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June 12, 2025
4:00- 5:00 PM

The Ever-Changing Legal Ethical Landscape and What You Need to Know

Meet Our Panelists

FACULTY

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RULES OF ENGAGEMENT

Ethical Rules Concerning Technology and Ai

KEY SOURCES:

- ABA Guidance on the Use of AI

- Resolution 604

- Cybersecurity Legal Task Force

Aba Rules on Technology and Ai Usage

- Rule 5.1: Lawyer supervision over nonlawyers

- Rule 5.3: Lawyer supervision over nonlawyers

- Rule 1.1: Competence

- Rule 3.3: Candor Toward the Tribunal

- Rule 1.4: Communications

- Rule 1.6: Confidentiality of Information

Ethical Concerns with Technology Assisted Review (Tar)

- **Model Rule 1.4**

    Lawyer's duty to communicate requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"

- **The ABA Practice Points**

    "in a document intensive case, communications with a client should include a discussion of the advantages and disadvantages of using TAR"

Ethical Duties of Lawyers and Arbitrators Practicing Remotely and in Electronic Settings

Technical competence is required under the ABA Model Rules of Professional Conduct

- What does this mean in an ever-changing virtual world?

- The Rule 1.1. Competence Comment requires that:

  "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."

- Why, and how, are lawyers getting in trouble?

Arbitrator and Counsel Issues in Virtual Hearings

- What should the arbitrator address regarding virtual hearings in preliminary hearings and scheduling orders?

- How can an arbitrator be accused of an abuse of discretion related to mandating a virtual hearing?

    -The ABA's Formal Opinion 498 Provides Examples

Virtual Hearings – Due Process Considerations

- Parties are entitled to fully and fairly present their case at the hearing

- Canon 1 of the Code of Ethics for Arbitrators in Commercial Disputes provides that

    - "An arbitrator should uphold the integrity and fairness of the arbitration process."

- Does the virtual hearing setting present due process hurdles to one party precluding fairness for it doing so?

    - Scenarios to Consider

NAVIGATING ATTORNEY-CLIENT PRIVILEGES AND ESI DISCOVERY

Issues and Traps for the Unwary

Attorney-Client Privilege

Definition and Scope

- Protects confidential communications between attorney and client

Key Issues

- Dual-purpose communications (legal vs. business)

Recent Developments

- Supreme Court cases and rulings

ESI Discovery

Key Issues in ESI Discovery

- Collection Challenges
- Preservation and spoliation
- Litigation Hold issues and obligations
- Production formats and metadata

Legal Framework

- Federal Rules of Civil Procedure (Rule 26(f))
- Case law and judicial guidelines
- ABA Model Rules on Attorney-Client Privilege and ESI

Traps for the Unwary

Common Pitfalls

- Misunderstanding the scope of privilege

- Failing to take reasonable steps to prevent disclosure

- Overbroad or vague ESI requests

- Inadequate ESI protocols

- Inadvertent production of privileged documents

Best Practices

- Clear communication guidelines

- Regular training on privilege issues

- Develop comprehensive ESI protocols

- Use of technology and experts

- Regularly update and review ESI practices

UNAUTHORIZED PRACTICE OF LAW

What is the Unauthorized Practice of Law?

- **ABA Model rule of Professional Conduct 5.5 (2019)**

  (a) A lawyer shall not practice law in violation of the regulation of the legal professional in that jurisdiction or assist another in doing so.

  . . .

  (c) A lawyer admitted in another US jurisdiction . . . May provide legal services on a temporary basis in the jurisdiction that:

  (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

  (2) are in or reasonably related to a ptending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.

  (3) Are in or reasonably related to a pending or potential arbitration, mediation or other alternative resolution proceeding . . . If the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.

- **State Level – Defined on a Case-by-Case Basis**

Legislative History

- Trend Towards Multi-Jurisdictional Practice – Commercial Construction

- ABA Task Force on Model Definition of Practice of Law (2002) – declined to adopt uniform definition

- *Draft Rule on Multi-Jurisdictional Practice (2021), ABA Commission on Multi-Jurisdictional Practice*

Do ADR Appearances Constitute the Practice of Law?

Framework For Analysis:

- Serving as Arbitrator

- Serving as Mediator

- Serving as an Advocate

ADR as Advocacy

- Issue with Settlements

- Propriety of Awards; Appeals

- Scope of Jurisdiction

- Ethical Obligation to Report

What Should an Advocate do Before Proceeding in an Arbitration in Which They are not Licensed?

- Determine whether State or Federal law applies; then

- Determine within those confines, what rules apply and how UPL defined;

- If still unsure, consider seeking an ethical opinion; or

- Retain local counsel; and possibly seek *pro hac vice* admission

ETHICAL CHALLENGES OF AI IN THE LEGAL PROFESSION

Accuracy and Reliability of Ai – The Good

- Document summaries can be generated rapidly.

- Legal Research can be rapid and comprehensive.

- Legal Briefs are true professional work, their preparation in draft is useful.

Accuracy and Reliability of Ai – The Bad

- AI tools may seriously mischaracterize the facts.

- AI hallucinations are common

- Demand Letters are being generated by non-lawyer shops based upon accident reports & medical records.

- Prediction of risk of release in criminal matters is being used, but has sinister implications.

- Awards and rulings are the responsibility of legal professionals, it is a grossly inappropriate use of AI.

Bias and Fairness

- AI systems may perpetuate or amplify existing biases in legal data and precedents

- Risk of discriminatory outcomes in areas like predictive sentencing, bail recommendations, and case outcome predictions

- Algorithms trained on historically biased decisions may continue patterns of inequity

Transparency and Explainability

- How Large Language Models Work - a useful one minute simplification

- "Black box" problem: difficulty explaining how AI reaches particular conclusions

- What is the data set, what verifications to fact (e.g. real cases) exist in the system?

- Legal professionals have ethical duty to understand and explain reasoning behind positions taken

- Clients and courts entitled to transparent explanations for legal advice and arguments

Accountability And Liability

- Unclear responsibility allocation when AI contributes to legal errors or harms

- Questions about malpractice when attorneys rely on AI systems

- The liability of AI providers is also a new area of concern for those parties.

- Professional responsibility standards need adaptation for AI-augmented practice

- Professional liability insurance needs to develop to incorporate AI Bot Associates.

Privacy and Confidentiality

- Client data used to train AI systems raises confidentiality concerns

- And the data set may be affected or supplemented by client secrets

- Risk of inadvertent disclosure through AI interactions

- Example - patent law where the AI now knows the new invention. Is that public disclosure?

- Attorney-client privilege implications when sharing information with AI tools

Access To Justice

- AI could widen justice gap if only available to wealthy clients/firms

- Conversely, could broadly democratize legal services if properly implemented

- Risk of two-tier justice system developing

- Or a lawyer app that performs as well as most lawyers in a specialized area

- Overwhelming of the courts with lawsuits filed by Pro Per's using AI bots.

AAA-ICDR Guidance on Arbitrators' Use of AI Tools

- Accuracy and Reliability

- Fairness and Due Process

- Independent Decision-Making

- Transparency with Parties

- Confidentiality and Data Protection

- Competence and Professionalism

THANK YOU

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