

Course Title: Ethically Evolving: Considerations for the use of artificial intelligence in real estate transactions.

Time: 1 hour (50 minute live lecture, 10 minute question and answer)

Objective:

- (a) Discuss what artificial intelligence or “AI” is, and a brief overview of technology which has emerged making the use of “AI” possible in our day-to-day lives in the 21st century.
- (b) Discuss if, and how, lawyers and business professionals can use generative AI in an ethical manner in the ordinary course of their practices/business.
- (c) Discuss and consider how market leaders are currently using AI and the path for the future.

Outline:

1. General Introduction

a. Brief History of / what is AI?

i. What is AI?

- 1. The use of technology to replicate the way in which humans think.
 - a. Reasoning
 - b. Learning
 - c. Self-Improvement
 - d. Creativity

ii. Brief History of Relevant Technology

- 1. Early Supercomputers (1960’s – 1980’s)
- 2. Personal Computing (1980’s – 2000’s)
- 3. “Internet Age” (2000’s – 2010’s)
- 4. “Modern” Era (2020 - Today)
 - a. Real emergence of ChatGPT, OpenAI, and other consumer facing products which place people in direct contact with “AI”.

b. What types of AI exist and are currently in use?

- i. Narrow AI – performs specific tasks without expanding beyond its instructions and inputs. Examples: image recognition, natural language processors and image generators. (Siri, Alexa and Google Assistant)
- ii. Reactive Machines – react to stimuli but don’t build memories that are accessible in the future. Examples: spam filters and recommendation systems (“Recommended for you” on streaming services)
- iii. Limited Memory – stores knowledge, learns and performs new tasks based on learned information. Used for making predictions and forecasting future trends. Examples: chatbots and self-driving cars.
 - 1. Machine Learning – trained on examples to make a prediction based on data. Examples: Autocorrect/text prediction or predicting loan defaults.

- a. Generative AI – trained on datasets, recognizes patterns in the data and draws conclusions to apply what it’s ‘learned’ through recognition to create new patterns and data. Examples: customer service chatbots. Used for research and brainstorming.

2. Model Rules and other sources of Professional Guidance

- a. Is there any guidance out there from Model Rules, other states, Kentucky, etc.

- i. ABA Resolution 604 (February 6, 2023)

- 1. Urges organizations that design, develop, deploy and use AI to follow guidelines:

- a. Ensure products, services, systems, and capabilities are subject to human authority, oversight, and control;
- b. Responsible individuals and organizations should be accountable for consequences caused by use of their AI products, services, systems, and capabilities unless they have taken reasonable measures to mitigate against that harm or injury; and
- c. Developers should ensure the transparency and traceability of their AI products, services, systems, and capabilities, while processing associated intellectual property, by documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes underlying their AI products, services, systems, and capabilities.

- 2. Comments:

- a. It’s not appropriate to shift legal responsibility to a computer or an algorithm rather than to responsible People
- b. White House Office of Science and Technology Policy released a blueprint for an AI Bill of Rights for “building and deploying automated systems that are aligned with democratic values and protect civil rights, civil liberties, and privacy.”
 - i. They explained some possibilities are: the right to know when and how AI is influencing a decision affecting civil rights and liberties, freedom from being subject to AI that hasn’t been carefully audited for accuracy and bias and to ensure it has been trained on sufficiently representative data sets, freedom from pervasive or discriminatory surveillance and monitoring, and the right to meaningful recourse if harmed by the use of an algorithm.

- ii. California State Bar - Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (November 23, 2023)
 - iii. New York State Bar Association – Task Force on Artificial Intelligence
 - iv. Florida Bar Association’s Board of Governors – Ethics Advisory Opinion 24-1
 - v. State Bar of Michigan – Ethics Opinion JI-155 (October 27, 2023)
 - vi. New Jersey – Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers (January 24, 2024)
- b. What do the Kentucky rules tell us about the use of AI?
- i. Competence – SCR 3.130(1.1)
 - 1. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
 - ii. Confidentiality – SCT 3.120(1.6)
 - 1. (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).
 - 2. (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - a. (1) to prevent reasonably certain death or substantial bodily harm;
 - b. (2) to secure legal advice about the lawyer's compliance with these Rules;
 - c. (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or
 - d. (4) to comply with other law or a court order.
- c. Kentucky Ethics Opinions – Drawing similar conclusions
- i. Ethics Opinion KBA E-437 on the use of “Cloud Computing”
 - 1. Kentucky Bar Association stated that lawyers may use cloud computing with clients’ confidential information. In doing so, Lawyers should following the Rules of Professional Conduct with regard to:
 - a. Safeguarding client confidential information;
 - b. Acting competently in using cloud computing;
 - c. Properly supervising the provider of the cloud service;

- d. Communicating with the client about cloud computing when such communication is necessary due to the nature of the representation.
 - 2. Key takeaways:
 - a. KBA has declined to institute specific practices, even more so when technology is advancing rapidly at the risk of obsolescence.
 - b. Lawyers have a reasonable duty of care with respect to the use of technology in the practice of law, as they do with other services such as off-site storage of client files, security systems for lawyers offices, etc.
- 3. Ethical Considerations for Lawyers
 - a. Upon engagement - What if you want to use AI?
 - i. “Informed Consent” within the meaning of SCT 3.130(1.6)
 - 1. Engagement Letters
 - 2. Separate Written Correspondence between Attorney and Client
 - b. Document Preparation Issues
 - i. Wrong, inaccurate or non-applicable provisions.
 - ii. Enforceability or “local law” issues, particularly with certain real property related documents such as Purchase Agreements, Deeds, Leases, Memorandums of Leases and Loan Documents.
 - c. Document Review Issues
 - i. AI may not be trained or understand the specific issues relevant for your transaction or matter.
 - ii. Uploading of confidential or proprietary information as well, can only be done with informed consent of all parties.
 - 1. Should be addressed in engagement letter
 - a. With varying types of AI, should be specific w/r/t the type of AI (i.e., generative vs machine learning) to avoid liability for the use of MS Word’s predictive text being caught under the umbrella of “AI” in the letter, etc.
 - 2. Need to fully understand and be transparent re: the AI provider and be able to explain the providers ability to protect confidentiality
 - 3. Have a plan for the providers failure to maintain security (similar to any other data breach)
 - d. Real World Examples
 - i. NY Lawyer who filed pleadings with fake cases cited to.
 - 1. Plaintiff’s Counsel submitted a response to a motion to dismiss which was, at least in part, drafted by ChatGPT.
 - 2. Defendant’s Counsel alerted the court to the presence of citation to these cases which did not exist.

3. Judge issued a Show Cause order in May 2023. The result was a sanction by the court and an order requiring the Plaintiff's counsel to pay \$5,000.00 to the Court.
4. Ethical Considerations for Business Professionals
 - a. Use of AI in underwriting of real estate transactions
 - i. Confidentiality clauses in contracts typically limit who information may be disclosed to if provided as typical "due diligence".
 - ii. Disclosure of personal information in lending transactions.
 1. There are some AI software suites already in use in the marketplace to automate customary underwriting in the residential space, but slower adoption has been seen in the commercial space.
 2. Uploading of personal or sensitive information should be provided
 - iii. Consideration of biases in AI algorithms, particularly with regard to "making decisions".
 - iv. Use of narrowly tailored products that are for the specific use needed is recommended in lieu of generally available products such as ChatGPT and similar generative AI.
 5. Applying AI to Legal Practice
 - a. Generative AI's usefulness in creating a "canvas" to create "tools".
 - i. Examples of product that can be produced.
 - b. Generative AI and basic queries for information.
 - i. Generative AI is *not* a replacement for online legal research databases (WestLaw, Lexis, etc.) and is not designed to produce questions to answers which require interpretation, skillfulness, and thoughtfulness of a licensed attorney.
 6. Applying AI to CRE Management and Transactions
 - a. AI-powered databases are able to quickly and efficiently summarize and group properties and other data by type, terms, etc.
 - i. Quickly identify all NNN properties or leases expiring in set time
 - ii. Quickly identify and group all properties subject to or benefiting from encumbrances (i.e. parking agreements or exclusive tenant rights)
 - iii. Group properties or subsidiaries by financing requirements (i.e. reporting dates, loan maturities)
 - b. Generate marketing materials
 - c. Create budgets, models and forecasts
 - i. Quickly and accurately process and evaluate historical budgets and expenses to generate a forward-looking budget
 1. Consider any non-recurring costs that would need to be included in the inputs in addition to the historical data (cap ex; lease rolls)
 - d. Streamline and process reporting data for lenders, government agencies, taxes, and audits.

- i. Key – need human oversight to ensure all inputs and outputs are accurate to avoid submitting false or misleading reports.
 - e. Brokers or agents can more efficiently search the market and offerings to match buyers or tenants with sellers or properties that may not have been otherwise identified
 - f. Monitor trends in the market to time investments/divestments, plan rent increases (or hotel costs in the lodging sector), track comparable assets to determine market needs (space per person, amenities, etc.)

- 7. What does the future of AI Look like?
 - a. Discussion of the continued evolution of the landscape of generative AI in the legal profession and the business side of real estate transactions and management.
 - b. What does the legal profession currently provide?
 - i. Westlaw, Lexis, Casetext and numerous other platforms provide some form of “AI” enhanced tools (primarily designed to assist in legal research).
 - ii. Tools provided by KY Bar Association
 - 1. The Kentucky Bar Association, in collaboration with Fastcase, offers members free access to an advanced legal research platform, featuring the AI-powered legal assistant – Vincent, from global legal service provider vLex. This platform contains Fastcase's comprehensive libraries covering all 50 states and Federal level materials from which you can apply Vincent to ensure you're not missing any relevant authority and achieve in seconds what would have taken hours.
 - iii. What does the future hold?
 - c. The future of AI in the CRE space
 - i. AI for performance
 - 1. Reduced human errors
 - 2. More efficiency and the need to keep up with the competition or re-imagine the process
 - 3. Utilizing AI for management to ensure all applicable laws, agreements, financing requirements and leasing requirements are met
 - ii. AI's impact on the ground
 - 1. Reduced or changing need for office space
 - a. Amenities to accommodate less active working time
 - b. Less space due to reduced head count in the office
 - c. Collaborative space to review and discuss inputs and outputs of AI to finalize work product
 - 2. Increased need for data centers
 - a. AI requires more computing space and servers

- i. Some properties may be solely dedicated to hosting servers
- ii. Will offices or manufacturing facilities need more space for local computing hardware and servers
- iii. Consider the needs of IT professionals or tech developers

8. Question and Answer (10 Minutes)