FOLEY

FOLEY & LARDNER LLP

CONTINUING LEGAL EDUCATION

2024 Developments in the Ethical Rules Governing the Use of AI in the Practice of Law
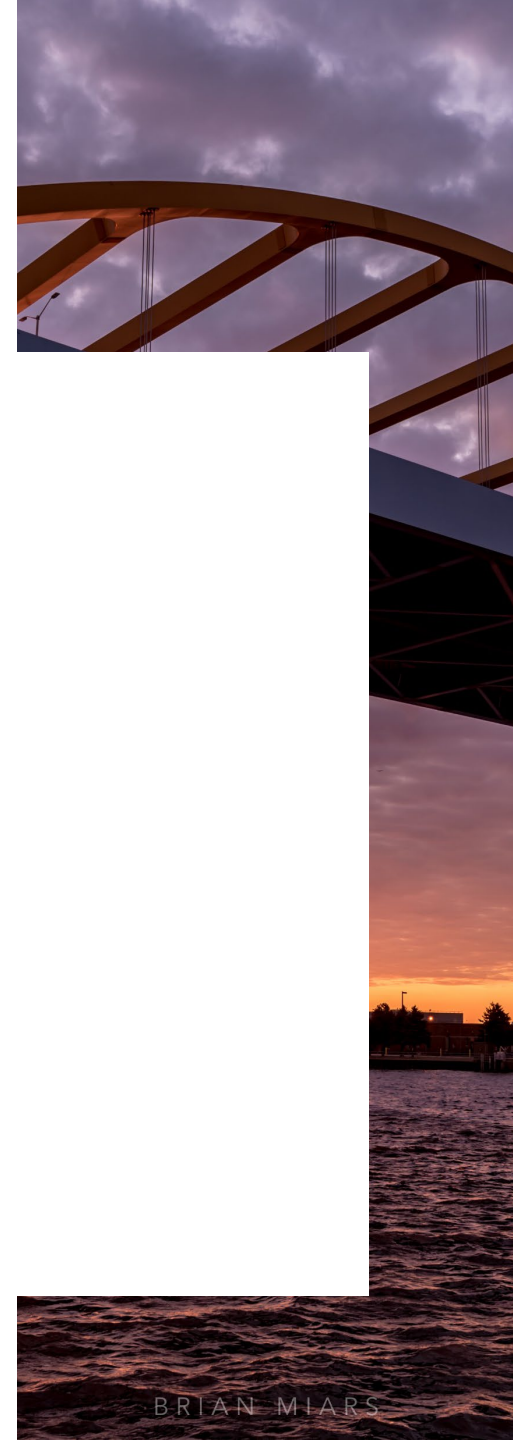
FOLEY.COM

Presenter

Philip C. Babler
Milwaukee

T: 414.297.5561
E: pcbabler@foley.com

FOLEY

FOLEY & LARDNER LLP

BRIAN MIARS

Artificial Intelligence

How is AI used in the practice of law?

Common Legal AI Applications

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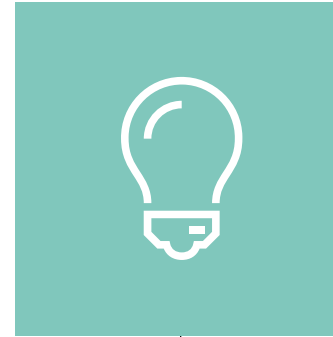- Suggest revisions

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
- Exemplar-based result delivery
- Deeper dives into case themes

Due Diligence
- Public searching
- Data sorting and coding
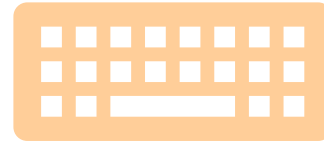- Predictive / Scoring

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

FOLEY

FOLEY & LARDNER LLP

BRIAN MIARS

Gen AI Adoption by Legal Professionals

- 14% have used Gen AI professionally or on a work task

- 75% are very concerned by the accuracy of the text generated by AI

- >50% agree Gen AI:

  – Will increase efficiency in legal work

  – Can be used for legal research, and reviewing and drafting legal documents

Bloomberg Law 2023 State of Practice #3

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Legal Organization Response to Gen AI

- Had internal discussions   47%

- Developed internal policy on using Gen AI tools   32%

- Updated existing internal policies to address AI related risks   27%

- Not sure   27%

- Advised clients on using it in their business   22%

- Purchased or invested in a gen AI tool   15%

- Banned the use of external gen AI tools for work   12%

Bloomberg Law 2023 State of Practice #3

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Most Popular AI Use Cases for Lawyers

1. Drafting/templating communications: 58%

2. Conducting legal research: 53%

3. Summarizing legal narratives: 42%

4. Reviewing legal documents: 34%

5. Drafting/templating legal contracts: 23%

6. Conducting due diligence: 21%

7. Reviewing discovery: 15%

https://pro.bloomberglaw.com/insights/technology/ai-in-legal-practice-explained/

BRIAN MIARS

Most Popular AI Use Cases in Industry

1. Cloud pricing optimization

2. Voice assistants, chatbots, and conversational AI

3. Uptime/reliability optimization

4. Predictive maintenance

5. Customer service operations

https://www.cio.com/article/652775/12-most-popular-ai-use-cases-in-the-enterprise-today.html

December 12, 2024

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Most Popular AI Use Cases in Industry

6. Personalization

7. AI IT Operations Management Tools
   - For intelligent alerting, root cause analysis, anomaly and threat detection, incident auto-remediation, and capacity optimization

8. Process Automation

9. Financial reporting and accounting

10. Recruiting/hiring

https://www.cio.com/article/652775/12-most-popular-ai-use-cases-in-the-enterprise-today.html

December 12, 2024

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Using AI in Employment Decisions

- Using a computational process that simplifies output, scores, classifies, or recommends to substantially assist or replace discretionary decision making for making employment decisions

- NYC under local law currently prohibits using automated employment decision tools (AEDT) to screen job candidates or employees for employment decisions

  - Could spread elsewhere

  - AEDT includes machine learning, statistical modeling, data analytics, and AI

Hot Topics in Cybersecurity: Shadow AI - PLI PLUS Transcript

December 12, 2024

BRIAN MIARS

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).

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Recent State Ethics Opinions

- Florida – January 19, 2024
- New Jersey – January 24, 2024
- New York – April 6, 2024
- District of Columbia – April 11, 2024
- Pennsylvania – May 22, 2024

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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. . . .").

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

D.C. Ethics Opinion:
Conduct Detailed Reviews of All AI Products

- D.C. Bar Ethics Opinion 388 (July 9, 2024)
  - "Before using any particular form of [AI], attorneys should have a reasonable and current understanding of how it works and what it does, with due regard for
    - (a) its potential dangers, including the risk of 'hallucinations' or misuse or exposure of Client Confidential Information,
    - (b) its limitations, including whether it uses a narrow dataset that could generate incomplete, out-of-date, or inaccurate results, and
    - (c) its cost."
  - "Attorneys also should have a reasonable basis for trusting the [AI] outputs, or must review and validate [AI] outputs, before incorporating these outputs in their work product for clients or relying on them in support of a legal proceeding."

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Pennsylvania Ethics Opinion: Get to Know Your AI Software

- Pennsylvania Bar Ethics Opinion 2024-200 (May 22, 2024)
  - "[I]f a lawyer chooses to use AI or any other technology, the lawyer has the responsibility to
    - (1) understand the technology and how it works,
    - (2) understand the benefits of the technology,
    - (3) understand the risks of the technology,
    - (4) check and verify all citations and the material cited, and
    - (5) especially in cases where the benefits outweigh the risks, have an obligation to educate the client and seek their informed consent to use the technology."

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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.

Ethics Opinions Emphasize Limiting Disclosure of Confidential Information

- State ethics opinions clarify that disclosure of client confidential information to AI software should be avoided at all costs.
- D.C. Bar Ethics Opinion 388 (July 9, 2024)
  - In the interest of adhering to the governing rules on confidentiality, lawyers should ask two questions:

    1. Will information I provide to the AI program be accessible to the AI provider or others not within the attorney-client relationship?

    2. Will involvement with the AI program affect answers future users of the AI program will get in such a way that might reveal information disclosed to the AI program?
  - If the answer to either is "yes," attorneys should be sure not to reveal any sort of confidential information.
- Florida Bar Ethics Opinion 21-1 (Jan. 19, 2024)
  - "Use of a 'self-learning' generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties."
- Pennsylvania Bar Ethics Opinion 2024-200 (May 22, 2024)
  - "[A] lawyer must not input any confidential information of a client into AI that lacks adequate confidentiality and security protections."

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

New York Ethics Report:
Key Considerations in Selecting AI Products

- New York Bar Ethics Report (Apr. 6, 2024)
  - Key Points for attorneys to be aware of and consider when using AI tools include:
    - Licensing Information
    - Terms of Use
    - Privacy Policies
    - Frequently Asked Questions
    - Data that is supplied to or inputted into the AI model
    - Data that may be viewed by and disclosed to third parties/vendors in the training of the AI model.

FOLEY

FOLEY & LARDNER LLP

BRIAN MIARS

Ethics Opinions Highlight the Benefits of In-House AI Programs

- Attorneys and firms can avoid confidentiality conflicts by using an in-house AI software.
- Florida Bar Ethics Opinion 21-1 (Jan. 19, 2024)
  - "It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party."
- D.C. Bar Ethics Opinion 388 (July 9, 2024)
  - Attorneys and firms should nonetheless stay educated on the terms and privacy policies of any AI software in use.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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?)

FOLEY
FOLEY & LARDNER LLP

December 12, 2024

BRIAN MIARS

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

December 12, 2024

Ethics Opinion Examples of Improper Disclosure of Confidential Information

- State ethics opinions provide multiple examples where disclosure of confidential information runs afoul of lawyers' ethical obligations.

- D.C. Bar Ethics Opinion 388 (July 9, 2024)
  - "Imagine, for example, the harm that would occur to the client if a lawyer shared the client's trade secret manufacturing process with a [AI], and the [AI] later revealed that information to others looking for faster and cheaper ways of making the product in question."

- New York Bar Ethics Report (Apr. 6, 2024)
  - Disclosing biometric data to a chatbot to assist a mediator in drafting their proposal raises multiple confidentiality violation concerns, especially since the AI could potentially store this data for use on future cases.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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.

FOLEY

FOLEY & LARDNER LLP

BRIAN MIARS

Ethics Opinions Advise on Client Consent Before Disclosure to AI Programs

- If confidential information is provided to AI software, state ethics opinion make clear that informed consent should be received prior to disclosure.

- D.C. Bar Ethics Opinion 388 (July 9, 2024)
  - "Absent client consent, lawyers who share Client Confidential Information with third party providers who have privacy policies like this risk violating their confidentiality obligations under Rule 1.6."

- Florida Bar Ethics Opinion 21-1 (Jan. 19, 2024)
  - "[I]t is recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information."

FOLEY

FOLEY & LARDNER LLP

BRIAN MIARS

FOLEY

FOLEY & LARDNER LLP

———

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

FOLEY
FOLEY & LARDNER LLP

December 12, 2024

BRIAN MIARS

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.

Ethics Opinions Suggest Communicating to Clients the Scope of AI in Use

- Pennsylvania Bar Ethics Opinion 2024-200 (May 22, 2024)

  – Lawyers should promptly inform clients of all "benefits, risks, and limits of the use of generative AI."

- New Jersey Bar Ethics Opinion (Jan. 25, 2024)

  – While the model rules might "not impose an affirmative obligation on lawyers to tell clients every time that they use AI," "if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer's use of AI."

- New York Bar Ethics Report (Apr. 6, 2024)

  – "Consider including in your client engagement letter a statement that the [AI] may be utilized in your representation of the client and seek the client's acknowledgement."

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Who Decides It's 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!

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

FOLEY

FOLEY & LARDNER LLP

The Lawyer's Obligations of Candor and Fairness as it Relates to AI

Model Rules 3.3 and 3.4

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.

FOLEY

FOLEY & LARDNER LLP

BRIAN MIARS

Ethics Opinions Reiterate the Need Verify (and Validate) All AI Generated Materials

- Lawyers must be cognizant of all content used from AI programming, verifying the results to the same (or perhaps greater) extent as one would a nonlawyer assistant.

- New Jersey Bar Ethics Opinion (Jan. 25, 2024)
  - "A lawyer who uses AI in the preparation of legal pleadings, arguments, or evidence remains responsible to ensure the validity of those submissions."
  - "While the [model rules] do not require a lawyer to disclose the use of AI, such use does not provide an excuse for the submission of false, fake, or misleading content."

- Florida Bar Ethics Opinion 21-1 (Jan. 19, 2024)
  - "Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI."

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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
  - Lawyers 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.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

AI Ethics Disciplinary Cases

- ***People v. Crabill*** (Colorado Supreme Court, November 22, 2023)

  - Attorney Crabill was hired to prepare a motion to set aside a judgment.

  - Problem: He has never prepared such a motion.

  - To solve this problem, Crabill:

    - consulted ChatGPT

    - **cited** case law found by **ChatGPT without reading the cases or verifying if the citations were accurate**

    - filed the motion

    - discovered that the **ChatGPT cases were bogus** before the hearing

    - did *not* notify the court about the bogus cases at the hearing

    - did *not* withdraw the motion

    - falsely **blamed a legal intern** for the mistakes when confronted by the judge

    - filed an affidavit confessing that he used ChatGPT when drafting the motion---six days after the hearing.

  - Outcome:

    - Violation of Colorado RPC 1.1 (competence); 1.3 (reasonable diligence and promptness in representation); 3.3 (false statement of material fact or law to the tribunal); 8.4(c) (dishonesty, fraud, deceit, or misrepresentation).

    - **Suspension**: one year + one day; 90 days to be served; the remainder can be stayed upon completion of a two-year probation, with conditions.

December 12, 2024

BRIAN MIARS

AI Ethics Disciplinary Cases

- *U.S. v. Prakazrel Michel*, No. 1:19-cr-00148-1 (CKK) (D.D.C.) (Aug. 30, 2024).
  - Defendant, a famed musician, alleged his attorney's unfiltered reliance on AI for a closing argument amounted to ineffective assistance of counsel.
  - While the court suggested counsel's overuse of AI was concerning, there was insufficient evidence indicating the errors changed the outcome of the trial.
- *People v. Zachariah C. Crabill*, 2023 Colo. Discipl. LEXIS 64 (Nov. 22, 2023).
  - A lawyer filed a motion with multiple fictitious cases found using ChatGPT.
  - The lawyer discovered the issue, but rather than alerting the court to the sham cases, the lawyer "falsely attributed the mistakes to a legal intern," resulting in a one-year suspension and two-year probation.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

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)

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Ethics Opinions Warn of Potential UPL Violations When Using AI

- Lawyers should be wary of using AI in such a way that it amounts to an unauthorized practice of law violation.

- New York Bar Ethics Report (Apr. 6, 2024)
  - Some meaningful level of human oversight is necessary to avoid unauthorized practice of law issues when using AI.
  - AI should assist—but not replace—a lawyer's legal work.

- Pennsylvania Bar Ethics Opinion 2024-200 (May 22, 2024)
  - "To avoid the [unauthorized practice of law], lawyers must ensure that AI does not give legal advice or engage in tasks that require legal judgment or expertise, without the involvement of a licensed attorney."
  - "There must always be a human element in the legal work product to ensure that lawyers are upholding their ethical obligations."

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Ethics Opinion Examples of AI Tools Leading to UPL Violations

- A variety of different AI-related tools could constitute the unauthorized practice of law, if unregulated.
- New York Bar Ethics Report (Apr. 6, 2024)
  - "Based on current case law, AI programs can direct clients to the forms they need to fill out."
  - "However, these programs may not give any advice as to the substance of the client's answers because that would be replacing the work of a human lawyer."
- Florida Bar Ethics Opinion 21-1 (Jan. 19, 2024)
  - "[A] lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation."
  - Lawyers should similarly avoid using any AI chatbots that either:
    - Provide legal advice without input from an attorney; or
    - Do not include express disclaimers regarding the use of AI.

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

FOLEY
FOLEY & LARDNER LLP

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).

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Ethics Opinions Underscore the Need to Supervise AI Usage

- Both supervising and subordinate attorneys must ensure complete compliance with their ethical obligations regarding the use of AI.

- D.C. Bar Ethics Opinion 388 (July 9, 2024)
  - One step lawyers can take is to have their colleagues satisfy themselves (in writing) that client confidentiality will be protected when using AI software.
  - Another step supervising lawyers can take is requiring colleagues "to verify the accuracy of the output" of any AI software used.

- Florida Bar Ethics Opinion 21-1 (Jan. 19, 2024)
  - Supervising lawyers should consider using the same review measures for colleagues using AI materials as they other

- New York Bar Ethics Report (Apr. 6, 2024)
  - Ethical obligations apply with equal force to subordinate lawyers as they do to supervising lawyers.

FOLEY
FOLEY & LARDNER LLP

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 can liability be allocated by agreement?

FOLEY
FOLEY & LARDNER LLP

December 12, 2024

BRIAN MIARS

Ethics Opinions Advise on Delegating AI Use

- Best practices dictate supervising lawyers use an abundance of caution when delegating the use of AI to other lawyers or nonlawyer professionals.

- D.C. Bar Ethics Opinion 388 (July 9, 2024)
  - One step lawyers can take is to have their colleagues satisfy themselves (in writing) that client confidentiality will be protected when using AI software.
  - Another step supervising lawyers can take is requiring colleagues "to verify the accuracy of the output" of any AI software used.

- Florida Bar Ethics Opinion 21-1 (Jan. 19, 2024)
  - Supervising lawyers should consider using the same review measures for colleagues using AI materials as they otherwise would reviewing a nonlawyers assistance on any work product.
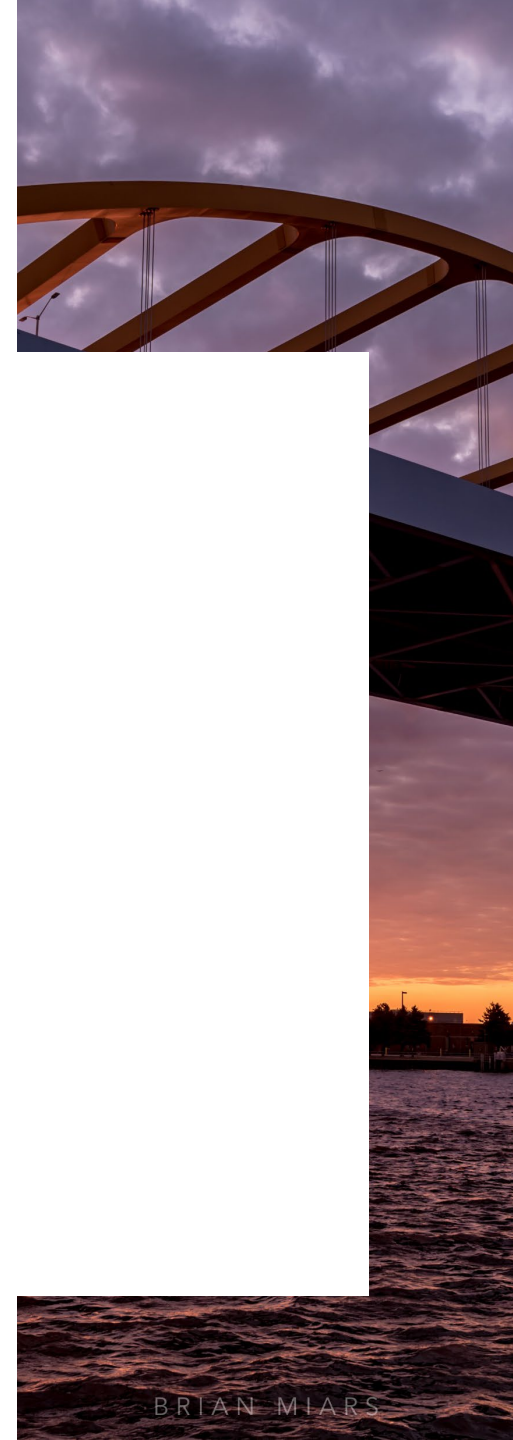
FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

FOLEY

FOLEY & LARDNER LLP

―――

Take Aways and Questions and Answers

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
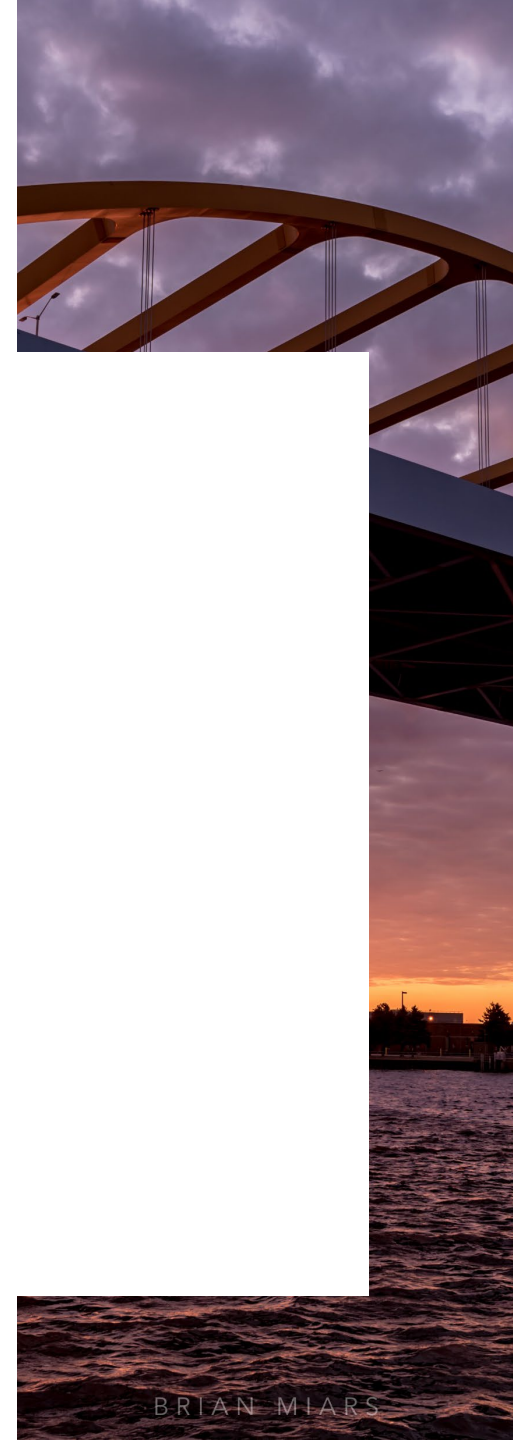- Embrace without fear – Trust but Verify

FOLEY
FOLEY & LARDNER LLP

BRIAN MIARS

Thank You

- Questions?

FOLEY
FOLEY & LARDNER LLP

About Foley

Foley & Lardner LLP is a preeminent law firm that stands at the nexus of the Energy, Health Care & Life Sciences, Innovative Technology, and Manufacturing Sectors. We look beyond the law to focus on the constantly evolving demands facing our clients and act as trusted business advisors to deliver creative, practical, and effective solutions. Our 1,100 lawyers across 26 offices worldwide partner on the full range of engagements from corporate counsel to intellectual property work and litigation support, providing our clients with a one-team solution to all their needs. For nearly two centuries, Foley has maintained its commitment to the highest level of innovative legal services and to the stewardship of our people, firm, clients, and the communities we serve.

FOLEY

FOLEY & LARDNER LLP

FOLEY.COM

BRIAN MIARS