

**Prompts, pitfalls, and digital due diligence
in the use of AI**

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Foley's List

**DPP v GR [2025] VSC
490, [79] Elliot J**

The ability of the court to rely upon the accuracy of submissions made by counsel is fundamental to the due administration of justice. Self-evidently...any use of artificial intelligence without careful and attentive oversight of counsel would seriously undermine the court's processes and its ability to deliver justice in a timely and cost-effective way...counsel must take full and ultimate responsibility for any submissions made to the court. To this end, it is not acceptable for artificial intelligence to be used unless the product of that use is independently and thoroughly verified. The same may be said for solicitors responsible for producing or filing court documents.

**Murray on behalf of
the Wamba Wemba
Native Title Claim
Group v State of Vic
[2025] FCA 731, [12]
Murphy J**

Whilst the use of AI is growing, practitioners must be aware of its limitations. It is critical that legal practitioners use proper safeguards to verify the accuracy of the work produced. Any use of AI must be consistent with the overriding duty of legal practitioners as officers of the Court and their fundamental obligation to uphold, promote and facilitate the administration of justice.

Other cases

- **Re Walker** [2025] VSC 714 (Moore J disciplined the practitioner)
- **Dayal** [2024] FedCFamC2F 1166 (Judge Humphreys referred to the regulator)
- **Mertz v Mertz (No 3)** [2025] FedCFamC1A 222 (Court referred to regulator)
- **JNE24 v Minister for Immigration and Citizenship** [2025] FedCFamC2G 1314 (Judge Gerard referred to regulator and ordered costs to be paid by the practitioner personally)

A final case of interest to criminal lawyers:

- **DPP v Khan** [2024] ACTSC 19 (Mossop J considered apparent AI use in preparing a character reference)

AI and the Conduct Rules

The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and *Legal Profession Uniform Conduct (Barristers) Rules 2015* do not directly regulate use of AI.

Pasuengos v Minister for Immigration and Citizenship (No 2) [2026] FedCFamC2G 96 at [17]:

“...there is nothing inherently impermissible about using generative AI programs to assist in legal research. However, it is not a proper substitute for legal research and it must be used having a legal practitioner's duty to the Court firmly in mind”.

Re Walker [2025] VSC 714 at [61], *citing Director of Public Prosecutions v GR* [2025] VSC 490 [80]:

“It is not acceptable for artificial intelligence to be used by solicitors or barristers in the production of court documents, unless the product of that use is independently and thoroughly verified”.

The Conduct Rules

- Duty to the court and to the administration of justice
 - *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 3
 - *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 4(a)
- Duty to deliver legal services competently and diligently
 - *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.3
 - *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 4(c)
- Duty to not engage in conduct which is either prejudicial or likely to diminish public confidence in the administration of justice
 - *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 5.1.2.
 - *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 8(b) and 8(c)
- Duty not to engage in conduct that will bring the legal profession into disrepute or diminish public confidence in the legal profession
 - *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 5.1.2.
 - *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 8(c)
- Duty to not knowingly or recklessly mislead the court
 - *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 19.1.
 - *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 24
- Duty to promote and protect the client's best interests to the best of a lawyer's skill and diligence
 - *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.
 - *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 35.

Consequences of ethical breaches in using AI

Court determination of ethical breach and reprimand

- *Re Walker* [2025] VSC 714
 - Moore J found there was no utility in a referral to the VLSB+C because all the facts and circumstances were clear and he was able to determine a breach under the Court's inherent jurisdiction.
 - Found the solicitor had engaged in "unprofessional conduct" and imposed a reprimand.
 - Relevant considerations to the level of penalty were number of breaches of ethical rules, general deterrence, cases concerned a claim not pressed and therefore there was minimal impact, good prior history of no unprofessional conduct by the solicitor, sincere remorse expressed by the solicitor, adverse publicity to the solicitor amounted to extra curial punishment.

Personal costs orders

- *JNE24 v Minister for Immigration and Citizenship* [2025 FedCFamC2G 1314];
 - Improper conduct led to costs being thrown away and the applicant discontinuing their proceedings (only in part as a result of the solicitor's conduct).
 - 'Unreasonable conduct' basis for making personal costs order – notable in that though these factors typically are focussed on inappropriate actions with regard to prospects of success, there was no finding here that there were no prospects of success. Use of AI was "serious dereliction of duty owed to the court, or serious misconduct in promoting the course of, and the proper administration of, justice" [40], citing Wigney J in *Mitry Lawyers v Barnden* [2014] FCA 918 [42].
- *Murray on behalf of the Wamba Wemba Native Title Claim Group v State of Victoria* [2025] FCA 731
 - Personal costs order on an indemnity basis.

Referral to VLSB+C for disciplinary action

- *Re Dayal* [2024] FedCFamC2F 1166
 - VLSB+C confirmed they had varied his practising certificate. The variation of Mr Dayal's practising certificate resulted in him no longer being entitled to practise as a principal lawyer, only practising as an employee solicitor, and undertaking supervised legal practice for a period of two years, no longer operations his own legal practice, and reporting to the VLSB on a quarterly basis.

Themes

- Many (but not all) cases involve hallucinated authorities which are prepared by a junior solicitor or law clerk that are provided to the court without being checked by a supervising solicitor.
 - *Pasuengos* [34]: “The Court has sympathy for the position of both practitioners...the Court understands why a junior practitioner may be attracted to the use of a tool such as AI to cut through what might at first be thought of as an un-navigable volume of case law. The Court also accepts as genuine the principal solicitor’s statement that AI has never factored into their practice and hence they did not think to consider that the cases may be hallucinated. However, both explanations do not deal with the central vice in this matter. As emphasised in *JNE24*, it is the placing of false authorities before the Court that is the conduct which warrants sanction. The failure is not the verification of cases. It is a failure to review the cases that your research (whether AI or more traditional) has uncovered, for relevance, currency and applicability. It is a failure to ensure that your conduct does not mislead the Court.
- Genuine remorse, offers to reimburse clients for their costs, candour, and inexperience or ignorance of AI use are not sufficient to prevent a referral to a legal regulator.

Other official guidance on AI in courts

Other guidance as to the use of AI in courts and practice includes:

- Supreme Court of Victoria: *'Guidelines for Litigants – Responsible Use of Artificial Intelligence in Litigation'*
- Victorian Legal Services Board & Commissioner: *'Statement on the Use of Artificial Intelligence in Australian Legal Practice'*
- Victorian Law Reform Commission: *'Artificial Intelligence in Victoria's Courts and Tribunals'*

*SCV: 'Guidelines for
Litigants –
Responsible Use of
Artificial Intelligence
in Litigation'*

- Issued in May 2024.
- Guidelines to assist both practitioners and self-represented litigants conducting litigation in Supreme Court of Victoria.
- Emphasis on users having an understanding of the capacity and limitations of AI, protecting privacy and confidentiality of information, transparency where AI is used where appropriate.

**VLSB&C: *‘Statement
on the Use of
Artificial Intelligence
in Australian Legal
Practice’***

- Issued in December 2024.
- Joint statement from other legal profession regulators, including NSW and WA.
- Common set of principles highlighting importance for lawyers to understand the use and expectations of AI use to assist with protecting clients from risk and preserve the administration of justice.
- Importance of maintaining high ethical standards and adherence to professional obligations involving confidentiality, independence, candour and charging reasonable costs.

***VLRC: 'Artificial
Intelligence in
Victoria's Courts and
Tribunals'***

- Referral made in May 2024. Report tabled in February 2026.
- Balance efficiency gains from AI with fundamental requirements of fairness and integrity in the Victorian justice system.
- Report contains 30 recommendations to guide safe use of AI in courts and tribunals as it evolves.
- Recommends a principles-based regulatory approach concentrated on guidelines and education.

**VLRC: Eight
principles to guide
safe use of AI in
courts and tribunals**

1. Impartiality and fairness
2. Accountability and independence
3. Transparency and open justice
4. Contestability and procedural fairness
5. Privacy and data security
6. Access to justice
7. Efficiency and effectiveness
8. Human oversight and monitoring

***VLRC: 'Artificial
Intelligence in
Victoria's Courts and
Tribunals'***

*Is legislative reform necessary for the safe
use of AI in courts and tribunals?*

**A different lens:
an ethical obligation to
engage with AI?**

1. Capabilities and common use cases
2. Current adoption in the Australian market
3. Anticipated future developments : an ethical imperative to use AI?

Capabilities and common uses

What can AI do for lawyers now?

Use cases depend on practice areas

1. Natural language case law search
2. Document generation
3. Contract review
4. Summarisation
5. Support tasks: meeting notes

A sample of legal-specific products

Product	Type of product	Use case
Lexis / Westlaw / Harvey / vLex / Kira / Josef	AI-assisted research and generation	Case law research Document drafting
Nexlaw / Casefleet / eBrief	Litigation support	Analysis, litigation, chronology building
Clio / Relativity / Smokeball	Practice management	e-discovery, account management

Adoption in the Australian market

- Surveys of current use
- Law firms
 - Large commercial
 - SMFs
 - Criminal
- Barristers
- International trends

**Anticipated
developments:**

**a future ethical
imperative?**

- Near term (12-24 months)
- Medium terms (2-5 years)

If everyone else is using it...?

- Client expectations
- Court expectations

Recap

→ Reasonable not to use AI, but unreasonable to be completely ignorant

Near future: May need to justify why NOT using AI for certain tasks

→ Professional obligations unchanged

Competence, supervision, verification still required

Can't delegate professional judgment to AI

→ Human judgment essential

AI assists, doesn't replace professional responsibility

Those who adopt without proper verification protocols risk disciplinary and other consequences

Questions?

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