LEGAL ETHICS IN THE AGE OF BIG DATA & ARTIFICAL INTELLIGENCE

Presentation to AZ Thurgood Marshall Inn of Court

December 13, 2023

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FOUNDER & CEO
LEGAL DECODER, INC.

WHAT'S HAPPENING WITH BIG DATA AND AI TODAY?

SOME RECENT HEADLINES:

Pentagon Plans Vast AI Fleet to Counter China Threat

Defense Department seeks an array of air-, land- and sea-based autonomous systems to keep pace with adversaries

By *Nancy A. Youssef* [Follow] *and Michael R. Gordon* [Follow]
Updated Sept. 6, 2023 3:43 pm ET

WSJ | OPINION

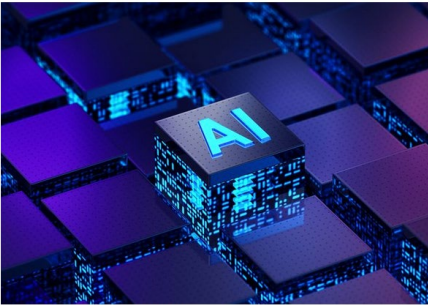Business   U.S.   Politics   Economy   Tech   Finance   **Opinion**   Arts & Culture   Lifestyle

OPINION | LETTERS   [Follow]

Firms Need Big Data More Than They Need Big Tech

Companies can pool their data without handing it over to a major proprietary vendor.

July 6, 2023 11:14 am ET

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How A.I. Can Help

ChatGPT is changing how people work. That can be scary. But for now, most jobs are still safe.

How Artificial Intelligence Is Being Used to Detect Breast Cancer That Doctors Miss

Hungary has become a major testing ground for artificial intelligence software to spot cancer, as doctors debate whether it would replace them in medical jobs.

6 MIN READ

As A.I. Booms, Lawmakers Struggle to Understand the Technology

Tech innovations are again racing ahead of Washington's ability to regulate them, lawmakers and A.I. experts said.

CRITIC'S NOTEBOOK

When the Movies Pictured A.I., They Imagined the Wrong Disaster

Instead of the chilling rationality of HAL in "2001: A Space Odyssey," we get the messy awfulness of Microsoft's Sydney. Call it the banality of sentience.
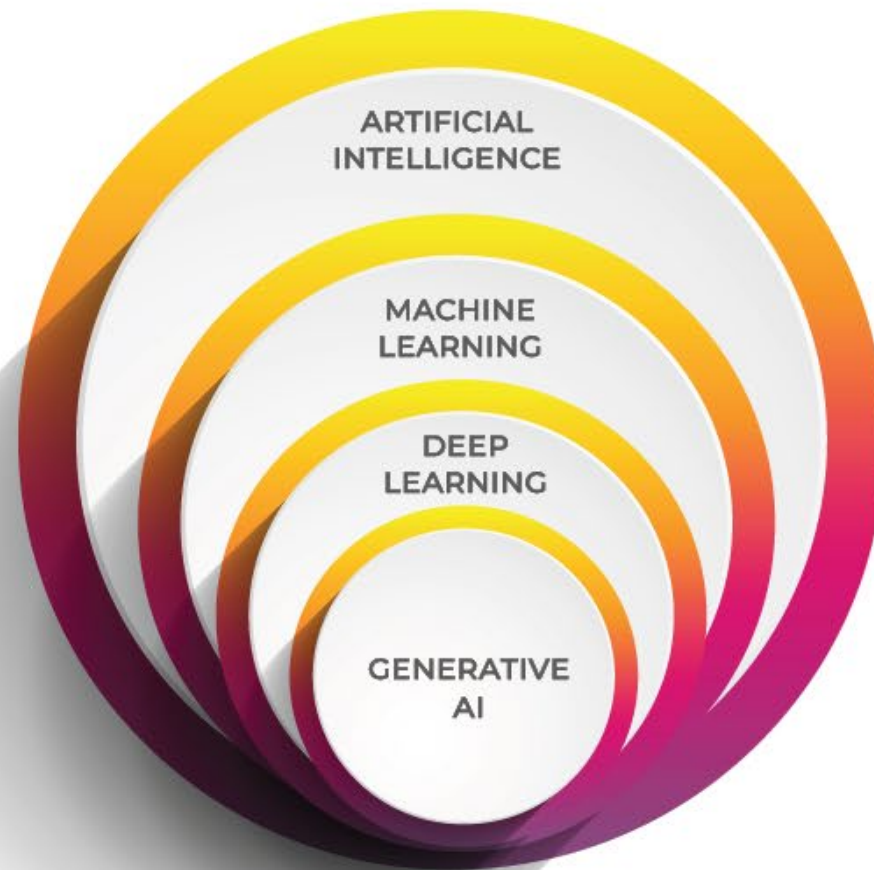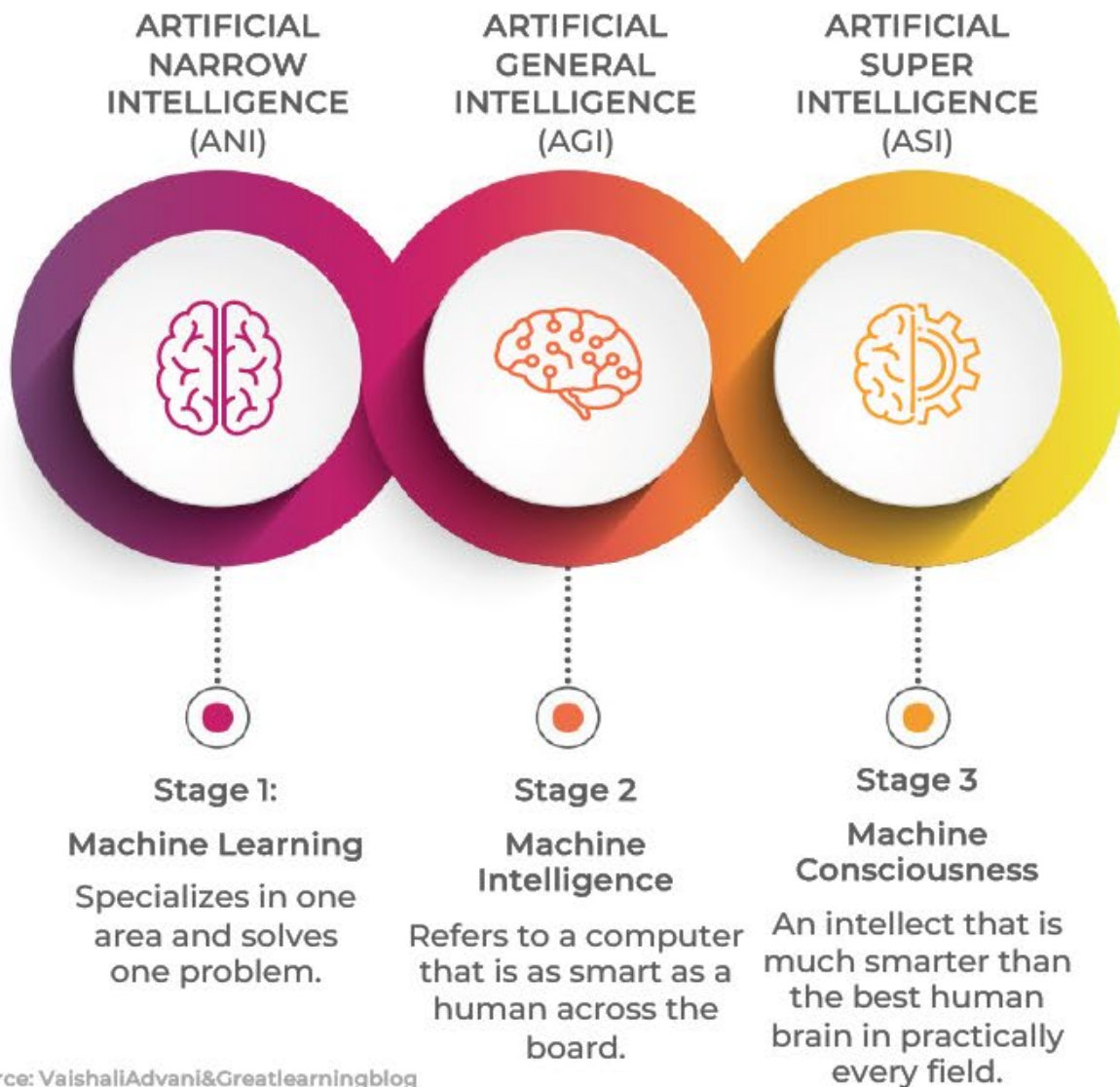

KEYWORDS

Why You Soon Won't Be Able to Avoid AI—At Work or At Home

Tech giants are racing to incorporate artificial intelligence into almost every aspect of their businesses, aiming to make AI indispensable for some—and unavoidable for the rest of us

ARTIFICIAL INTELLIGENCE: WHAT IS IT?

3 TYPES OF ARTIFICIAL INTELLIGENCE

ARTIFICIAL NARROW INTELLIGENCE (ANI)

ARTIFICIAL GENERAL INTELLIGENCE (AGI)

ARTIFICIAL SUPER INTELLIGENCE (ASI)

Stage 1:

Machine Learning

Specializes in one area and solves one problem.

Stage 2

Machine Intelligence

Refers to a computer that is as smart as a human across the board.

Stage 3

Machine Consciousness

An intellect that is much smarter than the best human brain in practically every field.

ARTIFICIAL INTELLIGENCE

MACHINE LEARNING

DEEP LEARNING

GENERATIVE AI

THE INTERDEPENDENCE OF BIG DATA AND ARTIFICIAL INTELLIGENCE

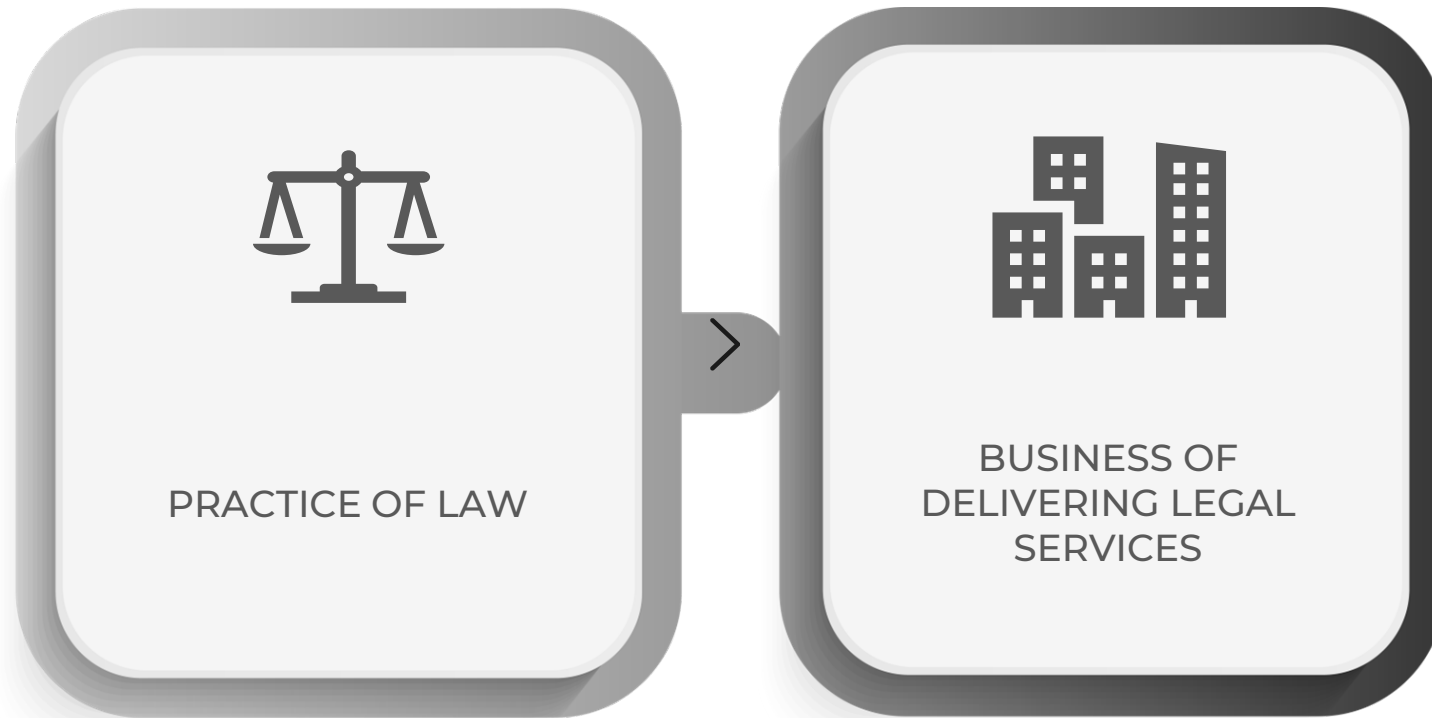**BIG DATA**

**RESULT:
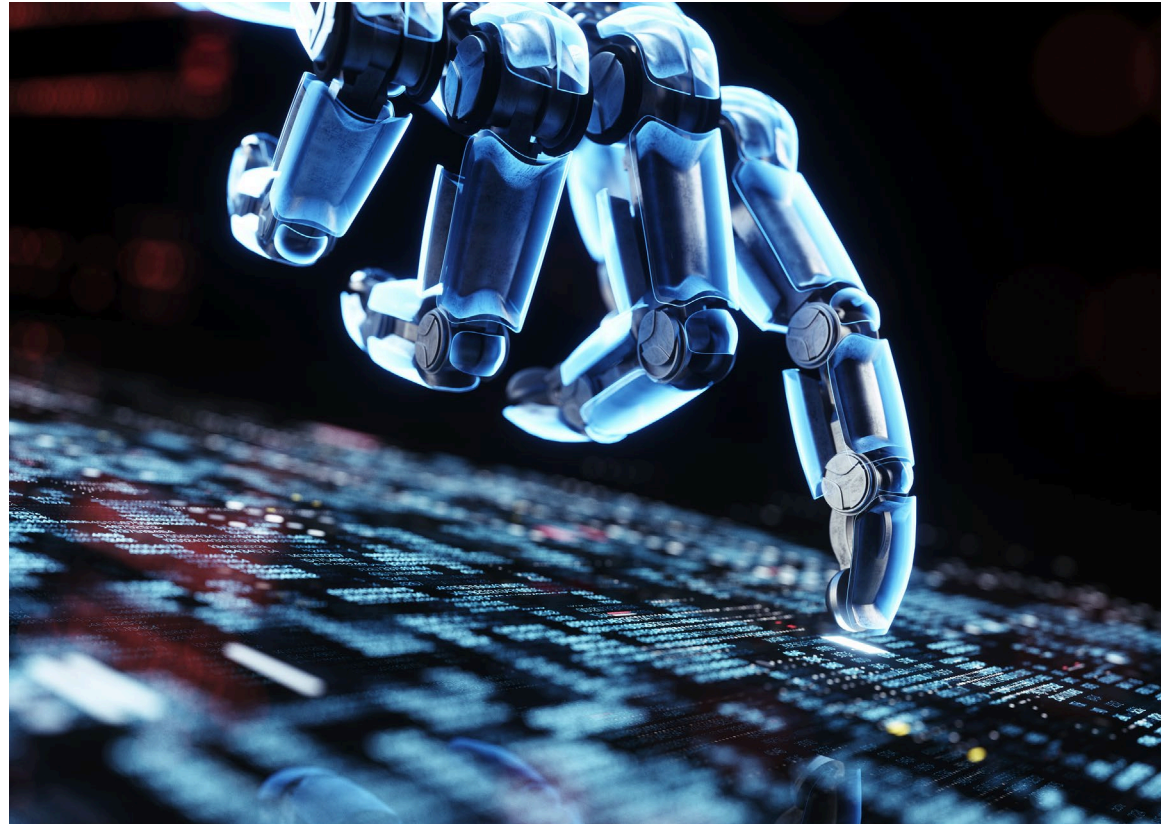NEXT GEN BUSINESS
INTELLIGENCE**

**AI
SOFTWARE**

PROFESSIONAL SERVICES ARE UNDERGOING A TRANSFORMATION

PRACTICE OF LAW > **BUSINESS OF DELIVERING LEGAL SERVICES**

THE PERCEIVED RISKS OF USING BIG DATA AND AI

RISE OF THE ROBO-PROFESSIONAL

THE REAL RISK:
<u>NOT</u> USING BIG DATA AND AI

THE QUESTION SHOULD NOT BE CAN YOU RISK USING BIG DATA AND AI

THE QUESTION IS CAN YOU RISK <u>NOT</u> USING BIG DATA AND AI

- COMPETITION IS FIGURING IT OUT
- NEW GENERATION OF PROFESSIONALS EMBRACING IT
- CREATES OPPORTUNITY FOR MORE PROFITABLE ENGAGEMENTS
- CLIENTS ARE EXPECTING IT

LEGAL DIVE   Deep Dive   Opinion   Library   Press Releases   Topics ⌄

DIVE BRIEF

60% of in-house counsel expect law firms to use generative AI

Most corporate lawyers want to know if their outside firms are using tools such as ChatGPT and they want some say in the matter, according to a LexisNexis survey.
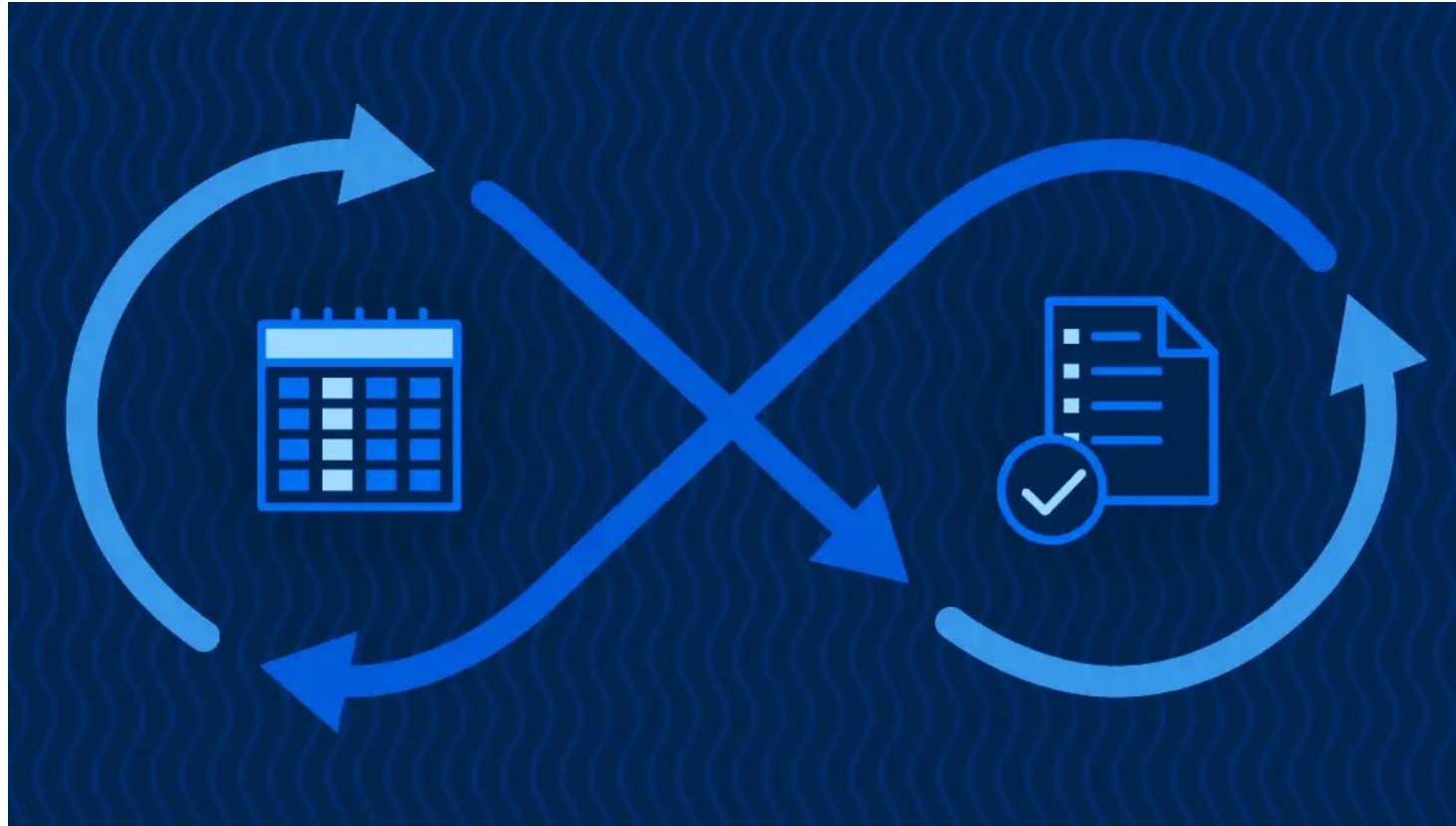
Published Aug. 25, 2023

Lyle Moran
Reporter

An artificial intelligence brain concept *Olemedia via Getty Images*

COMPUTERS ARE BETTER AT REPEATED TASKS

Consistent, Reliable and Tireless

HOW AI OFFERS BENEFITS FOR CLIENTS

FIRMS ARE BEING CHALLENGED TO INCORPORATE AI INTO THEIR WORK

HELPS FIRMS DEAL WITH SHRINKING CLIENT BUDGETS

FEWER LPL CONCERNS

MORE EFFICIENT & COST - EFFECTIVE OUTCOMES

TECHNOLOGY ENABLED SERVICES WITH HUMAN IN LOOP

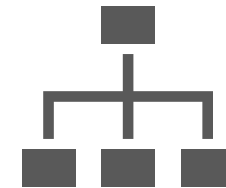# TECH ENABLED LAWYERING

NO, YOU'RE NOT GOING TO BE REPLACED BY A ROBOLAWYER— BUT YOU SHOULD CONSIDER PARTNERING WITH ONE

RECORDS
RETENTION

LEGAL
RESEARCH

RESOURCE
MANAGEMENT

DOCUMENT
AUTOMATION

eDISCOVERY
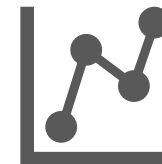
CASE
MANAGEMENT

WHAT TO CONSIDER WHEN USING TECHNOLOGY AND AI

BALANCING THE BENEFITS AND RISKS

The more routine the work, the less senior the person needed to handle the work.

EMERGING TECH AND LEGAL ETHICS

- Emerging technologies have always created novel ethical issues/traps (e.g., email, cell phones, cloud computing, virtual offices)
- AI is the most disruptive technology ever, and is moving faster than law, regulations and ethical rules can keep up

State Bars Start To Take Action

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

  - Bar Association to develop a 1 hour CLE on generative AI

  - Proposal to explore requiring California-accredited law schools to require courses on generative AI

  - To consider new rules for the California bar exam to include generative AI

  - Recommend Supreme Court and legislature revisit definition of unauthorized practice of law given developments in AI

  - Undertake further study of additional changes in ethics rules relating to competence, client communication, supervision of AI, etc.

- Florida Bar: Proposed a new advisory opinion (24-1) on "Lawyers' Use of Generative AI" - to be finalized in January 2024

  - Cautions and preventive measures to prevent attorneys from leaking client information when using generative AI

  - Attorney must oversee and check the work product of a generative AI system

  - Law firms must ensure that chatbots do not inadvertently create a client-lawyer relationship

  - Cannot charge more than actual attorney time spent on matter when charging for legal services involving use of generative AI

ETHICAL CONCERNS FOR LAWYERS & AI

ALIGNING AI WITH THE MODEL RULES OF PROFESSIONAL CONDUCT

- Rule 1.1 (Competence).
- Rule 1.2 (Client Consultation)
- Rule 1.6 (Confidentiality)
- Rule 3.3 (Candor to the tribunal) and Rule 4.1 (Truthfulness in statements to others)
- Rule 5.3 (Supervising nonlawyers)
- Rule 5.5 (UPL).
- Rule 1.5 (Reasonable fees)

SETTING UP GUARDRAILS FOR ETHICAL COMPLIANCE

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.

DUTY OF TECHNOLOGICAL COMPETENCE ADOPTED BY 40 STATES

Comment 8: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, <u>including the benefits and risks associated with relevant technology,</u> engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
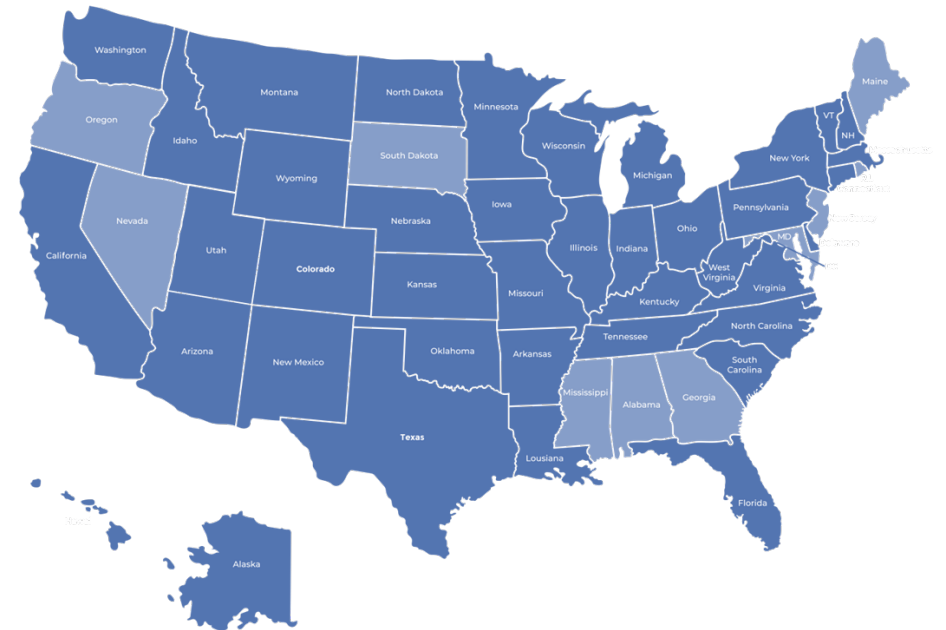
MODEL RULE 1.1 – COMPETENCE (con't)

Understand the law, but what else?

- Risks

- Capabilities

- Accuracy

- Logic (not just mistakes)

Substantive legal issues

(IP | privacy | cybersecurity | contractual rights | legal advocacy)

MODEL RULE 1.4 COMMUNICATIONS

A lawyer must communicate with client

- Discuss benefits and risks of using AI technology with client?
- Explain any decision not to use AI technology?
- Obtain client's consent to share the client's data with an outside AI vendor?

Question: How many details / specificity is required?

MODEL RULE 1.6 CONFIDENTIALITY

Lawyer must *"make reasonable efforts to prevent trhe inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation"*

PRACTICE POINTERS:

- AI may use all information as training data
- Review how vendor agreements safeguard clients' data
- Review data retention policies
- Consider IT/data security consultants
- Communications with client
- Encryption & redaction

MODEL RULE 3.3
CANDOR TOWARD TRUIBUNAL

- Model Rule 3.3 provides that a "lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law…"

- Several courts issued standing orders

  - Attorneys and pro se litigants must verify that AI generated filings & pleadings have been checked for accuracy, using print reporters, traditional legal databases, or other reliable means.

MODEL RULE 5.3
DUTY TO SUPERVISE

Lawyers who are supervisors or managers must use "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer...."

What happens when due diligence is not possible?

Establishing ethical guardrails is vital

MODEL RULE 5.5
UNAUTHORIZED PRACTICE OF LAW

Rule 5.5(a) provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." Subsection (b) of Rule 5.5 further states that "a lawyer shall not aid a nonlawyer in the unauthorized practice of law." Exception: Comment 2 to Rule 5.5 where the unauthorized practice of law rule is not violated where a lawyer supervises work he or she has delegated and retains responsibility for the non-lawyer.

Define "Practice of Law"

- Applying legal principles to a client's specific facts
- Preparing legal documents
- Providing legal advice

Can AI engage in the practice of law?

vs.

MODEL RULE 5.5 (con't) UNAUTHORIZED PRACTICE OF LAW

LACBA News

New Technology, Old Rules? Upsolve and the fight over 'legaltech' and Unauthorized Practice of Law

Posted on: Jul 4, 2023

Articles are provided regularly by LACBA's longstanding Professional Responsibility and Ethics Committee.

By William Simonsick[1]

The integration of law and technology has never been seamless, and the collision between electronic self-help resources and state unauthorized practice of law (UPL) statutes has been demonstrative of the uncertainty that new technologies face when intersecting with old rules. California and 9th Circuit case precedent has consistently ruled that electronic legal advice applications violate UPL. However, the Southern District of New York recently in Upsolve, found that the Free Speech Clause of the First Amendment can limit the application of UPL to the dissemination of legal assistance software toolkits.[2] Notwithstanding the greater argument regarding the roles of ttorneys and non-attorneys in addressing the access to justice crisis and the push for a civil Gideon[3] the outcome of the recent Upsolve decision is notable for ethics practitioners and legaltech entrepreneurs alike. What it means for Californian practitioners remains unclear until the 9th Circuit or higher court revisits the issue, but we can expect this to remain a dynamic area of law that requires the utmost caution until such case precedents are reconciled.

Rule 1.5: REASONABLE FEES

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses...

What does the 8-Factor Test mean in the Age of Artificial Intelligence?

Rule 1.5: REASONABLE FEES (con't)

LAW TIMES

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Judge says AI could have been used

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A judge capped the costs award in an occupier's liability personal injury costs judgment, writing that the use of artificial intelligence should have "significantly reduced" counsel's preparation time.

Carole Piovesan says courts are grappling with the use of AI in litigation. Photo: Laura Pedersen

To Use or Not to Use?

SHOULD LEGAL FEES IN A TECH ENABLED WORLD BE VIEWED THROUGH A DIFFERENT LENS?

Nancy B. Rapoport & Joseph R. Tiano, Jr., *Reimagining "Reasonableness" Under Section 330(a) in a World of Technology, Data, and Artificial Intelligence* 97 Aᴍ. Bᴀɴᴋʀ. L.J. 254(2023)

BUSINESS ETHICS & EMERGING REGULATORY STANDARDS FOR AI

- Bias & skewed training data

- Lack of transparency

- Job elimination

- Discriminatory results

- Data security

- Personal privacy

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