Know

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Relevant Rules of Professional Conduct

Competence	Confidentiality	Truthfulness	Supervision
<ul style="list-style-type: none">• Rule 1.1: Competence	<ul style="list-style-type: none">• Rule 1.6: Confidentiality of Information	<ul style="list-style-type: none">• Rule 3.1: Meritorious Claims & Contentions• Rule 4.1: Truthfulness in Statements to Others• Rule 8.4: Misconduct	<ul style="list-style-type: none">• Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer• Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

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AI and GenAI TERMINOLOGY

- **AI** – “Intelligence” of machines or technology (as opposed to human intelligence)
- **Machine Learning (ML)** – AI involving algorithms that enable computer systems to iteratively learn from data and make decisions, inferences, or predictions
- **Generative AI (GenAI)** – Subset of AI that can produce “new” content in a manner that mimics human output
- **GPT** – Generative Pretrained Transformer
- **LLM** - Large Language Model – Based on a “neural network” with millions or billions of parameters
- **NLP/NLU** – Natural Language Processing/ Understanding
- **Hallucination** – Generating fictitious data

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What is an LLM?

- A probabilistic model of language
 - Content creation – text, images, audio files, deepfakes, code
 - Produces output based on probabilities and not necessarily verbatim
 - Looks for the next likely word using predictive analytics
 - Optimized for fluency, not accuracy
 - An LLM does not “know” the answers to a user’s prompt
 - Best for repetitive language (not computational) tasks and phraseology

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Ethical issue #1: Duty of Competence

- Rule 1.1: Competence
- **Danger:** Potential for not understanding what you are doing.
- **Ask:**
 - Do I understand to a reasonable degree how this tool works, its limitations, and the terms of use?
 - Am I relying on the tool to verify its own output?
 - Am I using my own professional judgment or substituting the tool's judgment for my own?
- **Best practice:**
 - Carefully review AI generated output for accuracy and bias.

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Higher Education Community & AI

- Colleges
- Accreditors
- EdTech
- Marketing firms and other outside vendors agencies
- U.S. Department of Education

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Uses of AI in Higher Education

- Marketing
- Admissions
- Financial aid
- Research
- Learning

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Uses of AI in Higher Education

- Assessment
- Online proctoring
- HR
- Administrative support
- Accreditation

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Potential Compliance Issues

- Data privacy & cybersecurity
- Accessibility
- Title VI & Title IX
- Distance Education (“regular and substantive interaction”)
- Third-party servicer liability

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AI & Compliance Program

- AI can potentially assist with efforts to comply with:
 - Prohibition on misrepresentation
 - Student outcome standards

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Response by Regulators

- U.S. Department of Education
- Congress
- Accreditors

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Ethical Issue #2: Duty of Confidentiality

- Rule 1.6: Confidentiality of Information
- **Dangers:**
 - Potential for sharing with third parties or use for training
 - Potential for unauthorized disclosure of institutional information
- **Ask:**
 - Does the generative AI tool have adequate confidentiality and security protections?
 - Has the AI tool provider agreed not to use for training purposes or share the institution's information?
- **Best practice:**
 - Anonymize institutional information input into the tool

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AI Contracting Considerations

- Understand technology involved!
- Key questions when considering the use of AI tools:
 - What are the anticipated inputs?
 - What are the intended outputs?
 - Who owns and controls various data sets?
 - What LLM is being leveraged?
- Primary risk areas when incorporating AI through vendors:
 - IP infringement around training data
 - Ownership of input and output
 - Confidentiality
 - Data Security
 - Hallucinations
 - Implicit bias in training data/AI model

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AI Contracting Considerations – Terms of Use

- Agreements vary and need to be reviewed carefully
- Treatment of prompts
 - Confidentiality – are prompts used to train the GenAI model?
 - Ownership – are you giving the AI provider a “nonexclusive, worldwide, royalty-free, irrevocable, sublicensable, and fully paid-up right” to use prompts, including with third parties?
- Data privacy and IP compliance – rep/warranty that the AI tool does not violate data privacy laws or the IP rights of third parties
- Treatment of outputs
 - Ownership – disclaim or assign to the user all rights, title, and interest to outputs; this does not guarantee IP rights
 - Use restrictions – user cannot build competitive technology; do uses comply with internal policies, applicable laws, regulations?
- Indemnification (Google, Microsoft, Adobe) – some assumption of responsibility of infringement with their GenAI tools
 - Training data – training data infringes a third party’s IP
 - Outputs - may be conditional (i.e., not intentional infringement)

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AI Contracting Consideration – Vendor Diligence

- Diligence of Potential AI Vendors
 - Vendor Questionnaires
 - Use of AI
 - Training data and data rights
 - Data security
 - Monitoring of inputs and/or outputs
 - What company information is the vendor collecting, processing, sharing
 - Incident response procedures
 - Audit rights
 - Diligence responses can be reps and warranties

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AI Bias Identification and Mitigation

- What information contains bias?
 - Bias in the training data; bias in the algorithms
 - Bias In AI Tools Developed and Fine-Tuned Internally
 - Bias In AI Tools and Output From Third Parties
- Bias Mitigation Strategy
 - Adopt guiding principles (e.g., transparency, visibility, equity during development and deployment)
 - AI model validation and impact assessments
 - Communicate mitigation attempts with stakeholders
 - Develop reporting guidelines
 - Accountability framework – culture that redresses harms caused by biased models

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Intellectual Property Considerations

- Patents – Only a human can be an “Inventor”
 - 2/13/24 – PTO’s Inventorship Guidance for AI-assisted Inventions
 - Inventors must be human, but the use of AI does not preclude the creation of an invention if the human makes a “significant contribution”
 - AI-generated innovations are not patentable, *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022)
- Copyright - AI output not copyrightable – How much human involvement is enough?
 - *Thaler v. Perlmutter*, No. 22-cv-1564 (D.D.C. Aug. 18, 2023) (“human authorship is a bedrock requirement of copyright”)
 - Must disclose use of AI in registration applications
 - Infringement claims - Does your output include another’s copyrighted materials?
 - Internet scraping and the importance of human intervention

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Ethical Issue #3: Duty to be Truthful

- Rule 3.1: Meritorious Claims & Contentions
- Rule 4.1: Truthfulness in Statements to Others
- Rule 8.4: Misconduct
- **Danger:** AI can generate false information.
- **Best Practice:**
 - Verify all information generated by an AI tool to ensure that it is accurate.

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Developing an AI Policy – Risk Analysis Framework

- AI Risk Management – “safety first” or just “do no harm”?
 - AI risks should not be considered in isolation
 - Integrated into an organization’s larger risk management strategy
 - How does your organization quantify and prioritize the risks?
- Consideration of applicable laws and regulations
- Accountability framework and AI Policy enforcement
 - Make clear that non-compliance may result in disciplinary action

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Developing an AI Policy – Risk Analysis Framework

- Data used to train AI tool - the Internet, licensed data, your data
- Bias and discrimination – bias in training data sets and algorithms
- Intended use cases – content development, decision-making, content consumption, knowledge retrieval, etc.
- Intended users – employees, suppliers, contractors
- Method of access to the AI tool (consider controls and impact of terms of use)
- "Governance" - ensuring checks for responsible use, quality control, and expected outcomes (e.g., privacy and data loss prevention, cybersecurity, and limiting liabilities)
- Human intervention - monitoring and oversight of people and systems, review of output before use, citation of AI when used

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Developing an AI Policy – Best Practices

- Be proactive, not reactive
- Cross-functional with different stakeholder needs addressed (e.g., IT, HR, Legal, Privacy)
 - AI Steering Committee
 - Technical lead involvement is key
- Govern when and how employees and students can use AI
 - Alumni and volunteers who may act on your behalf
 - Third-parties that collect and process private data
- Context specific – policy by design, tailored to your institution’s business objectives, acceptable risks, and permitted use cases
- Executive Level/C-Suite Buy-In
 - AI Policy rollout and messaging to stakeholders are important

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AI Policy Considerations

- A policy should be clear and easy to understand and follow
- A policy should be transparent and explain the risk
 - Caveat – an organization that uses AI may not fully understand the risk (e.g., what’s in the algorithms and training data)
- A policy should be realistic and reflect an institution’s culture
- AI use requires monitoring, training, and awareness
- Responsible AI use involves developing and periodically measuring metrics
- Consistent evaluation of an AI user’s knowledge, usage, and gap analyses

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AI Policy Considerations (Cont'd)

- **WHO: AI User Scope**
 - Who does the policy apply to?
 - All employees, contractors, and other third-parties that use AI on behalf of an organization and/or with its data
- **WHAT & HOW: Terms of AI Use**
 - Which AI applications can be used?
 - Evaluation of AI tools before usage (e.g., security, terms of service, training data, producer use of output)
 - Permitted use cases
 - Define responsible AI use
 - Create a culture of security, awareness, and respect
 - Compliance with laws and regulations
 - Exceptions for specific personnel and use cases?
 - Do they need to be trained accordingly?

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Ethical Issue #4: Duty to Supervise

- Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer
- Rule 5.3: Responsibilities Regarding Nonlawyer Assistance
- **Best practices:**
 - Establish policies regarding the permissible uses of generative AI
 - Train your team on the ethical use of AI tools
 - Treat the AI tool like a nonlawyer assistant – is its conduct compatible with your professional obligations, or are you relying on an inexperienced or overconfident assistant?
 - You remain responsible for the work product that you create, even if it was originally researched or drafted by the AI tool.

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Broad AI Governance Principles

- Transparency
- Data Privacy and Security
- Safe and Reliable Solutions
- Fair and Equitable Use
- Inclusiveness
- Accountability

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Thank you!



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