

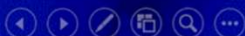


OCTOBER 1, 2024

# Discovery, Data Protection, and AI: How To Litigate Ethically and More Effectively Using AI Technology



SHOOK  
HARDY & BACON



# Speakers



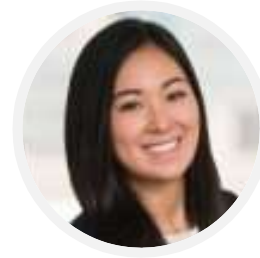
## Patrick Oot

*Partner* | Washington, DC  
Shook, Hardy & Bacon



## Shannon Schoultz

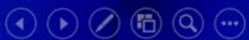
*Associate* | Atlanta  
Shook, Hardy & Bacon



## Meg Inomata

*Senior Legal Counsel*  
Waste Management

SHOOK, HARDY & BACON



# Today's Roadmap

As Artificial Intelligence (“AI”) and generative AI models continue to revolutionize various industries, the potential impact on litigation is profound, reshaping how organizations manage and analyze vast amounts of data in a protected environment.

- 1 AI's Impact on the Legal Field**
- 2 The Role of AI in Discovery**
- 3 Impact of AI on Legal Departments**
- 4 Ethical Considerations**
- 5 Looking Ahead**

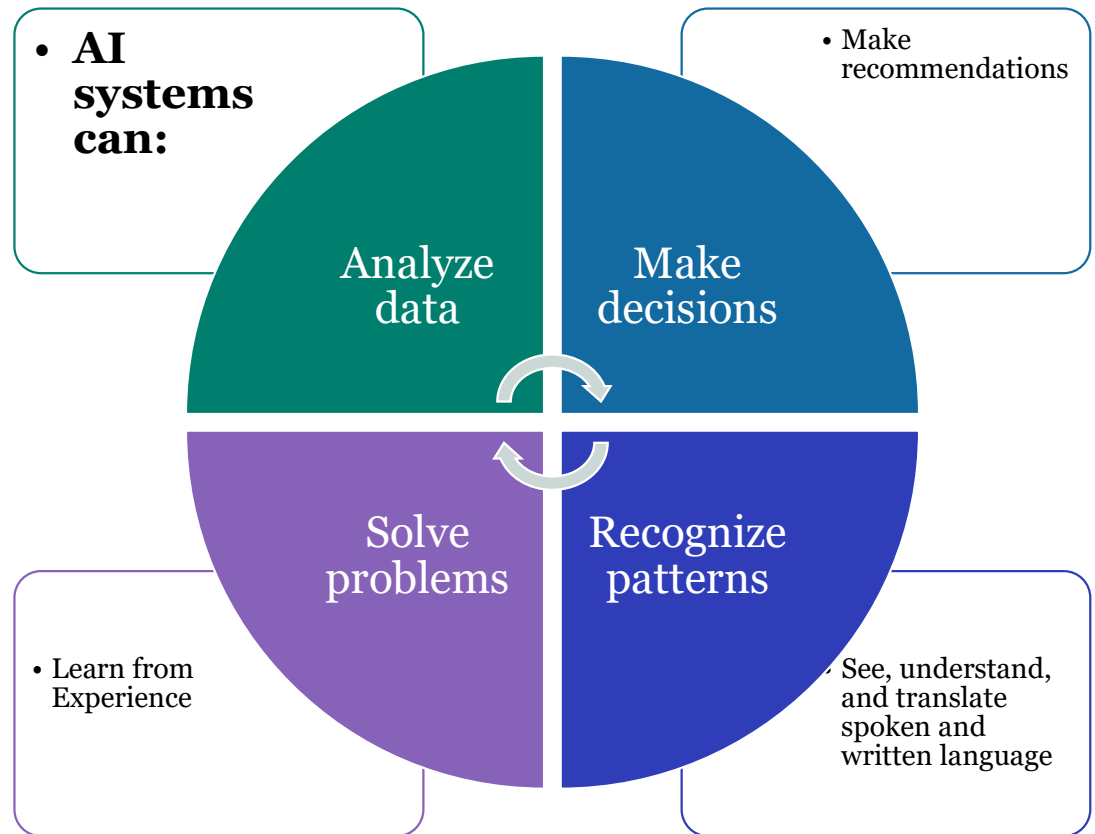


# AI's Impact on the Legal Field

*What is AI?*

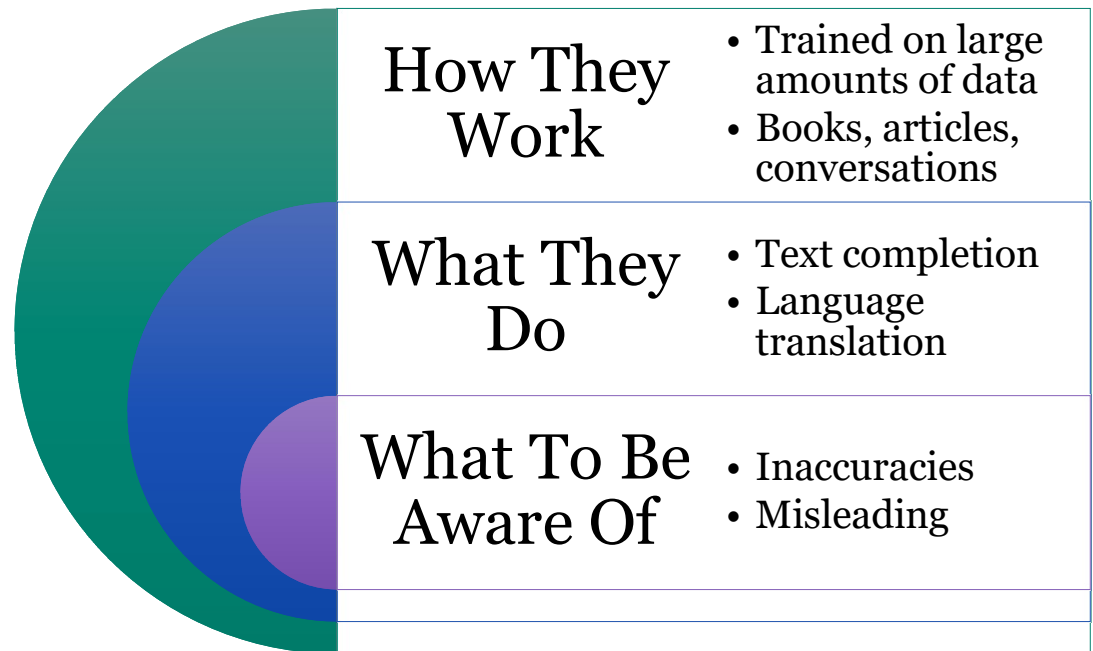
Artificial intelligence (AI) is a field of study that uses technology to create machines that can perform tasks that typically require human intelligence. AI is a combination of technologies, mathematics, statistics, cognitive science, and computing.

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AI and cognitive computing or machine learning are generally interchangeable terms that all refer to how computers learn from data and adapt with experience to perform tasks.

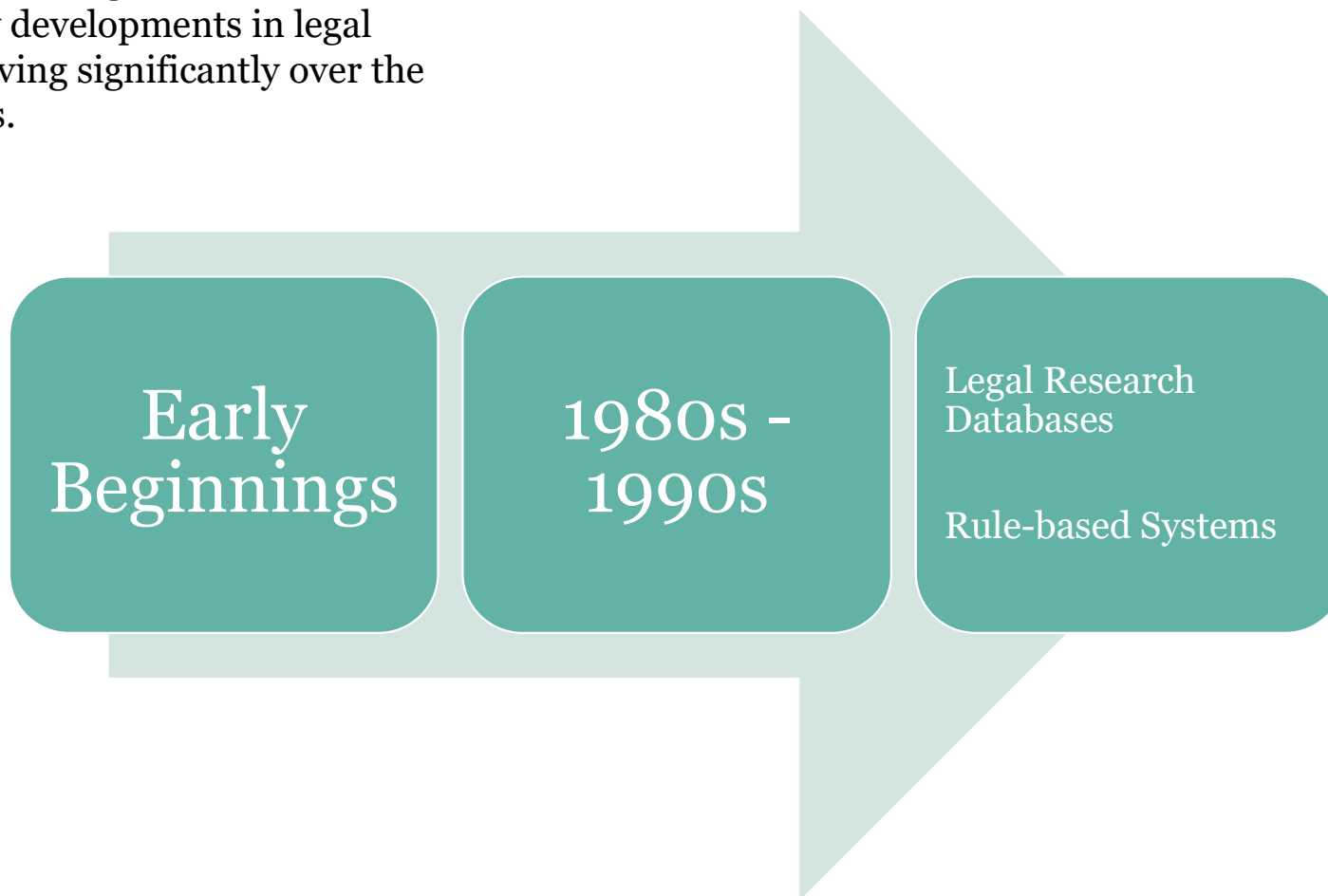




# AI's Impact on the Legal Field

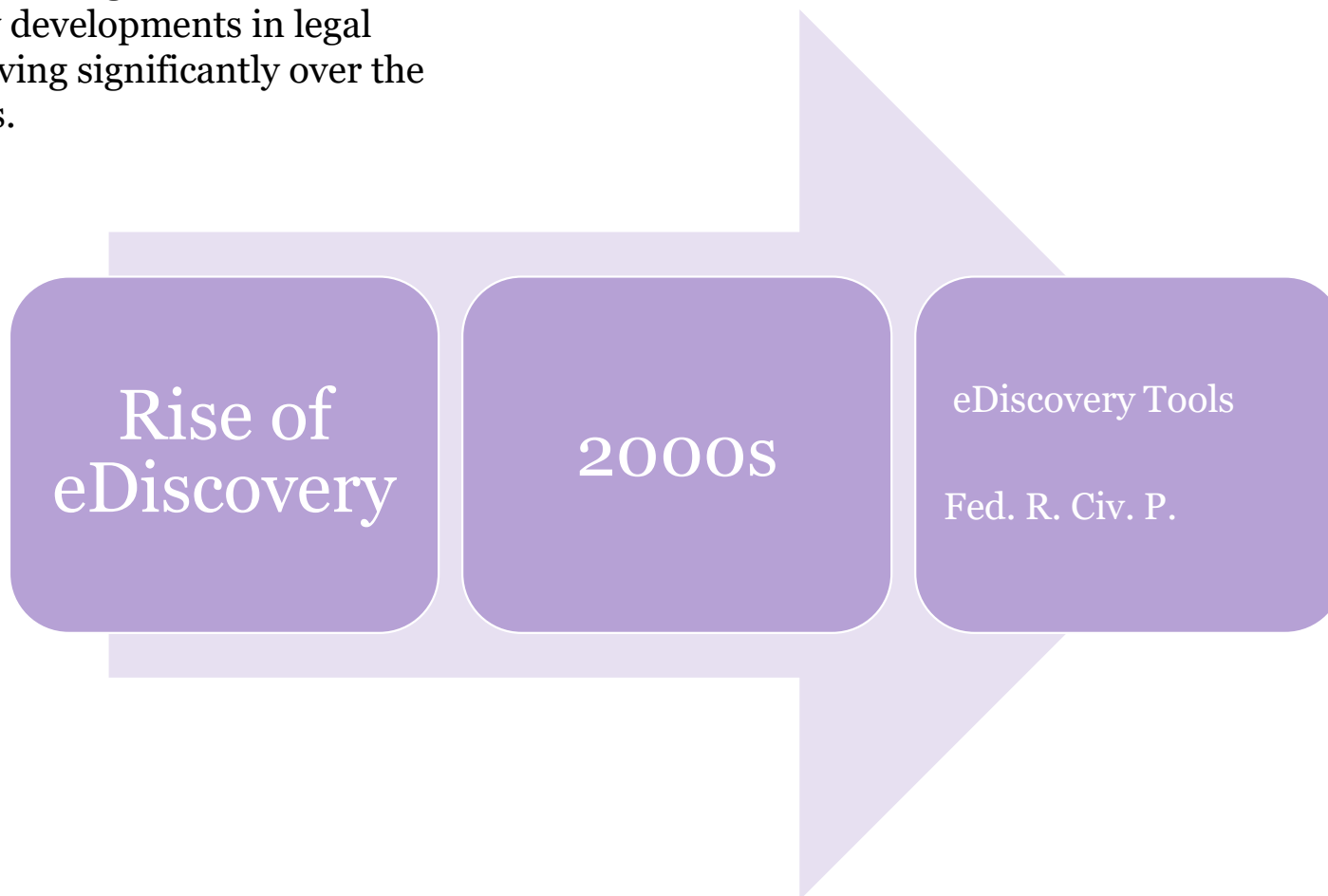
*Evolution of AI in Litigation*

The history of AI in litigation can be traced back to the early developments in legal technology, evolving significantly over the past few decades.

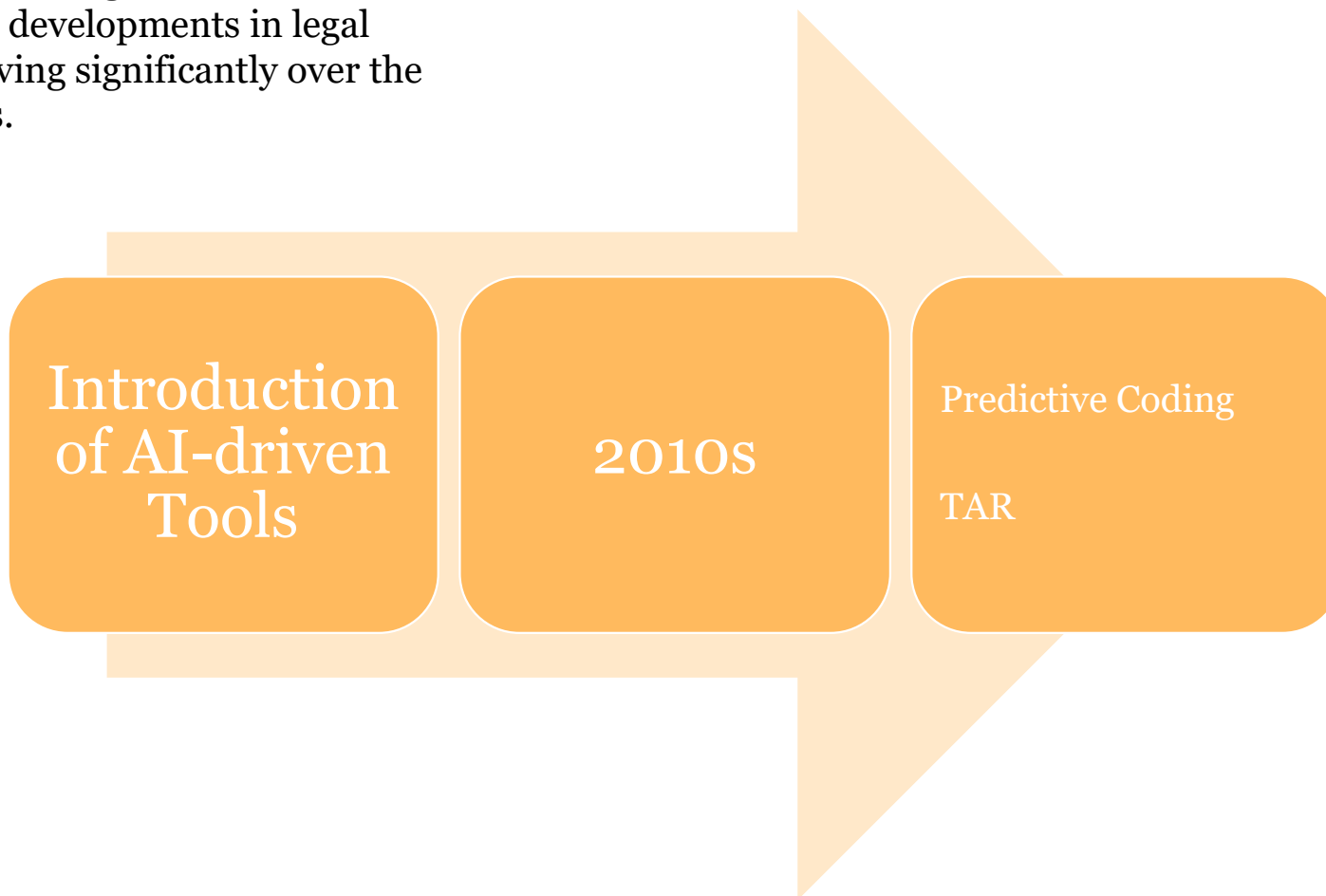




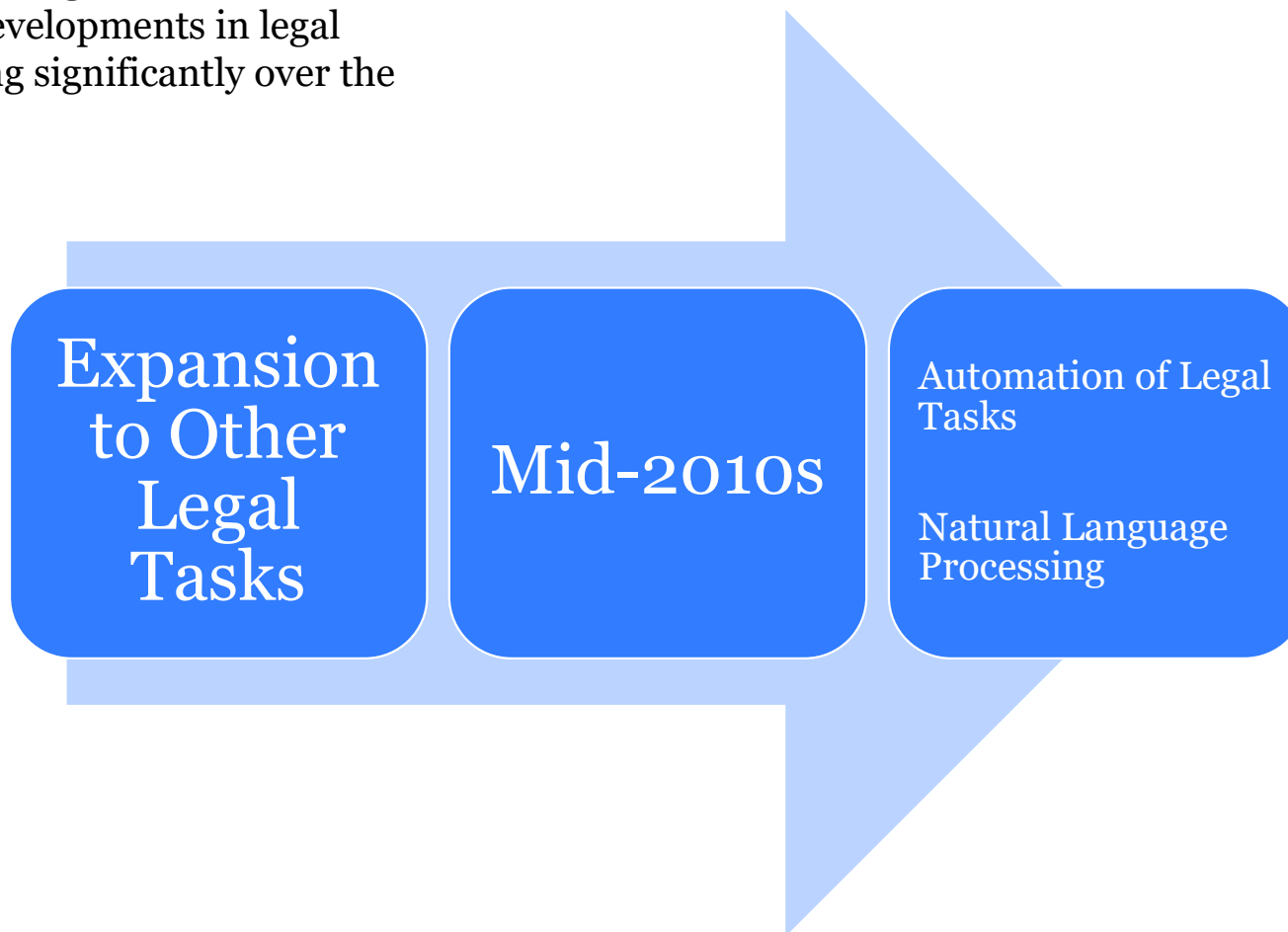
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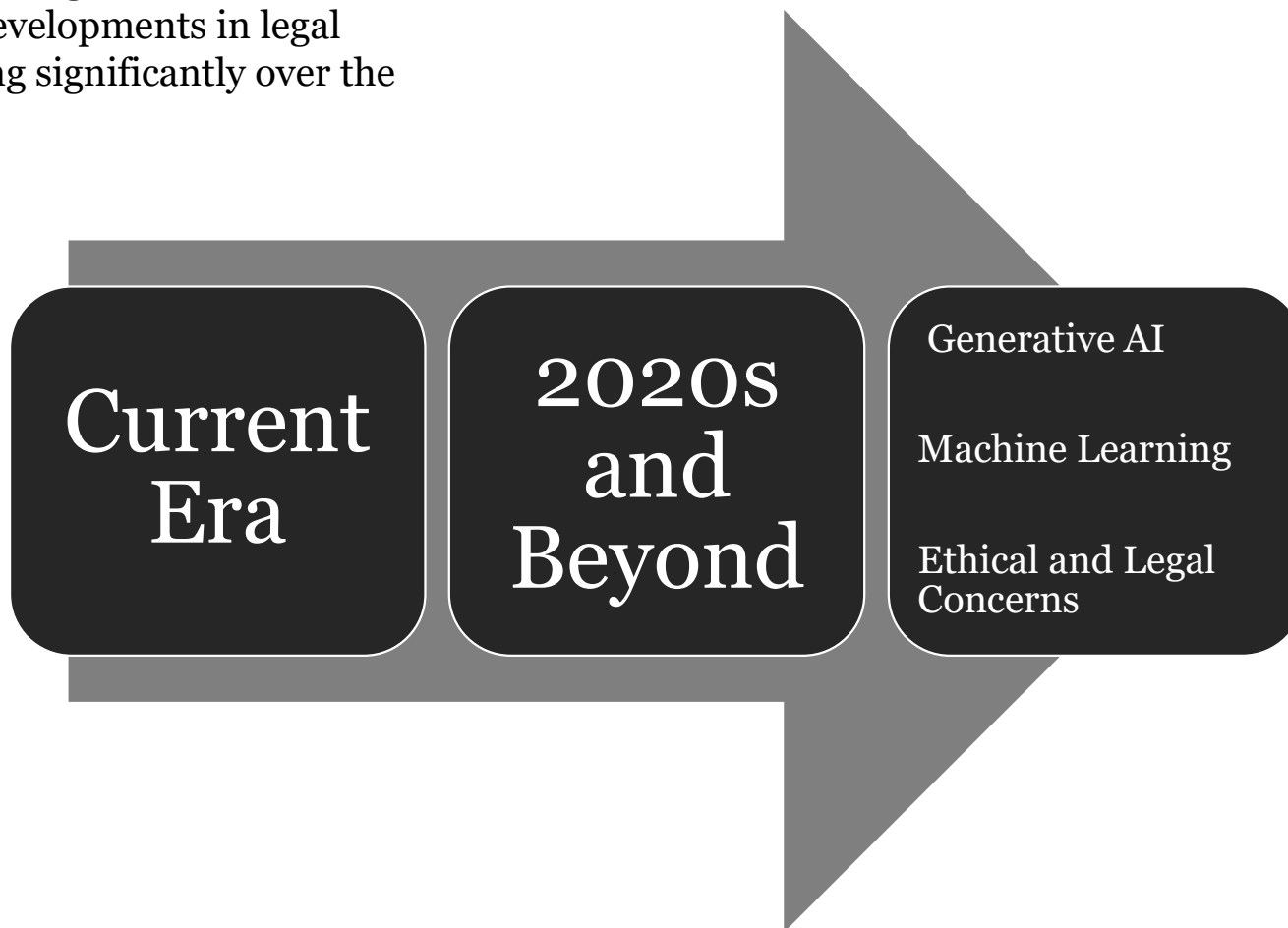
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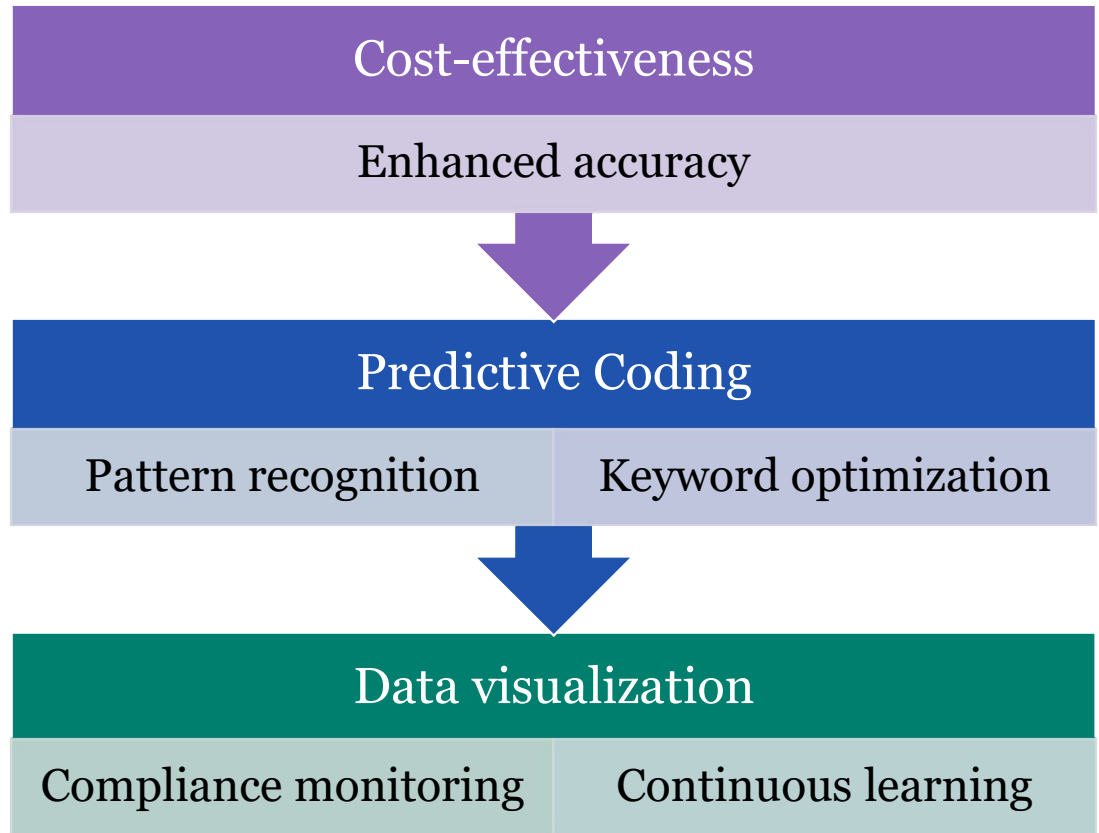




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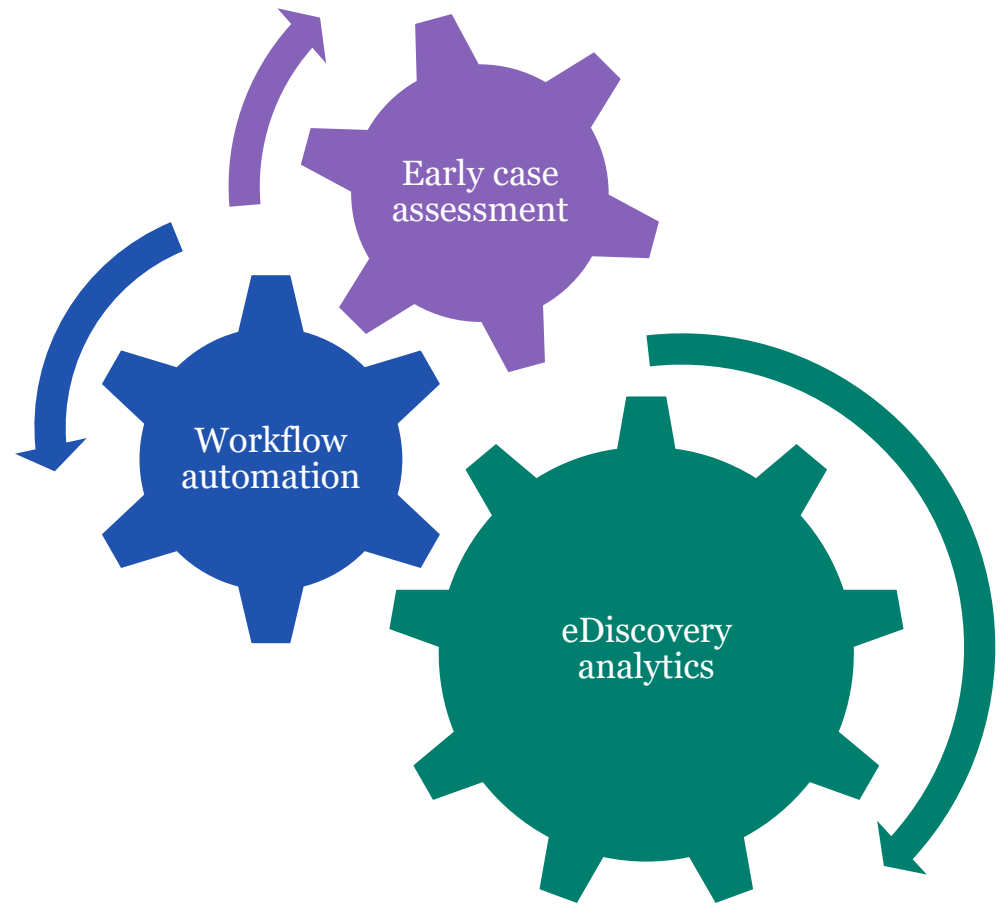
# The Role of AI in Discovery

- Benefits of AI in Discovery



—  
**AI-driven tools  
enhance written  
discovery and  
document review**





# Examples of AI Use in Legal Discovery

# AI Vendors in the Legal Industry

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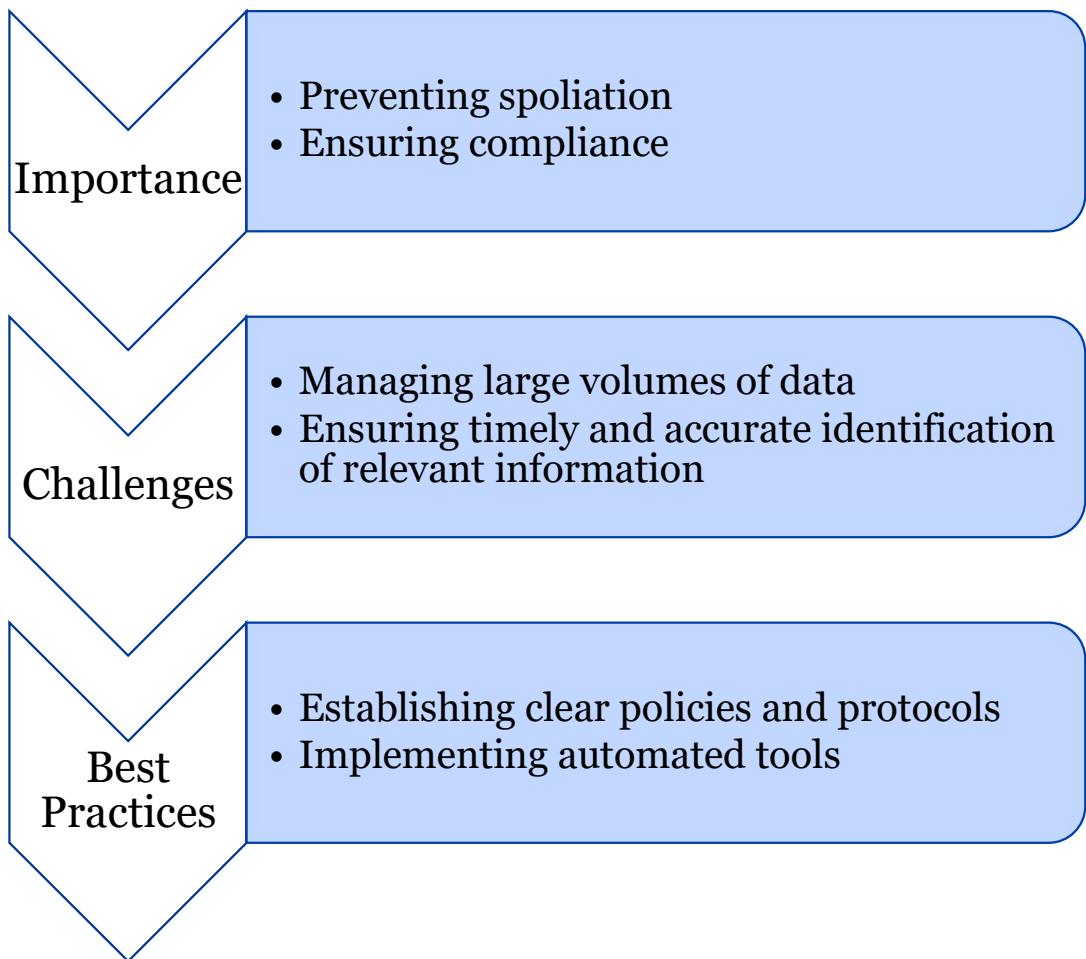


Harvey.



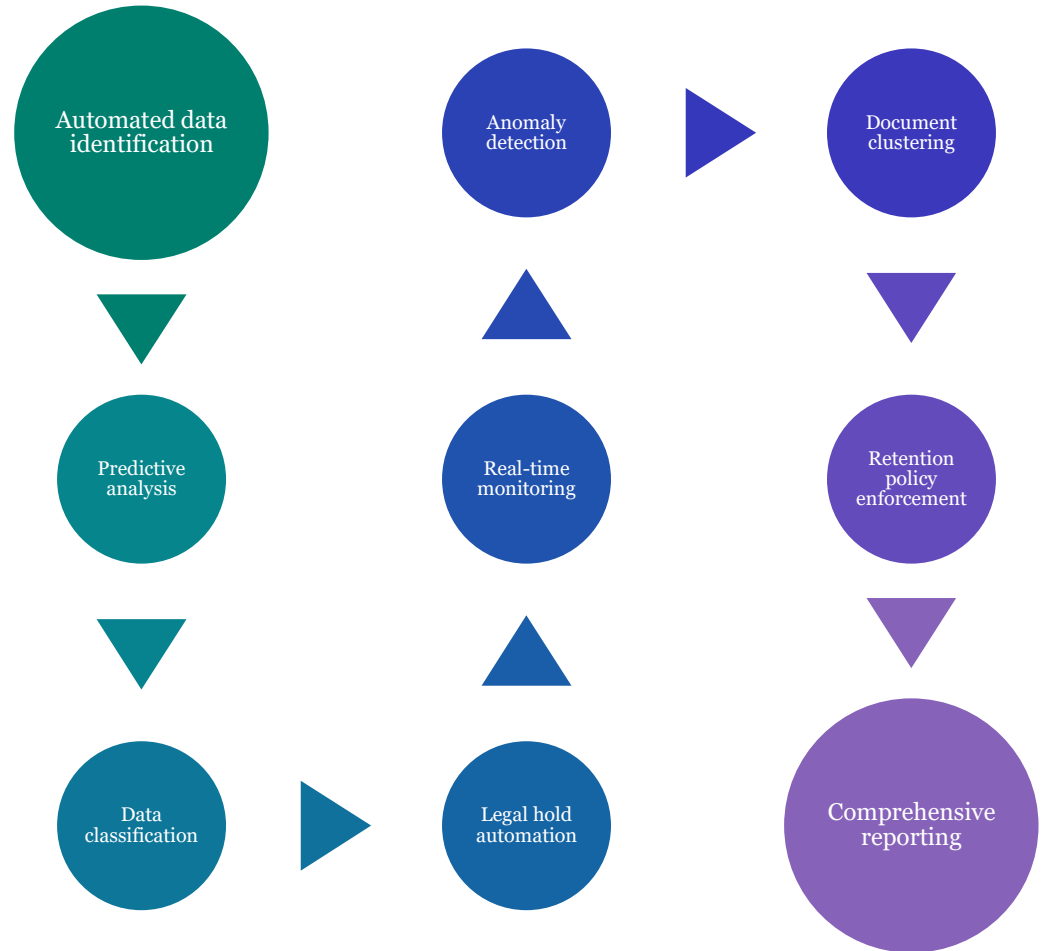
# Understanding Data Preservation

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# Data Preservation Techniques Using AI

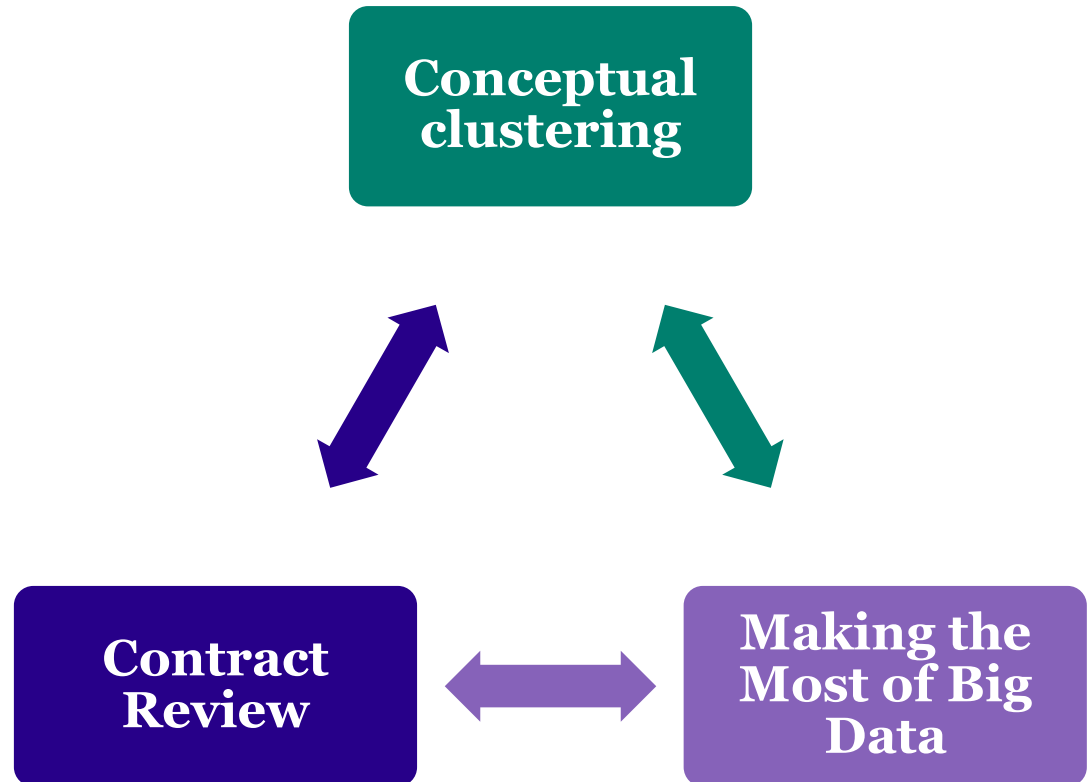
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# Impact of AI on Legal Departments

# How AI Could Be Helpful





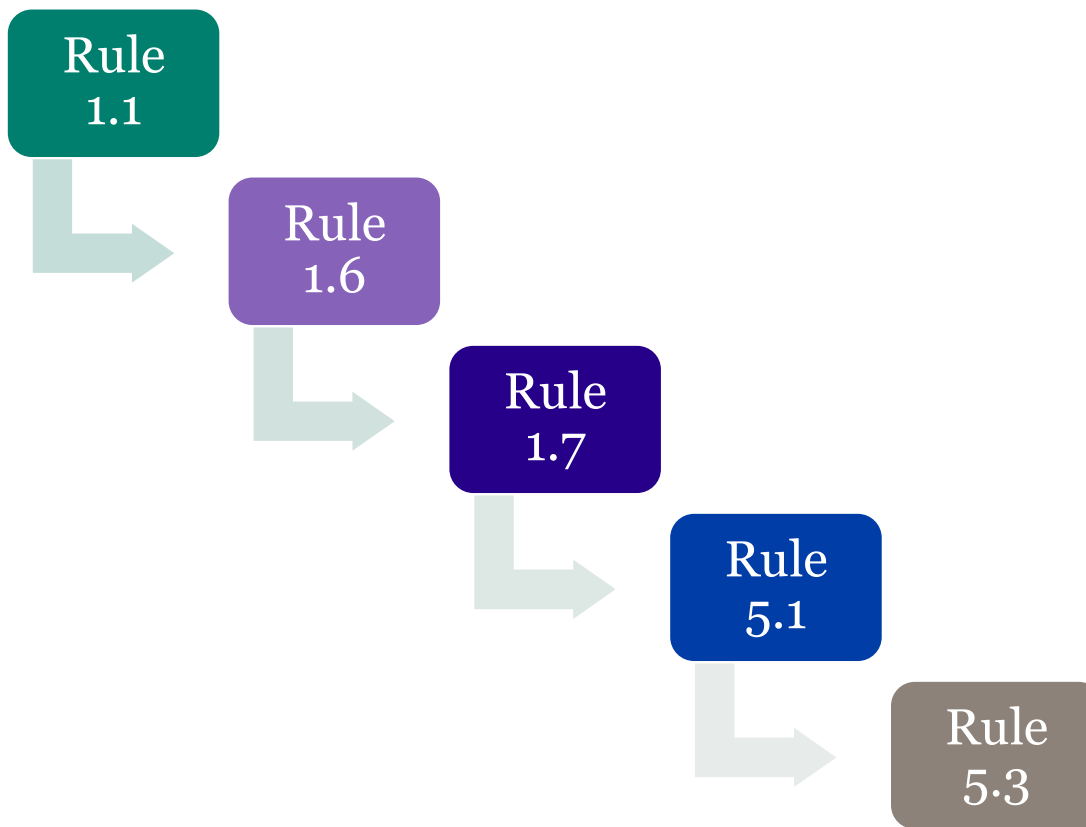
# Key Concerns for In-House Counsel





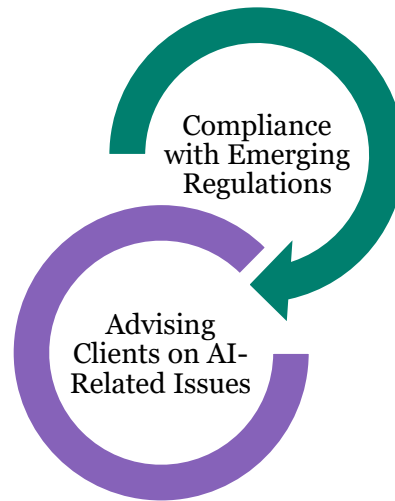
# Ethical Considerations for AI in Litigation

# Virginia Rules of Professional Conduct



## ***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.**



## ***Rule 1.6 – Confidentiality of Information***

- **A lawyer shall not reveal information relating to the representation of a client, unless:**

**Informed Consent**

**Implied Authority**

**Permitted  
Disclosures**

## *Rule 1.6 – Confidentiality of Information*

- **Best practices for safeguarding client information when using AI tools:**

Understand the AI tools being used

Limit data exposure

Encrypt  
data

Monitor and  
mitigate AI  
bias

Maintain  
control over  
data

Obtain  
informed  
client consent



## **Rule 1.7 – Conflict of Interest**

- **A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.**

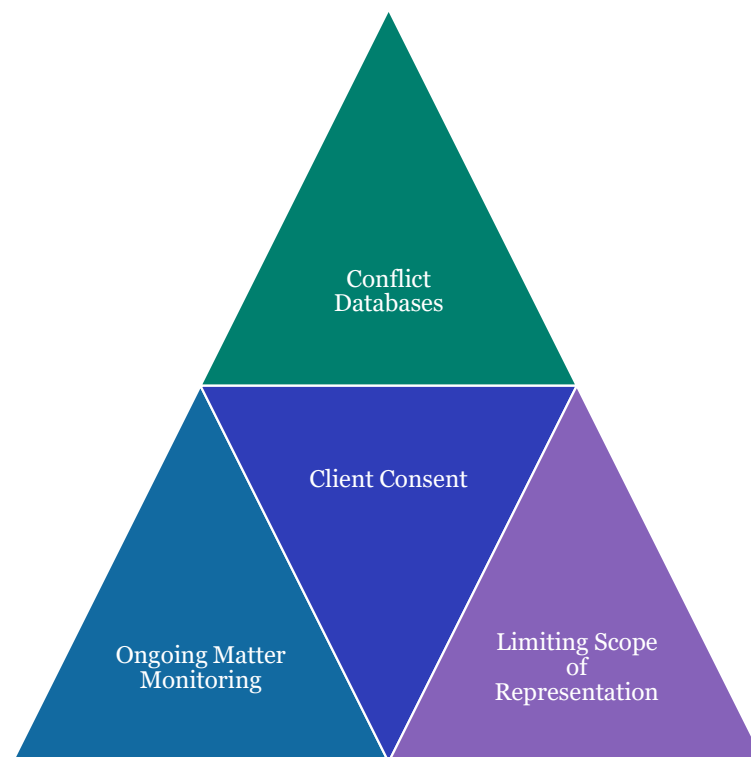
**Direct Adversity  
1.7(a)(1)**

**Material Limitation  
1.7(a)(2)**

**Conditions for Waiving  
Conflicts 1.7(b)**

## ***Rule 1.7 – Conflict of Interest***

- **Methods for identifying and managing conflicts:**



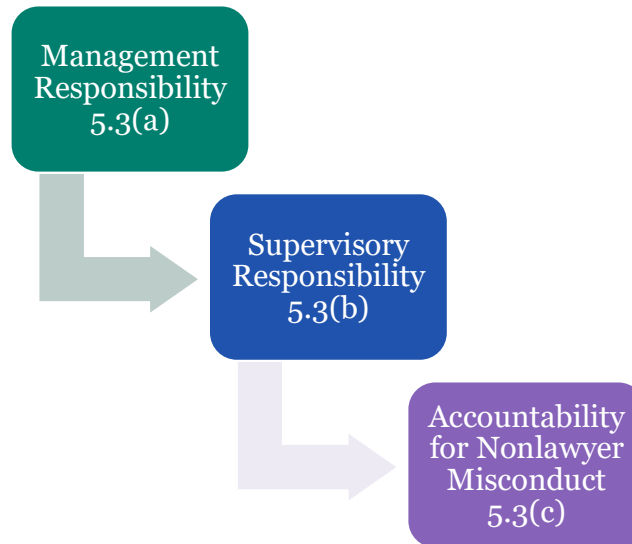
## ***Rule 5.1 – Responsibilities of Supervisory Lawyers***

- Responsibilities of partners, managers, and supervisory lawyers to ensure that lawyers within a firm or organization comply with the rules of professional conduct.**



## Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants

- Ethical obligations of lawyers to ensure their non-lawyer staff, such as paralegals, legal assistants, and other support personnel act in accordance with the professional conduct rules that govern lawyers.





# Practical Considerations: AI in Action

*What Would You Do?*



A senior litigation attorney has integrated a cutting-edge AI-based legal research and drafting tool to increase efficiency in preparing briefs, motions, and responses. The tool promises to analyze legal precedents, summarize case law, and draft legal documents based on input queries. Due to increasing caseload pressure, the attorney begins to rely heavily on the AI system for drafting motions, only performing a cursory review of the AI-generated content before submitting documents to the court.

Over time, the attorney notices that the AI system occasionally produces inaccurate legal citations, misstates the holding of certain cases, and, in some instances, omits critical legal arguments. Despite these shortcomings, the attorney continues to use the AI tool, trusting the system's ability to streamline work and believes that the volume of cases justifies this reliance. In one case, a motion drafted primarily by the AI tool is filed, but opposing counsel swiftly points out significant citation errors and accuses the attorney of negligence.

The Court issues an order requiring the attorney to explain the errors in the brief and address whether the reliance on AI constitutes a violation of professional responsibility. How should the attorney frame its response to the Court?



Which of the following actions would best demonstrate to the Court that the attorney remains compliant with Rule 1.1 (Competence) while using AI technology?

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- A** Explain that the AI tool was used as a resource, but the ultimate responsibility for ensuring accuracy still lies with the attorney. Offer to refile the motion with corrected citations and ask the court for leniency based on the complexities of the case and reliance on a widely used technological tool.
- B** Argue that the AI tool is a trusted resource used by numerous law firms, and it was reasonable to rely on its output. Assert that the attorney was unaware of the specific errors until they were pointed out by opposing counsel and suggest that the technology itself should bear some responsibility.
- C** Acknowledge the errors but emphasize the significant time constraints and case load, asserting that the AI tool is indispensable in managing the attorney's workload. Argue that while the AI tool may have made some errors, the attorney was doing their best to meet deadlines under pressure, and such mistakes are an inevitable part of legal practice, whether through human error or AI use.
- D** Challenge the opposing counsel's argument and the court's order, maintaining that occasional citation errors happen in legal practice, regardless of whether AI tools are used. The attorney should argue that the minor citation errors do not rise to the level of professional misconduct, and any issue could have been resolved without further Court intervention.





An in-house legal team for a large corporation involved in a high-stakes multi-district litigation (MDL) case has implemented a new AI tool to help process and prepare defendant fact sheets. The AI system is designed to rapidly analyze vast quantities of the company's data, including sensitive information and personal identifying information (PII) of employees, contractors, and customers, to meet tight court-ordered deadlines.

However, during the AI tool's implementation, the legal team becomes aware of potential security vulnerabilities in the vendor's data protection measures. Internal IT flagged that the AI vendor may not be compliant with certain data security standards, raising concerns about potential breaches or unauthorized access to the company's sensitive data. The in-house counsel has raised these concerns with the vendor, but the vendor has yet to fully address them, citing the complexity of implementing enhanced security protocols on short notice.

The court has imposed strict deadlines for submitting the defendant fact sheets, and the legal team faces significant pressure to comply. Missing deadlines could result in court sanctions or adverse rulings that may severely impact the company's position in the litigation.

The legal team must now decide how to proceed, weighing the risks of exposing sensitive data against the repercussions of missing critical deadlines in the MDL.

## What is the best course of action for the in-house team to ensure compliance with Rule 1.6 (Confidentiality)?

- **A** Proceed with using the AI tool as planned, despite the security concerns, to meet the court-ordered deadlines. While acknowledging the potential data risks, argue that the pressing nature of the deadlines and the high stakes of the litigation justify continuing to use the tool. The team can implement additional internal oversight and data monitoring to mitigate potential breaches and address security issues after the fact.
- **B** Halt the use of the AI tool immediately, and seek an extension from the court, explaining the security vulnerabilities associated with the tool and the need to protect sensitive company data. While there is a risk of court sanctions or an adverse ruling, emphasize to the court that protecting PII and complying with data privacy laws takes precedence over immediate deadline compliance, especially given the potential legal liabilities arising from a data breach.
- **C** Request expedited security updates from the vendor, while proceeding cautiously with the AI tool for less sensitive data. Segment the information to only use the AI tool for non-PII company data and manually process the remaining sensitive information. Simultaneously, inform the court of the issue in a status update and request additional time for the manual processing of sensitive data until the AI tool's security concerns are fully resolved.
- **D** Proceed with the AI tool but inform the vendor in writing that the company expects immediate security upgrades. Hold the vendor accountable for any potential data breaches, reserving the right to take legal action if the vendor fails to protect the company's sensitive information. In the meantime, prepare a contingency plan to switch to an alternative manual process if security issues escalate, but continue using the AI tool under close supervision to meet deadlines.



A law firm represents two corporations, **Company A** and **Company B**, in entirely unrelated legal matters. Both corporations have expressed interest in utilizing the same AI platform for legal research, document preparation, and contract review. The AI platform, marketed as a tool for streamlining legal workflows, is capable of processing vast amounts of confidential data, analyzing case law, and automating document generation.

However, during a review of the AI platform's terms and functionality, the law firm discovers that the AI tool operates using shared algorithms and machine learning models. These shared algorithms are trained using anonymized data inputs from all users of the platform, but there is a potential risk that the AI could inadvertently access or utilize confidential information from both Company A and Company B, despite the tool's claims of robust data segregation.

The law firm is concerned that this setup could lead to a conflict of interest or even the inadvertent disclosure of proprietary or sensitive information from one client to the other. Both companies, unaware of this potential risk, are pressing forward, eager to implement the AI tool to increase efficiency in their legal operations. The law firm must decide how to handle this situation, balancing the need to protect its clients' confidentiality, avoid conflicts of interest, and manage the clients' desire to use the AI platform.



## What is the best course of action for the lawyer to ensure compliance with Rule 1.7 (Conflict of Interest)?

- **A** Immediately inform both Company A and Company B of the potential confidentiality risk, advising them to reconsider their use of the AI platform unless the vendor can provide additional assurances regarding data segregation. Although this may lead to delays or dissatisfaction, the firm's duty of loyalty and confidentiality to both clients must take priority, and full disclosure is necessary to avoid potential conflicts of interest or ethical violations.
- **B** Privately engage with the AI vendor to seek further clarification and enhanced security measures without informing the clients yet. Explore whether the vendor can improve data segregation and modify its algorithms to ensure that confidential information from each company is not accessed or used in any way by the other. If satisfactory assurances are received, proceed with the tool's use. If not, revisit the issue with the clients only if the risk cannot be resolved.
- **C** Allow both companies to use the AI platform as planned, but implement strict internal controls at the law firm to prevent any crossover of information between the two matters. The firm could conduct regular audits of the AI's outputs and ensure that separate teams handle each client's data. Since the risk of actual harm appears minimal and the tool is widely used in the legal industry, taking this approach could balance efficiency with data protection.
- **D** Advise only one client (Company A or Company B) to use the AI tool, and recommend the other client to explore alternative technology solutions. This would mitigate any potential risk of data crossover between the two clients, while still allowing at least one to benefit from the AI tool. However, this may strain the relationship with the client advised against using the tool, especially if they view it as an unnecessary precaution.



A senior partner at a law firm has introduced an advanced AI tool to help junior associates draft legal documents more efficiently. The AI system is designed to generate legal research, analyze precedents, and produce initial drafts of motions. However, due to time constraints and the assumption that the associates are tech-savvy, the partner has provided minimal training on the AI tool's limitations, potential risks, and how to cross-check the outputs.

A junior associate, working under significant pressure to meet a court deadline, relies heavily on the AI-generated analysis and submits a motion with only a brief review. The motion is based on flawed legal reasoning and inaccurate citations produced by the AI, resulting in an adverse ruling against the client. The ruling severely weakens the client's position in the case and exposes the firm to potential claims of malpractice.

The senior partner, aware of the mistake, now faces a difficult decision about how to address the error with the client and the firm. The partner must balance professional responsibility, firm reputation, and the use of AI tools in practice.

## What is the best course of action for the senior partner to ensure compliance with Rule 5.1 (Responsibilities of Partners and Supervisors)?

- **A** File a motion for reconsideration or an appeal and attempt to correct the error without mentioning the role of the AI tool to either the court or the client. The partner could treat this as a common mistake made during the normal course of legal work and move forward with damage control strategies, all while quietly implementing internal policies to train associates on the AI tool's limitations moving forward. This approach minimizes reputational harm but raises ethical questions about transparency with the client.
- **B** Immediately inform the client about the error, explaining that it resulted from the use of an AI tool and the inadequate review by a junior associate. Offer to correct the mistake and explore potential remedies, including filing a motion for reconsideration or an appeal. Acknowledge the firm's responsibility and emphasize that steps will be taken to prevent such issues from recurring, even though this might lead to a loss of trust or potential legal consequences for the firm.
- **C** Privately take responsibility within the firm, but do not disclose the full extent of the AI-related error to the client. The partner could quietly work with the litigation team to mitigate the damage, file corrected motions, and possibly negotiate a settlement. By containing the issue internally, the firm avoids damaging its reputation, though this approach risks further complications if the client later discovers the error and the firm's role in the negative outcome.
- **D** Place responsibility on the junior associate, downplaying the role of the AI tool. In communications with the client and the firm, the partner could emphasize the associate's failure to properly review the motion before submitting it, using this as a learning opportunity for junior associates. The partner could offer to personally oversee future filings to reassure the client, while avoiding direct blame for the AI tool's failure and the partner's lack of oversight.



The Legal Department of a corporation employs a nonlawyer assistant to help manage document review in a major litigation case using an AI-based eDiscovery tool. The AI tool is designed to sift through vast amounts of ESI and flag relevant documents based on parameters set by the legal team. The assistant is responsible for overseeing the AI tool's operation, including setting parameters, identifying relevant documents, and managing the review process.

Due to a misunderstanding of the case's key legal issues, the assistant inadvertently omits a set of critical documents from the review. These documents contained information that could have been pivotal to the company's defense. The error is discovered only after the company receives a negative ruling in court, partly due to the incomplete production. The omission puts the company at significant risk of sanctions, damages its defense strategy, and strains the relationship with outside counsel.

The Senior Legal Counsel, who oversees the assistant's work, is now faced with the challenge of how to address this error internally and in the ongoing litigation.



## What should the supervising attorney do to ensure compliance with Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)?

- **A** Independently resolve the matter internally without informing the court or outside counsel, unless directly questioned. The Senior Legal Counsel could implement stricter oversight procedures and retrain the assistant to ensure no further issues arise. This approach avoids immediate reputational and legal risks but raises serious ethical concerns if the omission is later discovered, potentially leading to even harsher penalties for nondisclosure..
- **B** Immediately disclose the omission to the court and opposing counsel, acknowledging that the error occurred due to the use of an AI tool managed by a nonlawyer assistant. Offer to promptly produce the missing documents and request a chance to rectify the situation. While this may expose the company to sanctions or further scrutiny, full transparency may demonstrate good faith and help mitigate any further consequences.
- **C** Privately inform the company's outside counsel about the omission, and work with them to strategize a response. The Senior Legal Counsel could choose not to immediately disclose the issue to the court, instead attempting to resolve the case through settlement or other means before the omission becomes known. This option could protect the company from immediate harm, but there are significant risks if the error is later uncovered by the opposing party or the court.



# Looking Ahead

*Ready or Not: AI tools are already here*



# Practice Pointers

- Lawyers must verify the outputs of AI tools to ensure accuracy and reliability in legal work.
- Lawyers are responsible for protecting client confidentiality, especially when using third-party AI tools.
- Transparency with clients about potential conflicts arising from shared resources (like AI platforms) is crucial.
- Implementing training programs and clear oversight mechanisms is vital for compliance with ethical obligations.



# Recommendations

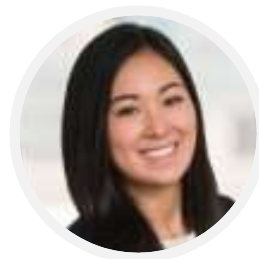
- Periodically review and audit the use of AI tools within the firm to assess their effectiveness and compliance with ethical rules.
- Develop and document policies regarding the use of AI technology, including data security protocols, conflict management procedures, and supervision requirements.
- While leveraging AI for efficiency, ensure that technology complements rather than replaces critical legal skills and judgment.

Questions?



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