



Ethically Evolving: Considerations for the use of Artificial Intelligence in Real Estate Transactions

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Objectives

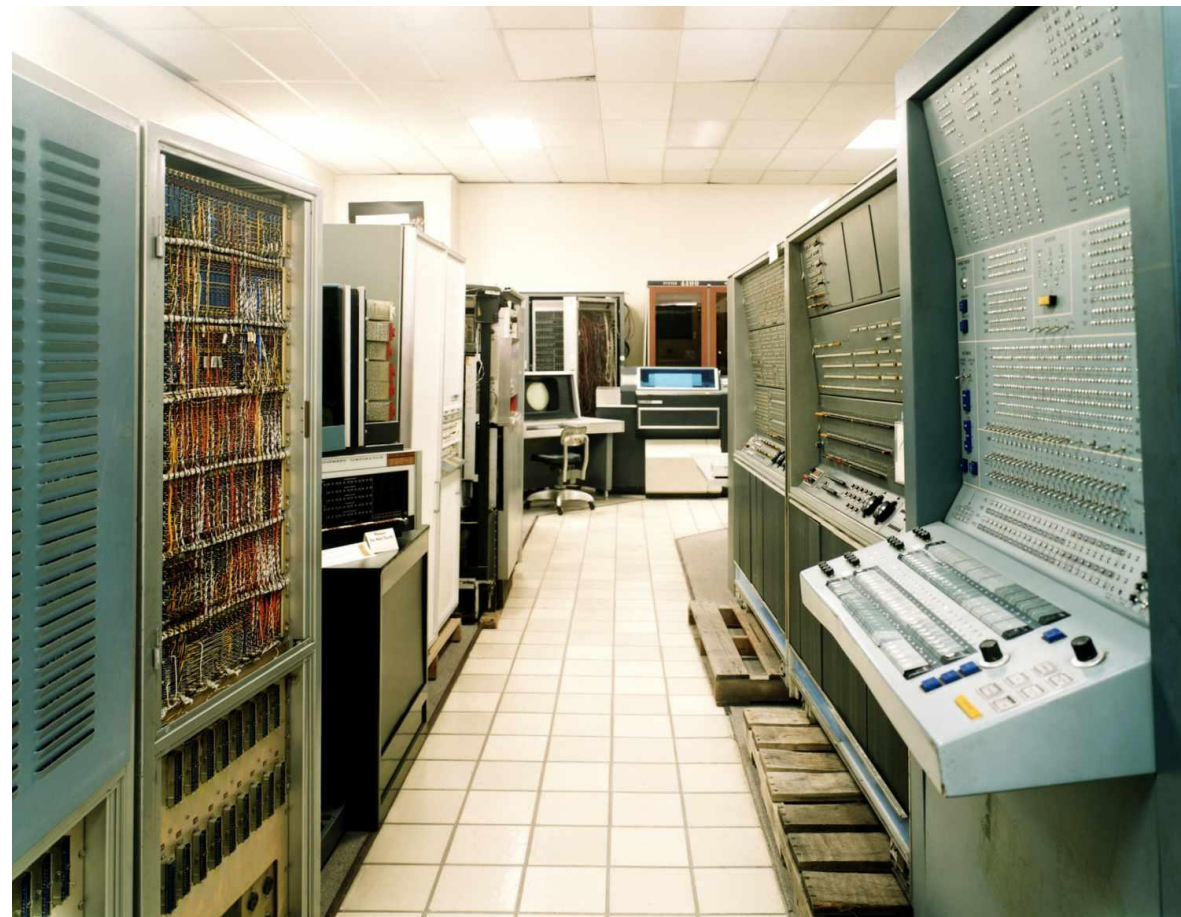
- Discuss what artificial intelligence or “AI” is, and a brief overview of technology which has emerged making the use of “AI” possible in our day-to-day lives in the 21st century.
- Discuss if, and how, lawyers and business professionals can use generative AI in an ethical manner in the ordinary course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



General Introduction

What is “AI” and a brief history of relevant technology.

- What is AI?
 - The use of technology to replicate the way in which humans think.
- Brief technological history
 - Early Supercomputers (1960’s – 1980’s)
 - Personal Computing (1980’s – 2000’s)
 - “Internet Age” (2000’s – 2010’s)
 - “Modern” Era (2020 – Today)



Seymour Cray's early supercomputer from ~1960.

Subsets of AI in Use Today

Limited Memory – stores knowledge, learns and performs new tasks based on learned information. Used for making predictions and forecasting future trends.

Machine Learning – trained on data sets to become capable of performing specific tasks.

Sequential AI – outputs are dependent on chronologically ordered data to capture patterns and make predictions over time.

Generative AI (“GenAI”) – 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.



Model Rules and other sources of Professional Guidance

American Bar Association

- ABA Resolution 604 (February 6, 2023)
 - Aimed at organizations that design, develop, deploy and use AI and urges such organizations to follow guidelines:
 - subjecting AI based products, services, systems, and capabilities to human authority;
 - ensuring responsible individuals and entities are accountable for consequences caused by AI unless reasonable measures have been taken to mitigate harm or injury; and
 - ensuring the transparency and traceability of AI based products, services, systems, and capabilities.
 - Comments from the ABA:
 - Not appropriate to shift legal responsibility to a computer or an algorithm rather than to responsible individuals and entities
 - Noted that the 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.”
 - 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
 - right to meaningful recourse if harmed by the use of an algorithm

American Bar Association continued

- ABA Formal Opinion 512 (July 29, 2024)
 - Specifically identifies rules that should be considered by lawyers utilizing GenAI
 - Competence (1.1)
 - Confidentiality (1.6, 1.9(c) and 1.18(b))
 - Communication (1.4)
 - Meritorious Claims and Contentions and Candor to the Tribunal (3.1, 3.3 and 8.4(c))
 - Supervisory Responsibilities (5.1 and 5.3)
 - Fees (1.5)

Bar Guidance from California – Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (November 23, 2023)

- Duty of Confidentiality: GenAI is able to use info that is input to train the AI and may also share the query with third-parties or may otherwise lack reasonable or adequate security. A lawyer: (i) must not input any confidential info into any GenAI solution that lacks adequate confidentiality and security protections; (ii) must anonymize client info and avoid entering identifying info; (iii) should consult with IT professionals or cybersecurity experts to ensure the AI system adheres to stringent security protocols and ensure the GenAI provider does not share or use the inputted info.
- Duties of Competence and Diligence: GenAI outputs can include info that is false, inaccurate or biased. A lawyer: (i) must ensure the competent use of the technology and apply diligence and prudence with respect to facts and law; (ii) should reasonably understand how the technology works, its limitations and the applicable policies governing the use and exploitation of client data by the product; (iii) must critically analyze, review, validate, and correct for accuracy and bias; and (iv) avoid over-reliance on GenAI to the extent it hinders critical attorney analysis fostered by traditional research and writing. Overreliance on AI is inconsistent with the active practice of law and application of trained judgement by the lawyer.
- Duty to Comply with the Law: A lawyer: (i) cannot counsel or assist a client to engage in conduct that the lawyer knows is a violation of any law, rule or order when using GenAI and (ii) should analyze the relevant and applicable laws and regulations.

Bar Guidance from California (continued)

- Duty to Supervise & Responsibilities of Subordinate Lawyers: Managerial and supervisory lawyers should establish clear policies about the permissible use of GenAI and make efforts to ensure lawyers and nonlawyers in their firm comply with professional obligations when using GenAI. A subordinate lawyer must not follow instructions to use GenAI in a way that would violate professional obligations.
- Communication Regarding GenAI Use: A lawyer should: (i) evaluate their communication obligations throughout the representation based on the facts and circumstances; (ii) consider disclosure to their client that they intend to use GenAI; and (iii) review applicable client instructions relating to the use of GenAI.
- Charging for Work Produced by GenAI and GenAI Costs: A lawyer may use GenAI to efficiently create work product and may charge for actual time spent but must not charge hourly fees for the time saved. Costs associated with GenAI may be charged in compliance with applicable law. The fee agreement should explain the basis for all fees and costs.
- Candor to the Tribunal and Meritorious Claims and Contentions: A lawyer: (i) must review all GenAI outputs and correct any errors or misleading statements made to the court; and (ii) should check for any local rules or orders that may necessitate the disclosure of the use of GenAI.
- Prohibition on Discrimination, Harassment and Retaliation: Some GenAI is trained on biased info and lawyers should continuously learn about AI biases and their implications in legal practice while establishing policies and mechanisms to identify, report and address potential AI biases.

Other States' Guidance for Lawyers

- New York State Bar Association – Task Force on Artificial Intelligence
- Florida Bar Association's Board of Governors – Ethics Advisory Opinion 24-1
- State Bar of Michigan – Ethics Opinion JI-155 (October 27, 2023)
- New Jersey – Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers (January 24, 2024)

Kentucky Rules of Professional Conduct

- SCR 3.130(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.

Kentucky Rules of Professional Conduct

- SCR 3.130(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).**
 - (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to secure legal advice about the lawyer's compliance with these Rules;
 - (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
 - (4) to comply with other law or a court order.

Kentucky Bar Association

Ethics Opinion KBA E-437 (March 21, 2014)



- **Question:** May lawyers use cloud computing with clients' confidential information?
- **Answer:** Yes, lawyers may use cloud computing with clients' confidential information, with certain guidance to lawyers.
- **Key Takeaways and Applying to Today:**
 - Implementation of specific practices is impractical with respect to the intersection between the practice of law and the use of technology in practice.
 - Lawyers have a duty of care with respect to the use of technology in the practice of law.



Ethnical Considerations for Lawyers

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- Consider SCR 3.130(1.6) – what does “informed consent” mean?
 - Are Engagement Letter disclosures sufficient?
 - Written Correspondence between Attorney and Client?
- Document Preparation Issues
- Document Review Issues
- Examples?

The Court is presented with an  **unprecedented circumstance**. A submission filed by plaintiff’s counsel in opposition to a motion to dismiss is replete with citations to non-existent cases. (ECF 21.) When the circumstance was called to the Court’s attention by opposing counsel (ECF 24), the Court issued Orders requiring plaintiff’s counsel to provide an affidavit annexing copies of certain judicial opinions of courts of record cited in his submission, and he has complied. (ECF 25, 27, 29.) Six of the submitted cases appear to be  **bogus judicial decisions with bogus quotes and bogus internal citations**. Set forth below is an Order to show cause why plaintiff’s counsel ought not be sanctioned.



Ethical Considerations for Business Professionals

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- Non-disclosure or other confidentiality provisions should be considered when underwriting a transaction on the “business” side.
- Potential disclosure of sensitive information in lending transactions.
- Consideration of biases in AI algorithms, particularly with regarding to “making decisions”.
- Use of narrowly tailored products that are fit for the specific use needed (rather than ChatGPT and similar generative AI).



Applying AI to Legal Practice

How should we apply AI to our practice?

- Generative AI's usefulness in creating tools or “canvases”.
 - Examples:
 - “Tracking” templates for large scale portfolio projects.
 - Creation of other “templates” for tracking administrative tasks.
- Generative AI and basic queries for information.

**But remember, do not disclose any client sensitive information in the process!*



Applying AI to CRE Management and Transactions

How is AI being used by CRE Professionals?

- Databases summarize and group properties and data by type or terms
- Generate marketing materials
- Create budgets, models and forecasts
- Streamline reporting data
- Brokers can compare data to match buyers or tenants with properties
- Monitor trends



What does the future of AI look like?

What does the future of AI look like in the legal profession?

- Landscape continues to evolve as technology continues to evolve.
- Existing and evolving current tools you should be aware of:
 - Westlaw, Lexis, Casetext and numerous other platforms have already, or are in the process of providing “AI” to assist with various tasks.
- Vincent by FastCase in collaboration with the Kentucky Bar Association
- What does the future hold?

What does the future of AI look like in the CRE space?

AI for Performance

- Reduced error in accounting for financial reporting
- Business professionals will need to incorporate AI to match efficiency of competitors
- Get comfortable using AI to manage properties and meet financing requirements

AI's Impact on the Ground

- Concerns surrounding the future of office space needs
- Collaborative or leisure space in offices
- Increased need for data centers



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thank you

