

IADC Midyear Meeting- Written Materials

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## **Stay a Step Ahead in the AI Race: Use Policies and Regulatory Trends**

Adoption of AI tools currently challenges many segments of the economy- most especially legal practice and insurance. Defense lawyers of all stripes are called on to both advise their clients regarding adoption, which includes policies governing use and consequences for misuse, and trying to keep pace with rapidly developing legislation, regulation and litigation. And we thought cyber and privacy were challenging! At the same time, insurers and insureds alike are examining all of their policies, hunting for potential unintentional exposure and striving to develop coverages that address a nascent risk. This session will explore the legal landscape and will rough out what AI use policies may address. A group of cyber, privacy and AI insurance experts will delve into the risk and the insurance policy language to look for when seeking coverage.

Just as we are lifting our heads above the flood of new cybersecurity and privacy laws, court decisions and regulations, our boards are implementing new artificial intelligence (AI)<sup>1</sup> tools and legislators are passing new AI laws. Just as there are many crossovers between cybersecurity and privacy, AI governance is weaving its way into the mix, challenging our capacity and quickening the pace of change. This article aims to bring awareness to the risks of implementation and compliance of AI for counsel and professionals, providing examples and useful resources along the way.

As with any newly adopted technology, there are risks when adopting AI tools. From chatbots to operational technology, generative AI that researches, writes and creates everything from business plans to marketing materials, budgets and artwork, AI has dominated conversations online, in the news and in the boardroom. It has also been the subject of legislation, litigation and regulation at all levels of government in the United States and abroad. These developments are similar to the journey cyber and privacy has taken, with the first data breach laws being adopted in the early 2000's<sup>2</sup> that relatively soon, at least in the legal world, have become the norm across all fifty states, United States territories and possessions and across the globe, to privacy laws that grew from the European Union and spread across the globe, with at least nineteen states passing new, comprehensive privacy laws, others considering them and a patchwork of sectoral and industry-specific regulations.<sup>3</sup>

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<sup>1</sup> AI references AI generally as well as generative AI and is used interchangeably. Distinctions are made when required for clarity.

<sup>2</sup> "History of Privacy Timeline," University of Michigan (<https://safecomputing.umich.edu/protect-privacy/history-of-privacy-timeline#:~:text=State%20Data%20Breach%20Notification%20Laws,exposed%20in%20a%20security%20breach.>)

<sup>3</sup> "What is GDPR, the EU's new data protection law?" GDPR.EU, (<https://gdpr.eu/what-is-gdpr/>).

Some of the many risks that we have seen so far are a mix of ethical, legal, technical and physical perils. As Jeff Goldblum, of Jurassic Park fame, said some thirty years ago, “Your scientists were so preoccupied with whether or not they could, that they didn't stop to think if they should.”<sup>4</sup> Ah, so true, but we are too far down the road to try to put that horse back in the barn. Now we need to face how we use AI and whether it is ethical or not.

Although there are some laws that govern its development and deployment, there aren't many that provide guardrails about how it may or may not be used. In other words, what are the ethical and unethical uses of AI? And, by “ethical,” let's use the BBC definition: “Ethics is concerned with what is good for individuals and society and is also described as moral philosophy. The term is derived from the Greek word ethos which can mean custom, habit, character or disposition. Ethics covers the following dilemmas: how to live a good life; our rights and responsibilities; the language of right and wrong; moral decisions - what is good and bad?”<sup>5</sup> Here are some examples to ponder and question whether the uses are ethical or not.

According to the New York Times, doctors have been allowing AI to draft and send responses to emails from patients' medical questions entered into MyChart. If this is true, the doctors may be in violation of their ethical responsibilities.<sup>6</sup> Similarly, more than one lawyer has been disciplined for generating legal documents to the court that were generated, and wrong.<sup>7</sup> And, in an even more disturbing revelation, a popular “Robot Lawyer” app neither tested the accuracy of its results nor did it have any lawyers reviewing or even employed by the company.<sup>8</sup> The company was settled with the Federal Trade Commission and agreed to pay \$193,000 for its unauthorized practice of law. Clearly, AI is being deployed for purposes that violate professional ethics and will require closer scrutiny and enforcement of current standards and will likely lead to more specific restrictions.

The American Bar Association issued guidance for lawyers in July of 2024, stating that attorneys are obliged to follow ethical rules regarding protecting their clients, standards of competence, guarding confidentiality of client data,

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<sup>4</sup> “Jurassic Park Predicted Our AI Debate 30 Years Ago.” Consequence, (<https://consequence.net/2023/08/jurassic-park-artificial-intelligence-essay/#:~:text=%E2%80%9CYour%20scientists%20were%20so%20preoccupied,to%20think%20if%20they%20should.%E2%80%9D>) (Hat tip to Karen Painter Randall, Partner and Chair of the Cybersecurity and Data Privacy Practice at Connell Foley, for bringing this quote to my attention.)

<sup>5</sup> “Ethics: a general introduction,” BBC, ([https://www.bbc.co.uk/ethics/introduction/intro\\_1.shtml#:~:text=Ethics%20is%20concerned%20with%20what,our%20rights%20and%20responsibilities](https://www.bbc.co.uk/ethics/introduction/intro_1.shtml#:~:text=Ethics%20is%20concerned%20with%20what,our%20rights%20and%20responsibilities))

<sup>6</sup> “That Message From Your Doctor? It May Have Been Drafted by A.I.” Teddy Rosenbluth, The New York Times, (<https://www.nytimes.com/2024/09/24/health/ai-patient-messages-mychart.html>).

<sup>7</sup> “Another NY lawyer faces discipline after AI chatbot invented case citation,” Sara Merken, Reuters, (<https://www.reuters.com/legal/transactional/another-ny-lawyer-faces-discipline-after-ai-chatbot-invented-case-citation-2024-01-30/>).

<sup>8</sup> “DoNotPay Has to Pay Up Over ‘World’s First Robot Lawyer’,” Matt Novak, Gizmodo, (<https://gizmodo.com/donotpay-has-to-pay-up-over-worlds-first-robot-lawyer-2000503265>).

communication and disclosing their fees.<sup>9</sup> A number of bar associations have addressed the AI issue head-on. For example, the New Jersey Bar Association has been quite active in developing template policies and guidance with regard to AI implementation and use.<sup>10</sup>

Transparency is another ethical issue that leads into legal risks. Transparency relates to revealing how AI models are trained and how they make decisions. Without it, it is impossible to evaluate its efficacy. And, due to the lack of transparency of many, if not most, models, a great deal of litigation has ensued. Examples include a myriad of lawsuits against AI developers by copyright holders who claim that their work has obviously been used to train because prompt results echo their work.<sup>11</sup> The outcomes of the copyright litigation could crater the AI industry due to the nature of infringement law and sanctions. A single violation, intentional or not, is subject to a \$750 to \$30,000 fine, with intentional violations yielding up to \$150,000 per violation. Multiply \$30,000 by the billions and billions of materials used to train models, and the sanctions could be quite substantial. And, copyright infringement sanctions do not apply only to the direct violator,<sup>12</sup> they also apply to indirect infringers.<sup>13</sup>

AI developers argue that their use of copyrighted materials are “fair use.” However, the fair use exception clearly does not apply to commercial use, which the AI products are explicitly designed for. According to Harvard University, “Fair Use is a legally permissible use of copyrighted material for specific purposes such as commentary, criticism, news reporting, research, teaching or scholarship.”<sup>14</sup>

While there are a couple of laws that require disclosure of AI use, most businesses in the United States and governments are not yet required to comply. Litigation is already underway alleging lack of transparency and demanding that

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<sup>9</sup> “Lawyers using AI must heed ethics rules, ABA says in first formal guidance,” Sara Merkens, Reuters, (<https://www.reuters.com/legal/legalindustry/lawyers-using-ai-must-heed-ethics-rules-aba-says-first-formal-guidance-2024-07-29/>).

<sup>10</sup> “NJSBA Report Explores Best Practices for AI Use in the Legal Profession,” New Jersey Bar Association, (<https://njsba.com/njsba-report-explores-best-practices-for-ai-use-in-the-legal-profession/>).

<sup>11</sup> See, for example, Authors Guild v Open AI, (<https://caselaw.findlaw.com/court/us-dis-crt-sd-new-yor/116009536.html>) (written works), Andersen v Stability AI, (<https://www.courtlistener.com/docket/66732129/andersen-v-stability-ai-ltd/>) (visual art), Center for Investigative Reporting v. OpenAI, (<https://www.courtlistener.com/docket/68892274/the-center-for-investigative-reporting-inc-v-openai-inc/>) (journalists and news organizations), Concord Music Grp. v. Anthropic PBC, (<https://casetext.com/case/concord-music-grp-v-anthropic-pbc-1>) (music publishers), Daily News v Microsoft, (<https://www.courtlistener.com/docket/68484432/daily-news-lp-v-microsoft-corporation/>) (newspaper), Getty Images (US), Inc. v. Stability AI, Inc., (<https://docs.justia.com/cases/federal/district-courts/delaware/dedce/1:2023cv00135/81407/1>) (images), The New York Times Company v. Microsoft Corporation (1:23-cv-11195) (newspaper). For a good, general, overview of transparency issues, with examples, see “Examples That Illustrate Why Transparency Is Crucial In AI,” Bernard Marr, Forbes, (<https://www.forbes.com/sites/bernardmarr/2024/05/17/examples-that-illustrate-why-transparency-is-crucial-in-ai/>).

<sup>12</sup> “Civil and Criminal Penalties for Violation of Federal Copyright Laws,” Kent State University, (<https://www.kent.edu/it/civil-and-criminal-penalties-violation-federal-copyright-laws#:~:text=Penalties%20for%20copyright%20infringement%20include,than%20%2430%2C000%20per%20work%20infringed.>).

<sup>13</sup> “Innocent Infringement in U.S. Copyright Law: A History,” R. Anthony Reese, (chrome-extension://efaidnbnmnibpcapjcgclefindmkaj/[https://www.law.uci.edu/faculty/full-time/reese/reese\\_innocent\\_infringement.pdf](https://www.law.uci.edu/faculty/full-time/reese/reese_innocent_infringement.pdf)).

<sup>14</sup> “What is “fair use”, and how does it apply to copyright law?” Harvard University, (<https://dmca.harvard.edu/faq/what-%E2%80%9Cfair-use%E2%80%9D-and-how-does-it-apply-copyright-law>).

developers, deployers and users explain how the models work and what they are being used for.<sup>15</sup>

There are many lawsuits pending against many government, quasi-government, and commercial entities alleging that their AI is biased in its application and demanding transparency into training and how decisions are made by the models, how they are supervised and whether humans rely on the AI to make decisions for them. For example, the American Civil Liberties Union filed suit against the National Security Agency in 2024, alleging that the government has refused to release reports and source documents that it has publicly announced as having been written.<sup>16</sup> As far back as 2018, the World Economic Forum decried the use of AI in making arrest, conviction and sentencing decisions in criminal matters.<sup>17</sup> Today, there are a number of lawsuits pending for false arrests made on the basis of faulty facial recognition results without benefit of additional corroborating information. These lawsuits require transparency regarding how the AI is trained, how it makes its decisions and what oversight and review takes place in moving forward with an arrest. However, governments have resisted Freedom of Information requests and stalled when responding to discovery requests.<sup>18</sup>

For cyber, privacy and compliance professionals, we find ourselves facing the daunting task of evaluating AI prior to adoption and working new AI laws into the matrices of cybersecurity and privacy frameworks. Most people in the profession seem to be taking on AI governance in addition to their regular gigs. So, let's take a look at AI litigation, legislation and then regulation.

As with cyber and privacy, there are a host of laws already on the books being used to litigate the use of AI. If there's anything the reader should take away from this article, it is to make sure to look beyond the "new" laws to analyze the laws already in place to imagine how they may be implicated by adopting and using AI both in the workplace and personally. Some examples include discrimination in making mortgage decisions when AI is the primary decision maker<sup>19</sup>, redlining in housing<sup>20</sup> and employment,<sup>21</sup> wrongful arrest based on

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<sup>15</sup> See "Government Use of AI," EPIC, for a rundown of government uses and suspected bias, (<https://epic.org/issues/ai/government-use-of-ai/>)

<sup>16</sup> "FOIA Lawsuit Seeking Records About the NSA's Use of Artificial Intelligence," ACLU, (<https://www.aclu.org/cases/aclu-et-al-v-nsa-et-al-foia-lawsuit-seeking-records-about-the-nsas-use-of-artificial-intelligence/>).

<sup>17</sup> "AI is convicting criminals and determining jail time, but is it fair?" World Economic Forum, (<https://www.weforum.org/agenda/2018/11/algorithms-court-criminals-jail-time-fair/>).

<sup>18</sup> For example, see *American Civil Liberties Union v. United States Department of Justice* (1:19-cv-12242), (<https://www.courtlistener.com/docket/16407892/american-civil-liberties-union-v-united-states-department-of-justice/>).

<sup>19</sup> "In re Wells Fargo Mortgage Discrimination Litigation," (3:22-cv-00990) (<https://www.courtlistener.com/docket/63052766/in-re-wells-fargo-mortgage-discrimination-litigation/?page=1>),

<sup>20</sup> "United States v. Meta Platforms, Inc.," (1:22-cv-05187) (<https://www.courtlistener.com/docket/63398625/united-states-v-meta-platforms-inc/>), "Open Communities v. Harbor Group Management Co., LLC," (1:23-cv-14070) (<https://www.courtlistener.com/docket/67824178/open-communities-v-harbor-group-management-co-llc/>).

<sup>21</sup> "Moblely v. Workday, Inc.," (3:23-cv-00770) (<https://www.courtlistener.com/docket/66831340/moblely-v-workday-inc/>).

faulty facial identification and profiling.<sup>22</sup> There are also accusations of libel<sup>23</sup> and for physical harm.

The European Union recently adopted the AI Act and is gearing up for enforcement.<sup>24</sup> In the United States, the Biden Administration issued an Executive Order on AI in October of 2023.<sup>25</sup> Utah and Colorado have recently passed comprehensive AI legislation.<sup>26</sup> The chief commonalities among the comprehensive state and EU laws is tiered regulation, whereas developers are subject to a set of rules and adopters are subject to others. Transparency, via notices and disclosures, and consent, typical of privacy laws, are features of many of the AI statutes.

In addition to the comprehensive AI laws, there are at least 26 states that have statutes addressing AI in one way or another. For example, Tennessee prohibits the use of a person's picture , "to generate "deepfakes."<sup>27</sup> Other states prohibit relying on AI alone to make employment decisions.<sup>28</sup>

Regulatory agencies have also set their sights on AI. For example, the FTC has directed their attention to AI<sup>29</sup>, as has the SEC.<sup>30</sup> The National Association of Insurance Commissioners has also issued guidance to insurers on implementing AI.<sup>31</sup>

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<sup>22</sup> "Oliver v. Detroit, City of," (2:20-cv-12711) (<https://www.courtlistener.com/docket/18508594/oliver-v-detroit-city-of/>), "Williams v. City of Detroit, Michigan, A Municipal Corporation," (2:21-cv-10827) (<https://www.courtlistener.com/docket/59815822/williams-v-city-of-detroit-michigan-a-municipal-corporation/>), "Woodruff v. Detroit, City of," (5:23-cv-11886) (<https://www.courtlistener.com/docket/67661093/woodruff-v-detroit-city-of/>), "Parks v. McCormac," (2:21-cv-04021) (<https://www.courtlistener.com/docket/59701745/parks-v-mccormac/>), "Reid v. Bartholomew," (1:23-cv-04035) (<https://www.courtlistener.com/docket/67800075/reid-v-bartholomew/>), "Murphy v. Essilorluxottica," (<https://blogs.gwu.edu/law-eti/ai-litigation-database-search/case-detail-page/?pid=127>).

<sup>23</sup> "Walters v. OpenAI, L.L.C.," (1:23-cv-03122) (<https://www.courtlistener.com/docket/67617826/walters-v-openai-llc/>).

<sup>24</sup> "EU AI Act: first regulation on artificial intelligence," European Parliament, (<https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>).

<sup>25</sup> "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," Joseph R. Biden, The White House, Oct. 30, 2023, (<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>).

<sup>26</sup> "Utah, Colorado Pave Way for AI-Specific State Laws – Is Your Company Ready for the Impending Regulation Wave?" Cooley, (<https://cdp.cooley.com/utah-colorado-pave-way-for-ai-specific-state-laws-is-your-company-ready-for-the-impending-regulation-wave/>) provides a good analysis of the two laws. "Artificial Intelligence Policy Act," (<https://le.utah.gov/~2024/bills/static/SB0149.html>), "Colorado AI Act," (SB-24-205) (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/[https://www.skadden.com/-/media/files/publications/2024/06/colorados-landmark-ai-act/2024a\\_205\\_signed.pdf?rev=44ed85a3d8dc4a9dbd6394d5ea904d48&hash=ADF46DF153FB0094ABCCA23AC4790F5D](https://www.skadden.com/-/media/files/publications/2024/06/colorados-landmark-ai-act/2024a_205_signed.pdf?rev=44ed85a3d8dc4a9dbd6394d5ea904d48&hash=ADF46DF153FB0094ABCCA23AC4790F5D)).

<sup>27</sup> "ELVIS Act," (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/<https://www.capitol.tn.gov/Bills/113/Bill/SB2096.pdf>)

<sup>28</sup> For example, Delaware, (<https://legis.delaware.gov/BillDetail?LegislationId=140388>), Montana, (<https://leg.mt.gov/bills/2023/billpdf/SB0384.pdf>), New Hampshire, ([https://www.gencourt.state.nh.us/bill\\_status/billinfo.aspx?id=865&inflight=1](https://www.gencourt.state.nh.us/bill_status/billinfo.aspx?id=865&inflight=1)), Oregon (<https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB619>) and Tennessee, (<https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0073>).

<sup>29</sup> "FTC Announces Crackdown on Deceptive AI Claims and Schemes," (<https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes>).

<sup>30</sup> "SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence," (<https://www.sec.gov/newsroom/press-releases/2024-36>).

<sup>31</sup> "Use of Artificial Intelligence Systems by Insurers," (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/[https://content.naic.org/sites/default/files/inline-files/2023-12-4%20Model%20Bulletin\\_Adopted\\_0.pdf](https://content.naic.org/sites/default/files/inline-files/2023-12-4%20Model%20Bulletin_Adopted_0.pdf)).

Finally, no article on AI governance would be complete without addressing contractual issues. Before adopting any AI, contract review is essential. Here again, AI is similar to cybersecurity and privacy technologies. Leadership and business units may be eager to adopt, but contract review is critical in order to identify and communicate out to stakeholders what, exactly, they are signing up for. For example, as with cloud services, AI providers generally limit their liability or disclaim it entirely. Your prompts and materials entered into the AI may become the property of the developer. Your company may be (and probably will be) limited in the uses of the AI. So reading the fine print is not only essential, it should be a source used in training users prior to and in conjunction with your deployment. AI is simply not something that should be introduced into the organization without proper vetting and training.

It's a lot to take in for already very busy professionals who are trying to keep up with burgeoning cybersecurity and privacy mandates. The good and bad news is that there is quite a bit more to come. Bad news because in the near term there will be more complexity and more volume of work to stretch our already taxed resources. Good news, because there is light at the end of the tunnel. There will be more resources devoted to cybersecurity, privacy and AI compliance. More colleges and universities have developed or are in the process of developing educational courses and programs to prepare us all to address these critical developments, as have professional organizations.<sup>32</sup> We may feel like we are charged with rolling a millstone up a mountain now, but as we progress, our efforts to educate our senior managers about the risks and tasks, and influence decisions to adopt new technologies and hire new resources.

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<sup>32</sup> Best Artificial Intelligence Programs, US News & World Report, (<https://www.usnews.com/best-graduate-schools/top-science-schools/artificial-intelligence-rankings>), "Artificial Intelligence Governance Professional," (<https://iapp.org/certify/aigp/>), "Certified AI Ethics and Governance Professional (CAEGP)," (<https://niccs.cisa.gov/education-training/catalog/tonex-inc/certified-ai-ethics-and-governance-professional-caegp>).

## Additional Resources

"The state of AI in early 2024: Gen AI adoption spikes and starts to generate value," Quantum Black/McKinsey

<https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai>

"AI Lawsuits Worth Watching: A Curated Guide," Tech Policy Press

<https://www.techpolicy.press/ai-lawsuits-worth-watching-a-curated-guide/>

"Case Tracker: Artificial Intelligence, Copyrights and Class Actions," Baker Hostetler

<https://www.bakerlaw.com/services/artificial-intelligence-ai/case-tracker-artificial-intelligence-copyrights-and-class-actions/>

"AI Litigation Database," George Washington Law School

<https://blogs.gwu.edu/law-eti/ai-litigation-database/>

"What Steps Can Companies Take to Protect Themselves from Liability?" Section in "Litigation Minute: The Generative AI Litigation Landscape," K & L Gates

<https://www.klgates.com/Litigation-Minute-The-Generative-AI-Litigation-Landscape-5-16-2024>

"U.S. Tort Liability for Large-Scale Artificial Intelligence Damages," Rand Corp

[https://www.rand.org/pubs/research\\_reports/RRA3084-1.html](https://www.rand.org/pubs/research_reports/RRA3084-1.html)

"US State AI Governance Legislation Tracker," IAPP (may require membership registration to access)

<https://iapp.org/resources/article/us-state-ai-governance-legislation-tracker/>

"Notice – Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers," New Jersey Courts

<https://www.njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey>

"Formal Opinion 2024-5: Generative AI in the Practice of Law," New York City Bar

<https://www.nycbar.org/reports/formal-opinion-2024-5-generative-ai-in-the-practice-of-law/>

"Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence," New York State Bar Association, April 2024

[https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf?srltid=AfmBOoo9tOx6zg5l6vTNYjBaW7TI7662OHIK3oOGSF8wloWz\\_RZifdfF](https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf?srltid=AfmBOoo9tOx6zg5l6vTNYjBaW7TI7662OHIK3oOGSF8wloWz_RZifdfF)

"Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law," State Bar of California

<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>

"European Lawyers in the Era of Chat GPT," The European Bars Federation, July 2023

<https://www.fbe.org/nt-commission-guidelines-on-generative-ai/>



“State of Connecticut Policy AI-01 AI Responsible Use Framework,”

State of Connecticut, February 2024

<https://portal.ct.gov/-/media/opm/fin-general/policies/ct-responsible-ai-policy-framework-final-02012024.pdf>

writer.com has a template for acceptable use policies.