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CONTINUING LEGAL EDUCATION

Ethical Challenges Presented by Rapidly-Changing AI Applications in the Practice of Law
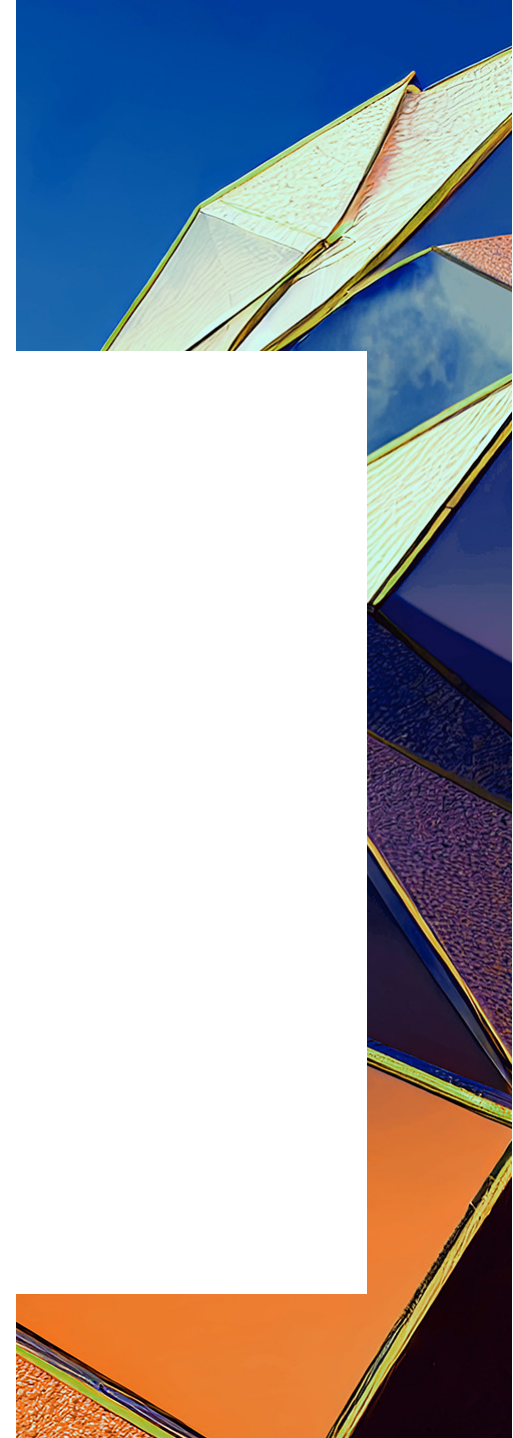
December 8, 2023

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Presenter

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Artificial Intelligence

How is AI used in the practice of law?

December 7, 2023

Common Legal AI Applications

Contract Review
- Review drafts based on preferred approach / terms
- Suggest revisions

Contract Analytics
- Extract information from existing contracts
- Automatically track renewals
- Enable complicated queries

E-Discovery
- Predictive Coding
- Recognition of Privileged Documents
- Recognition of ePHI or PII

Legal Research
- Natural language searching
- Examplar-based result delivery
- Deeper dives into case themes

Due Diligence
- Public searching
- Data sorting and coding
- Predictive / Scoring
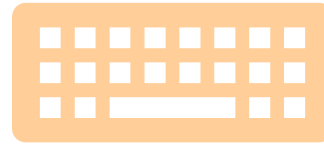
Common Legal AI Applications

Image Creators

- Generate drawings, art, and images of all kinds based on user prompts

Chat "Bots"

- Draft responses that sound like human prose

Grammar/Spelling

- Automatically correct errors, improve style

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American Bar Association Response

- ABA House of Delegates adopts Resolution 604 at the 2023 Midyear Meeting, urging human oversight, accountability, and transparency in AI.

- Creation of an ABA Task Force on Law and Artificial Intelligence to examine the impact of AI on law practice and the ethical implications for lawyers to explore:

  - Risks (bias, cybersecurity, privacy, and uses of AI such as spreading disinformation and undermining intellectual property protections) and how to mitigate them.

  - Emergent issues with generative AI

  - Utilization of AI to increase access to justice

  - AI governance (the role of laws and regulations, industry standards and best practices)

  - AI in legal education.

  (Source: ABA Press Release, August 28, 2023).

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Observations

- AI is nothing new but is now advancing more rapidly than before.

- AI should be embraced and managed, not feared.

- Beware of marketing pitches – "Don't believe (all) the hype."

- Some argue that the biggest risk of AI is non-adoption risk.

Chat GPT
Developer: OpenAI
First Released:
November 30, 2022

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Model Rules Disclaimer and Interpretation

- This presentation was prepared to spot and discuss issues based on the ABA Model Rules of Professional Conduct.

- The Model Rules are only binding to the extent adopted by individual states, and some states make material changes in the process of adoption.

- Be sure to consult the applicable rules and search for any ethical opinions, disciplinary decisions, and other authorities before deciding on any course of action.

- Model Rules apply to in-house counsel. The definition of "law firm" or "firm" includes "the legal department of a corporation or other organization." *See* Model Rule 1.0(c), [Comment 3] ("With respect to the law department of an organization . . . there is ordinarily no question that members of the department constitute a firm within the meaning of the Rules. . . .").

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The Lawyer's Obligation of Competence as it Relates to AI
Model Rule 1.1

Model Rule 1.1 – Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

- Tension? Compare:
  - [Comment 2]:

  A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

  - "New" 2012 [Comment 8]:

  To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

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States Adopting Technology as Component of Attorney Competence

- Since 2012 – Forty states have adopted the technology comment. *(Source: LawNext.com)*

- California: State Bar of California **Formal Opinion No. 2015-193**. Litigation attorneys need to either be competent in e-discovery or associate with others who are competent.

- Very little specific guidance on AI, in particular.

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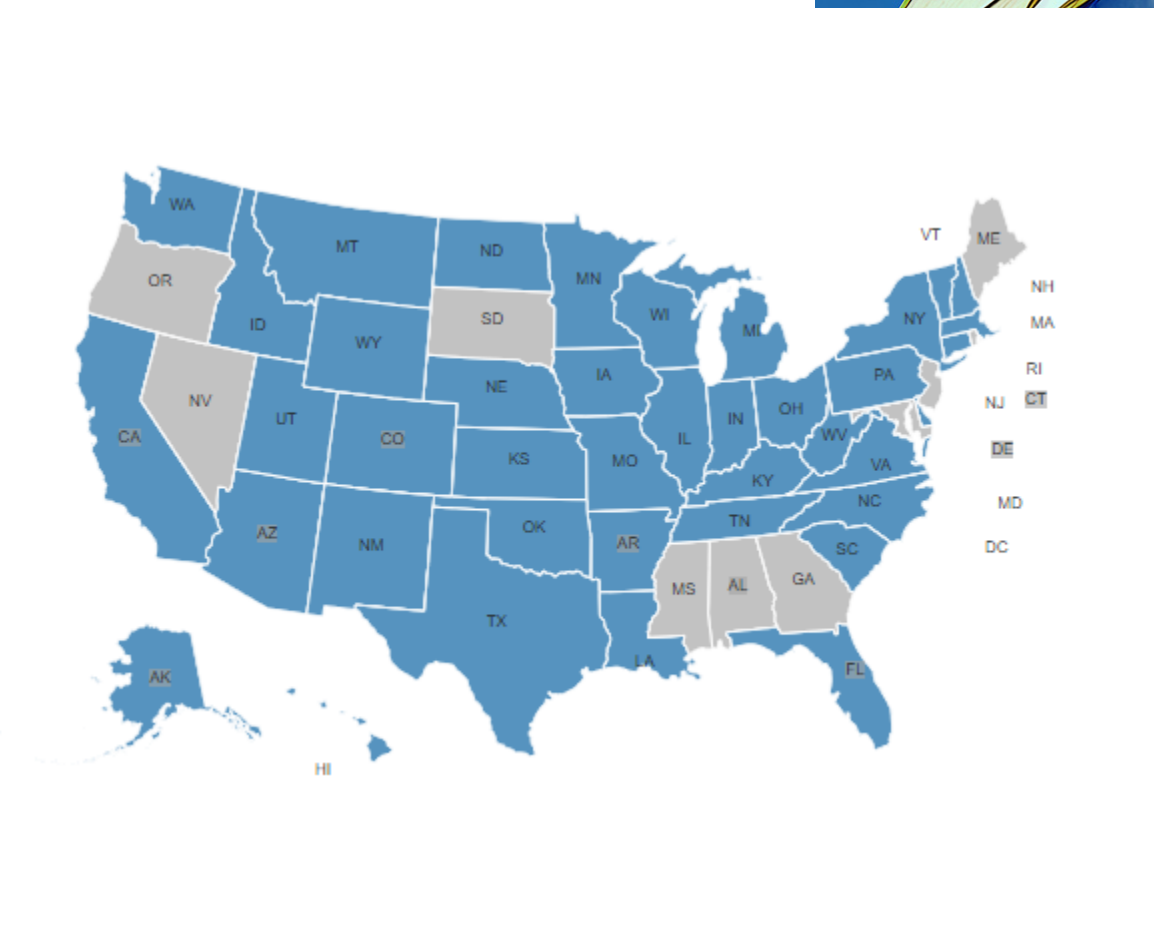
The Lawyer's Obligation of Confidentiality and Safekeeping of Client Property as it Relates to AI
Model Rules 1.6 and 1.15

Model 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.

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Model 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.

What Information Are You Giving to AI?

- Does your application crawl your environment, or based on discrete user input or prompts?
- Does the application "ingest" the information it is exposed to?
- Does the information become part of the teaching set for the application?
- It is OK to share confidential information with a third party, but must verify safeguards.

- Where does the AI run? Locally or in the cloud?
- Is the application confined within your enterprise environment, or is it hosted by a vendor?
- What confidentiality safeguards are there:
  - Your enterprise (is it presumably as safe as your regular locations – outlook, DMS, local drives?)
  - The vendor's environment (does your agreement provide for adequate safeguards?)

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Responsible Use of Research Prompts

- Ways to think about the position of AI vis-à-vis you when you are performing research
  - Another person sitting behind you watching your screen
  - Someone eavesdropping on your conversation
  - An application scraping your content and reposting it somewhere

- Solutions?
  - Anonymize or redact any confidential content
  - Consider not uploading actual documents
  - Use hypotheticals (specifically recommended in [Comment 4] to Model Rule 1.6)
- Remember how broad confidential information is: any information relating to the representation

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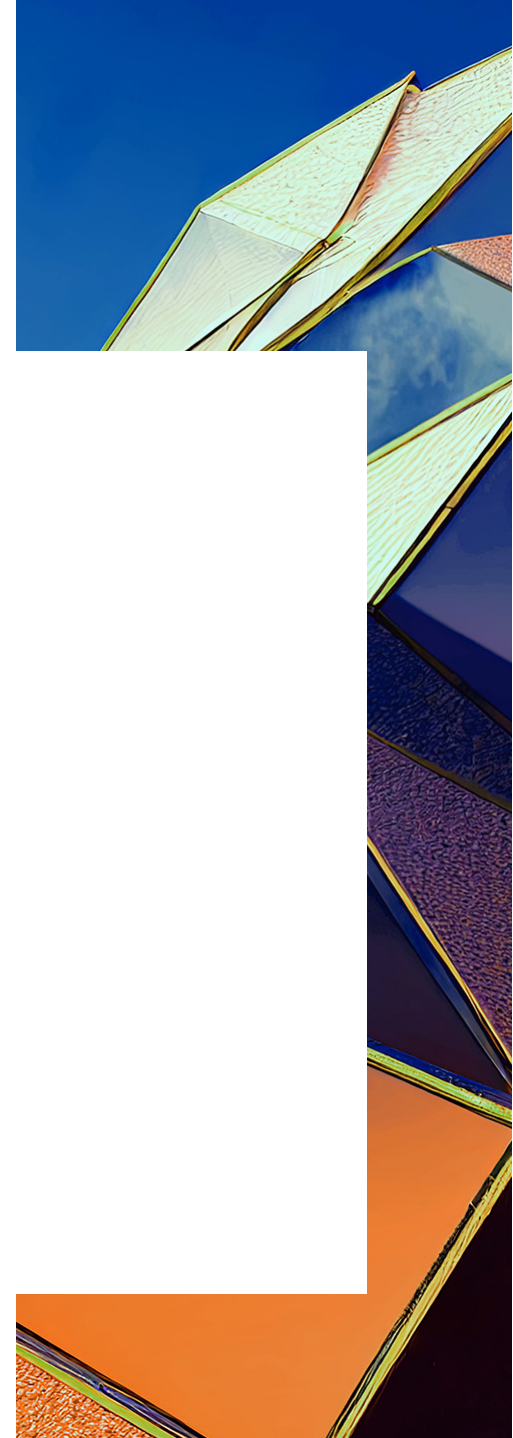
Model Rule 1.4 – Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other laws.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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The Lawyer's Obligation to Communicate / Informed Consent as it Relates to AI

Model Rules 1.4 and 1.2

Communicate the Risks/Rewards to the Client

- It may be ok to opt out of AI usage
  - Clients are asking law firms to catalog all the AI applications that are used, both client facing and behind-the-scenes that impact client data
  - Lawyers can be proactive by disclosing the risks and presenting the options.

- Balancing test
  - Risks of errors are often a range of bad outcomes, ranging from:
    - Inadvertent disclosure /loss of privilege or disclosure or a trade secret; to
    - A slightly less optimal result
  - Lower Cost
  - Higher Efficiency / Speed

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Model Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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Who Decides its OK to Use AI?

- Traditionally – the lawyer controlled the means by which client objectives were met.

- Modern world – business people want more control over their lawyers (control costs, staffing, etc.).

- Develop a policy – what's approved, what is not?

- Consider AI governance committee – multidisciplinary (lawyers, technology, information security, operations).

- Vet AI Applications

  - Beware of new entrants who may have great claims, but less experience with the legal market.

  - Large, brand-name legal tech providers are likely to have had more experience and more capacity for R&D.

  - Hard to know for us – be vigilant!

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The Lawyer's Obligations of Candor and Fairness as it Relates to AI
Model Rules 3.3 and 3.4

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Model Rule 3.3

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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When AI Messes Up, the Lawyer Can Be Held Responsible

- Particularly an issue for generative AI (e.g., ChatGPT, Google-Bard, Microsoft-Bing Chat).

- Courts requiring disclosure of whether generative AI has been used (E.g., selected judges in Ct. of Int'l Trade, N.D. Ill., E.D. Pa.)

- *Mata v. Avianca, Inc.,* S.D.N.Y. 2023
  - Opposition to motion to dismiss prepared used ChatGPT. Contained erroneous citations.
  - Lawyer sanctioned (each $5,000 and notify judges of erroneous cases).

- *Ex Parte Allen Michael Lee,* Texas App. 2023
  - Lawyer filed a writ of habeas corpus to be released or have bail reduced. Brought appeal.
  - Brief supporting appeal contained citations to cases that did not exist.
  - Court decided the brief may have been prepared with help of ChatGPT.
  - Court denied appeal – cited N.D. Tex. Judge Starr's certificate regarding use of AI.
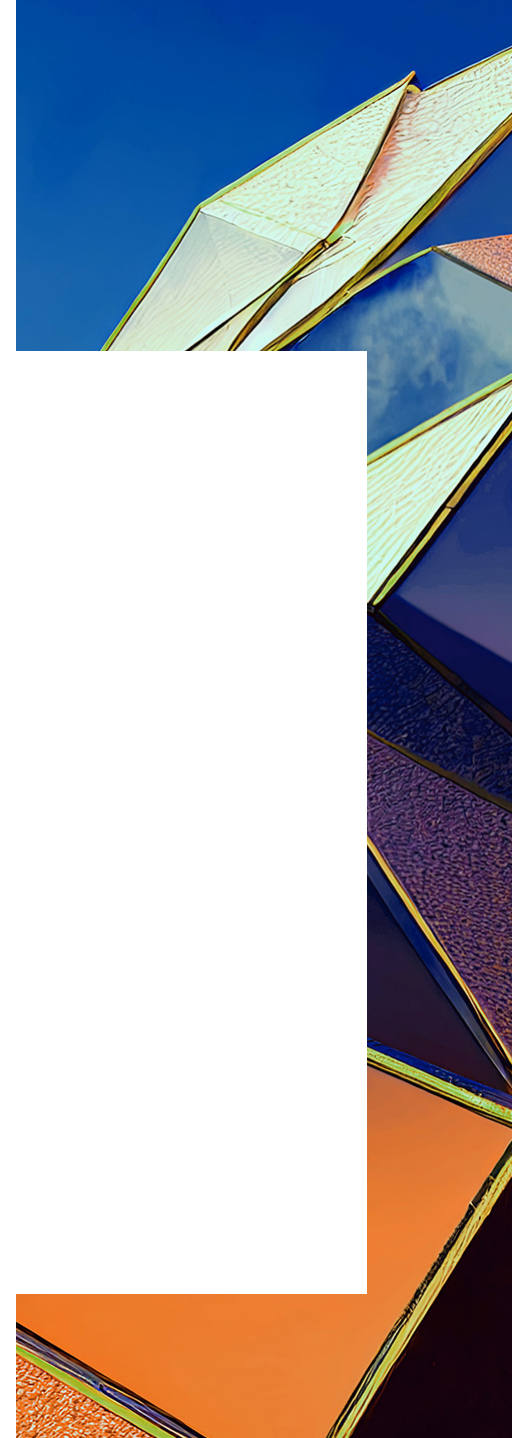
Model Rule 3.4

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; [or]

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. . . .

Obligations to Third Parties

- Impacts lawyer's obligation of truthfulness, the requirement not to falsify evidence.

- Responsible for the accuracy of what is presented.

- Additional considerations:
  - Civil fraud (if reckless)

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Supervision of Subordinate Attorneys and Non-Attorney Staff as it Relates to AI

Model Rule 5.1 and 5.3

Model Rule 5.1 – Responsibilities of Partners, Managers, And Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm [or a law department of an enterprise – See Comment[1]], shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 5.3 – Responsibilities Regarding Nonlawyer Assistance

- ABA House of Delegates adopts Resolution 604 at the 2023 Midyear Meeting, urging human oversight, accountability, and transparency in AI.

- Creation of an ABA Task Force on Law and Artificial Intelligence to examine the impact of AI on law practice and the ethical implications for lawyers to explore:

  - Risks (bias, cybersecurity, privacy, and uses of AI such as spreading disinformation and undermining intellectual property protections) and how to mitigate them.

  - Emergent issues with generative AI

  - Utilization of AI to increase access to justice

  - AI governance (the role of laws and regulations, industry standards, and best practices)

  - AI in legal education.

  (Source: ABA Press Release, August 28, 2023).

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Supervisory System

- Policies and Training are the key to adequate supervision.

- As AI is often used with third-party vendors, consider the learning with regard to managing e-discovery vendors:

  - Who will monitor the vendor (outside counsel vs. inside counsel – and does it matter who retains?)

  - In litigation, the party is generally responsible for its e-discovery vendor's errors. *See In Re Seroquel Products Liability Litigation*, 2007 U.S. Dist. LEXIS 61287, *49-50 (M.D. Fla. Aug. 21, 2007) (citing Sedona Principle 6: "Ultimate responsibility for ensuring the preservation, collection, processing, and production of electronically stored information rests with the party and its counsel, not with the nonparty consultant or vendor.")

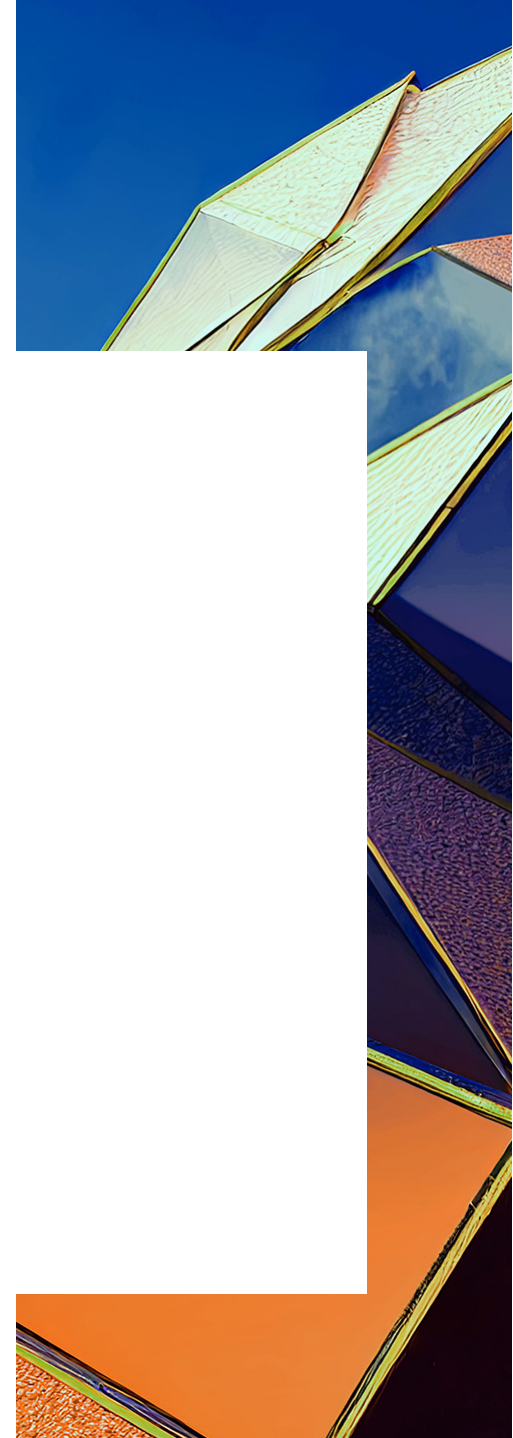 - But, liability can be allocated by agreement?

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Take Aways and Questions and Answers

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Take Aways

- Know your AI
  - What are you using?
  - How does it work?
- Consider an AI Usage Policy
- Consider an AI Governance Committee (policies and vetting of legal applications)
- Training is Key to Supervision
- Embrace without fear – Trust but Verify

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Thank You

- Questions?

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About Foley

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