

NAVIGATING THE FUTURE

LEGAL ETHICS IN THE AGE OF AI

Stacie Feldman Hausner, Esq.
Hon. Anita Santos (Ret.)



ADREvolution
ADR Services, Inc. 4th Annual MCLE Day
January 23, 2024

AGENDA

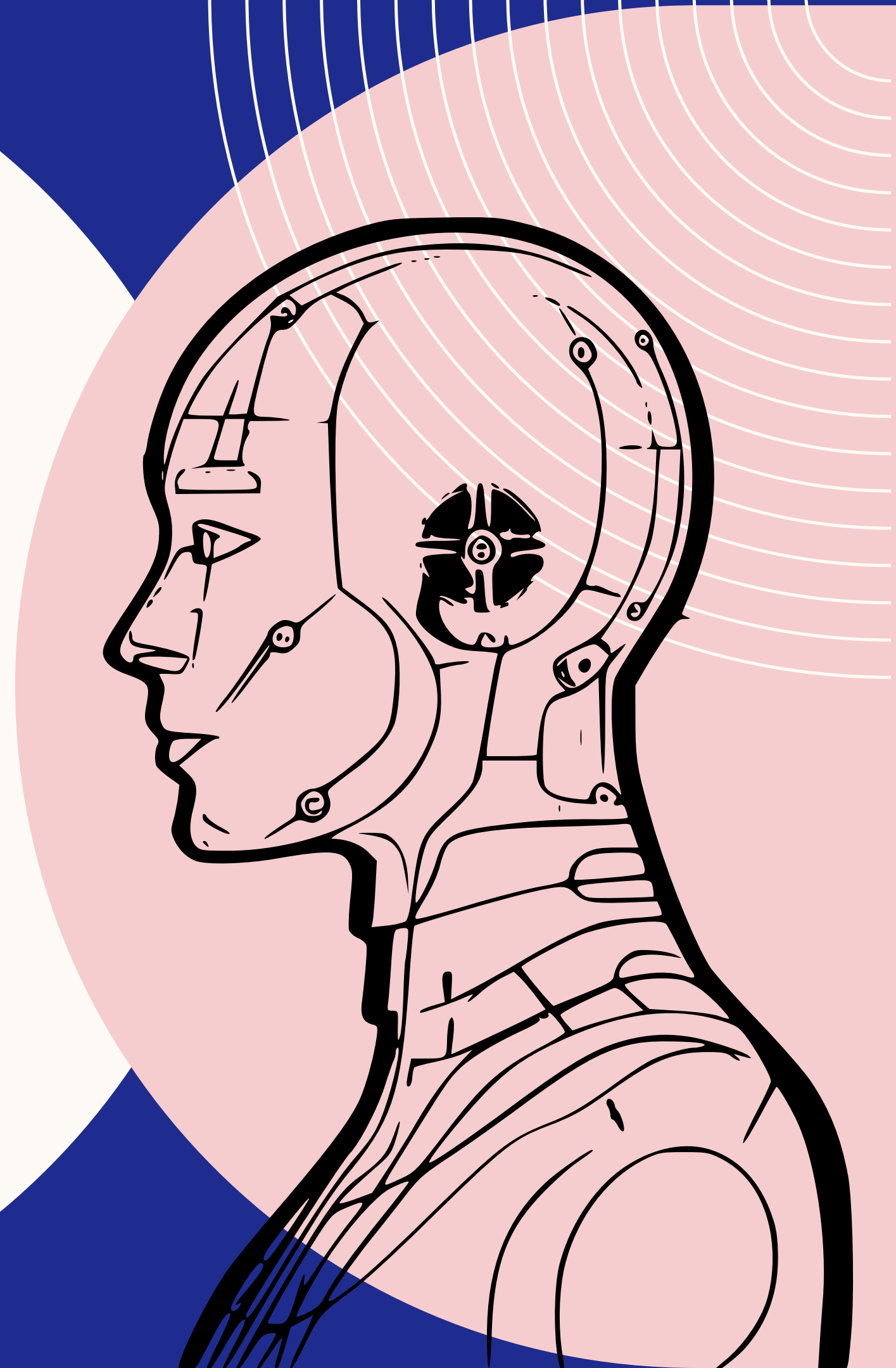
Generative AI: Technology, Usage

Truth & Lies in Mediation

Confidentiality

(In)Civility

GENERATIVE ARTIFICIAL INTELLIGENCE



What Is Artificial Intelligence?



In simple terms, artificial intelligence is the science of making computers and machines to mimic the problem solving and decision-making capabilities of humans.

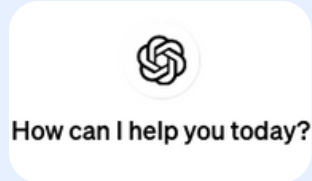
ChatGPT:

- “Generative Pre-trained Transformer”
- Machine learning
- Learns skills by analyzing enormous amounts of data

AI appears to be creative and conversational because it can identify billions of patterns in how people connect words, numbers and symbols and then use that knowledge to generate its own content.

Samples of AI Tools

ChatGPT



ChatGPT is a natural language processing tool driven by AI technology that allows you to have human-like conversations and much more with the chatbot

OpenAI



OpenAI is a private research laboratory that aims to develop and direct artificial intelligence (AI) in ways that benefit humanity as a whole.

Gamma



Create a working presentation, document or webpage you can refine and customize in under a minute, using our powerful AI generator

Canva



Produce AI-generated images and art with a text prompt using Canva's AI photo generator apps

Harvey.ai



Formulated specifically formulated for law firms and trained by general legal data, Harvey once engaged is then trained by the firm's own work products and templates.

Adobe Firefly



Adobe Firefly offers new ways to ideate, create, and communicate while significantly improving creative workflows using generative AI.

Grammarly



Grammarly is an American cloud-based typing assistant. It reviews spelling, grammar, punctuation, clarity, engagement, and delivery mistakes in English texts

Casetext



CoCounsel does document review, deposition preparation, contract analysis, and timeline creation using Thomson Reuters.

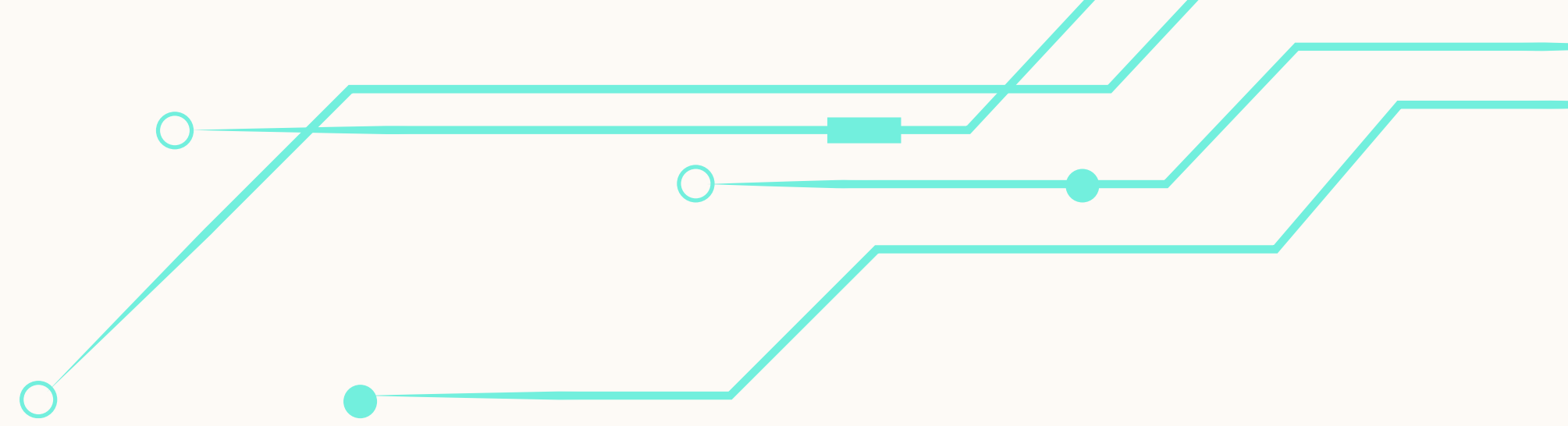
Otter.ai



An AI meeting assistant that records audio, writes notes, captures action items, and generates summaries.

How AI Can Help Us in Mediations & Negotiations

- Propose Creative Resolutions
- Help with Communication Challenges in Direct Negotiations
- Negotiation Coaching
- Research for Information and Understanding
- Drafting Settlement Agreements



Administrative Tasks

- Introduction letter to counsel for when they retain me for a case
- Prepare a written mediator's proposal
- Thank you letter to counsel
- Confidentiality Agreement
- LinkedIn Posts
- Social Media Blogs or monthly emails

Biases

AI based tools provide an objective and neutral view, without human biases

However, Chat GPT is not completely free of bias or discrimination – it relies on data sets and therefore can generate responses based on gender, race, etc. By changing the context, these statements can even be manipulated.

Problems/Limitations to ChatGPT

Be cautious with the output – it can be just plain wrong.

ChatGPT currently won't tell u how to do an illegal action

ChatGPT seems creative because using such enormous data, but it's not. It depends on the input from the user.

It does not currently understand the physical or psychological world. It doesn't have the capability to understand nuance that us human mediators understand. It can produce biased outputs because it's building on gender, racial and other biases of the internet and society.

Content is "unsupervised" so it can be based on online social media, fiction, and nonfiction.
Problem w confidentiality because Chat GPT stores data

ChatGPT cannot show empathy

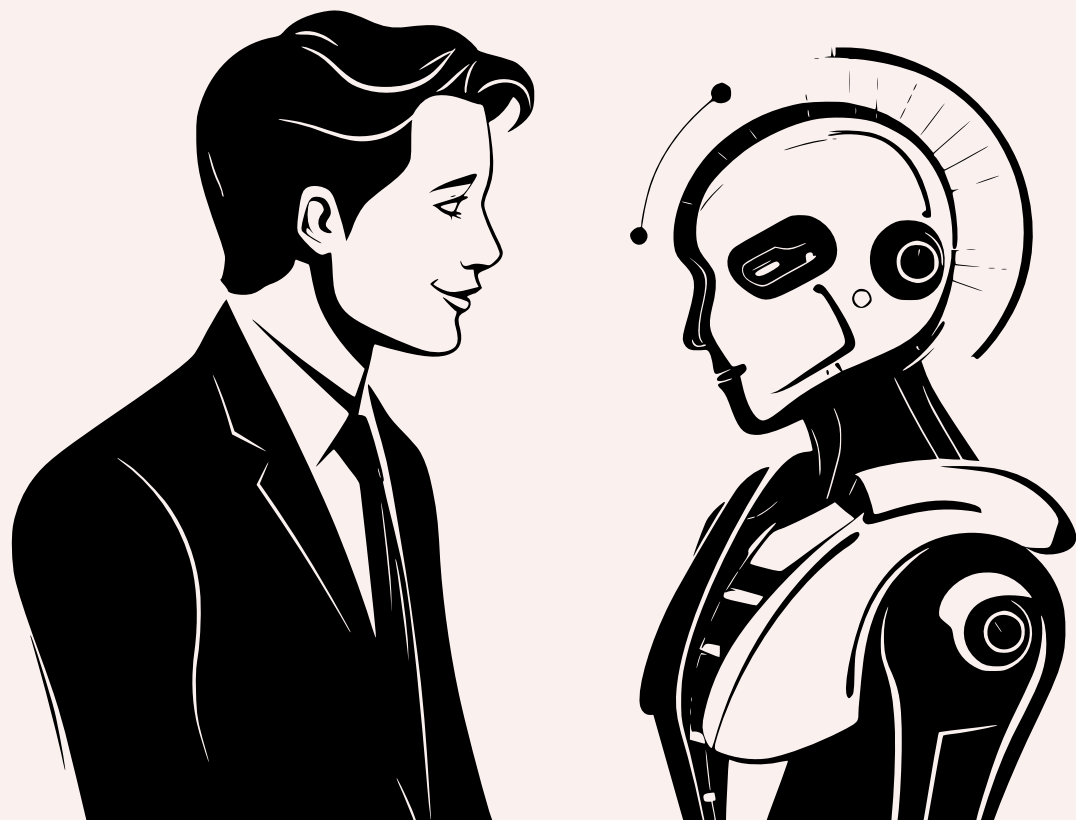
ChatGPT has no access to body language which is 70%-90% of all communication

Ethical & Legal issues

AI cannot fully understand emotions and is unable to understand perspective of conflicting parties (and to show empathy and support)

Will AI Replace Mediators in the Near Future?

I asked ChatGPT if it could replace a human mediator and it said, *"I cannot replace the role of a human mediator. A mediator is a trained professional ... [who] relies on a combination of communication skills, active listening, empathy and the ability recognize and address power imbalances.... While I can provide general information on conflict resolution, I cannot replace the human qualities that a mediator brings to the process. Mediation often involves emotional intelligence, which is an area where AI models like myself still have limitations."*



New MCLE Requirement Technology in the Law

Rule 2.72 of the Rules of the State Bar has been revised to increase required hours for the Competence requirement and to add new requirements for Technology and Civility. These changes will be effective starting with the 1/31/2025 compliance period and impacts Group 1 (A-G) and Group 3 (N-Z) only.

Technology Requirement – At least one hour of CLE is now required, focusing on the role of technology in the practice of law.

Generative AI & the CA State Bar

On November 16, 2023, the State Bar Board of Trustees approved the [Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law](#), developed by the Committee on Professional Responsibility and Conduct to assist lawyers in navigating their ethical obligations when using generative artificial intelligence. The Practical Guidance will be a living document that is periodically updated as the technology evolves and matures, and as new issues are presented.



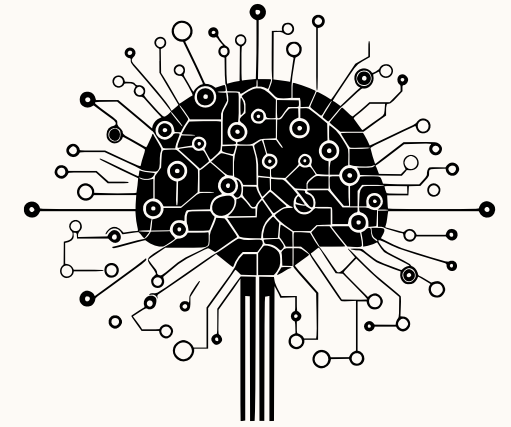
DUTY OF CONFIDENTIALITY

APPLICABLE AUTHORITIES

[Bus & Prof. Code § 6068 subd. \(e\)](#)

[Rule 1.6](#)

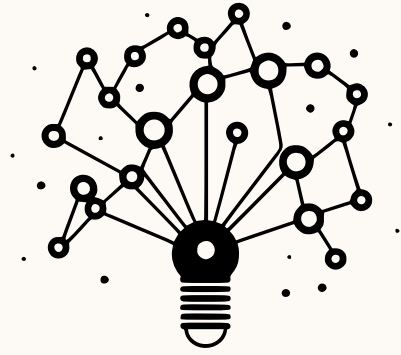
[Rule 1.8.2](#)



PRACTICAL GUIDANCE

Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes.

- Do not enter confidential information
- Anonymize client information
- Consult with IT professionals on security
- Review the Terms of Use to determine how the product utilizes inputs



PRACTICAL GUIDANCE

It is possible that generative AI outputs could include information that is false, inaccurate, or biased. A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.

- Understand the limitations of the technology before using
- Avoid overreliance on AI tools & critically analyze outputs
- A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times.

DUTY OF COMPETENCE AND DILIGENCE

APPLICABLE AUTHORITIES

[Rule 1.1](#)

[Rule 1.3](#)

DUTY TO COMPLY WITH THE LAW

APPLICABLE AUTHORITIES

[Bus & Prof. Code § 6068\(a\)](#)

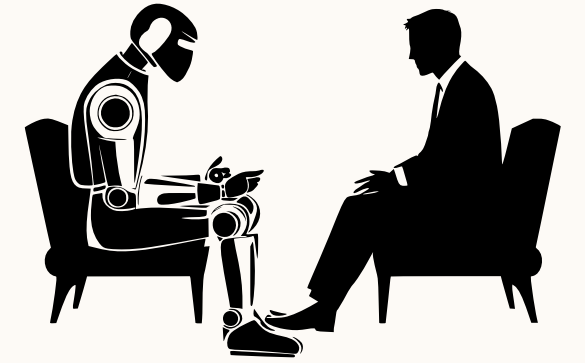
[Rule 8.4](#)

[Rule 1.2.1](#)

PRACTICAL GUIDANCE

A lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools. Understand the limitations of the technology before using

- Compliance with AI-specific laws
- Privacy laws
- Cross-border data transfer laws
- Intellectual property laws
- Cybersecurity concerns, etc.





PRACTICAL GUIDANCE

Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm's lawyers and non lawyers' conduct complies with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use.

DUTY TO

SUPERVISE LAWYERS AND NONLAWYERS, RESPONSIBILITIES OF SUBORDINATE LAWYERS

APPLICABLE AUTHORITIES

[Rule 5.1](#)

[Rule 5.2](#)

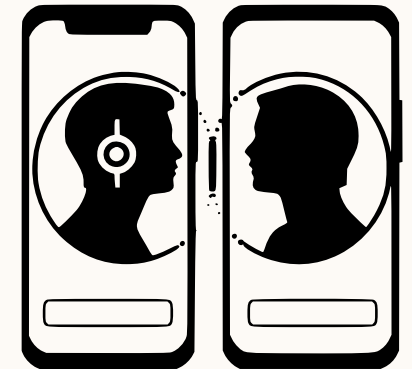
[Rule 5.3](#)

COMMUNICATION RE: GENERATIVE AI USE

APPLICABLE AUTHORITIES

[Rule 1.4](#)

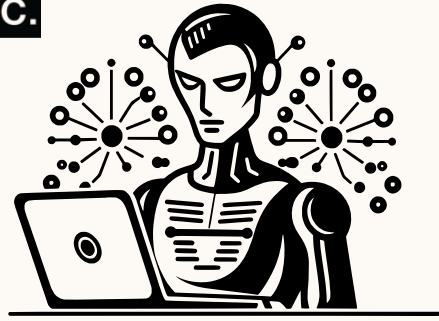
[Rule 1.2](#)



PRACTICAL GUIDANCE

A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client.

- Consider Disclosure to the client
- Review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.



PRACTICAL GUIDANCE

A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI.

- Fee agreement should explain these charges

CHARGING FOR WORK PRODUCED BY GENERATIVE AI AND GENERATIVE AI COSTS

APPLICABLE AUTHORITIES

[Rule 1.5](#)

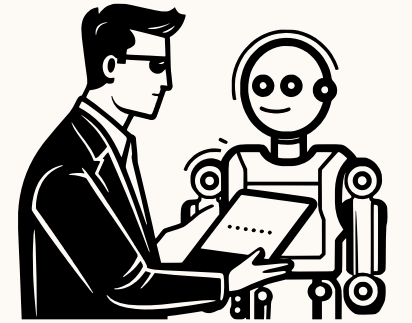
[Bus. & Prof. Code §§ 6147-6148](#)

CANDOR TO THE TRIBUNAL; AND MERITORIOUS CLAIMS AND CONTENTIONS

APPLICABLE AUTHORITIES

[Rule 3.1](#)

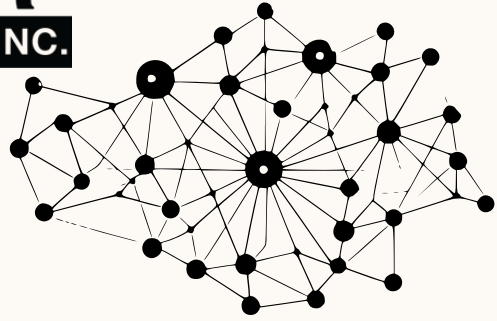
[Rule 3.3](#)



PRACTICAL GUIDANCE

A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court.

Check rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.



PRACTICAL GUIDANCE

Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI.

- Continue to learn about the technologies and their implications
- Firms should establish policies and mechanisms to identify, report, and address potential AI biases.

PROHIBITION ON DISCRIMINATION, Harassment, and Retaliation

APPLICABLE AUTHORITIES

[Rule 8.4.1](#)

FURTHER RESOURCES

- *Unmasking AI by Joy Buolamwini*
- *The Deep Learning Revolution by Terrence Sejnowski*
- *System Error by Rob Reich*

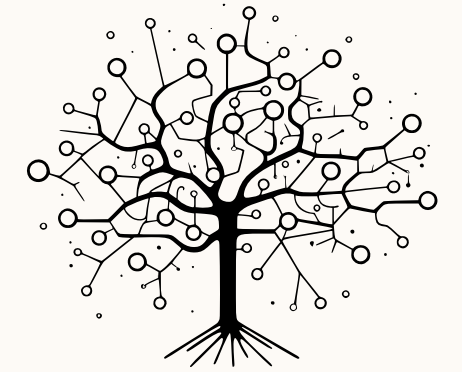
PROFESSIONAL RESPONSIBILITIES OWED TO OTHER JURISDICTIONS

APPLICABLE AUTHORITIES

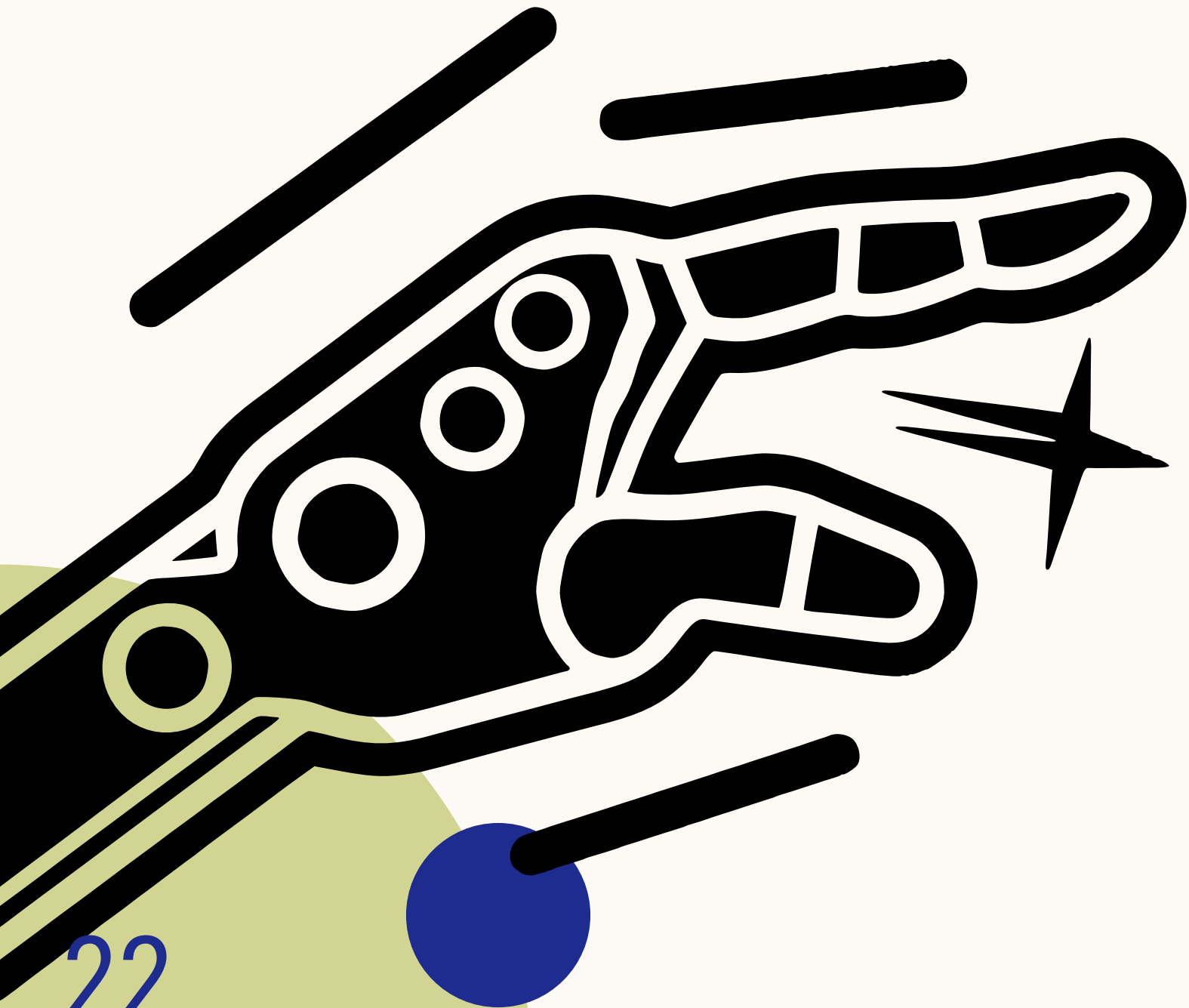
[Rule 8.5](#)

PRACTICAL GUIDANCE

A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.



MEDIATION SIMULATIONS



PEACEMAKERLEGAL

PROGRAM

VIDEO

**ChatGPT Mediation
Simulation**

Tools for AI Use:

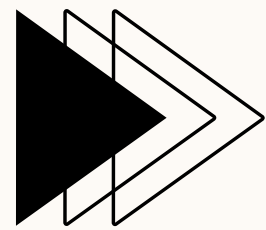
These cheat sheets direct the user on prompts to use and ways to best engage AI. They give detailed explanation and examples for optimum results: <https://write.law/cheat-sheets-and-guides>

The four I found most helpful:

- Using GPT: API
- Prompt Tips
- GPT Writing Prompt
- Prompt Engineering

David Freeman Engstrom, Professor at Stanford Law school

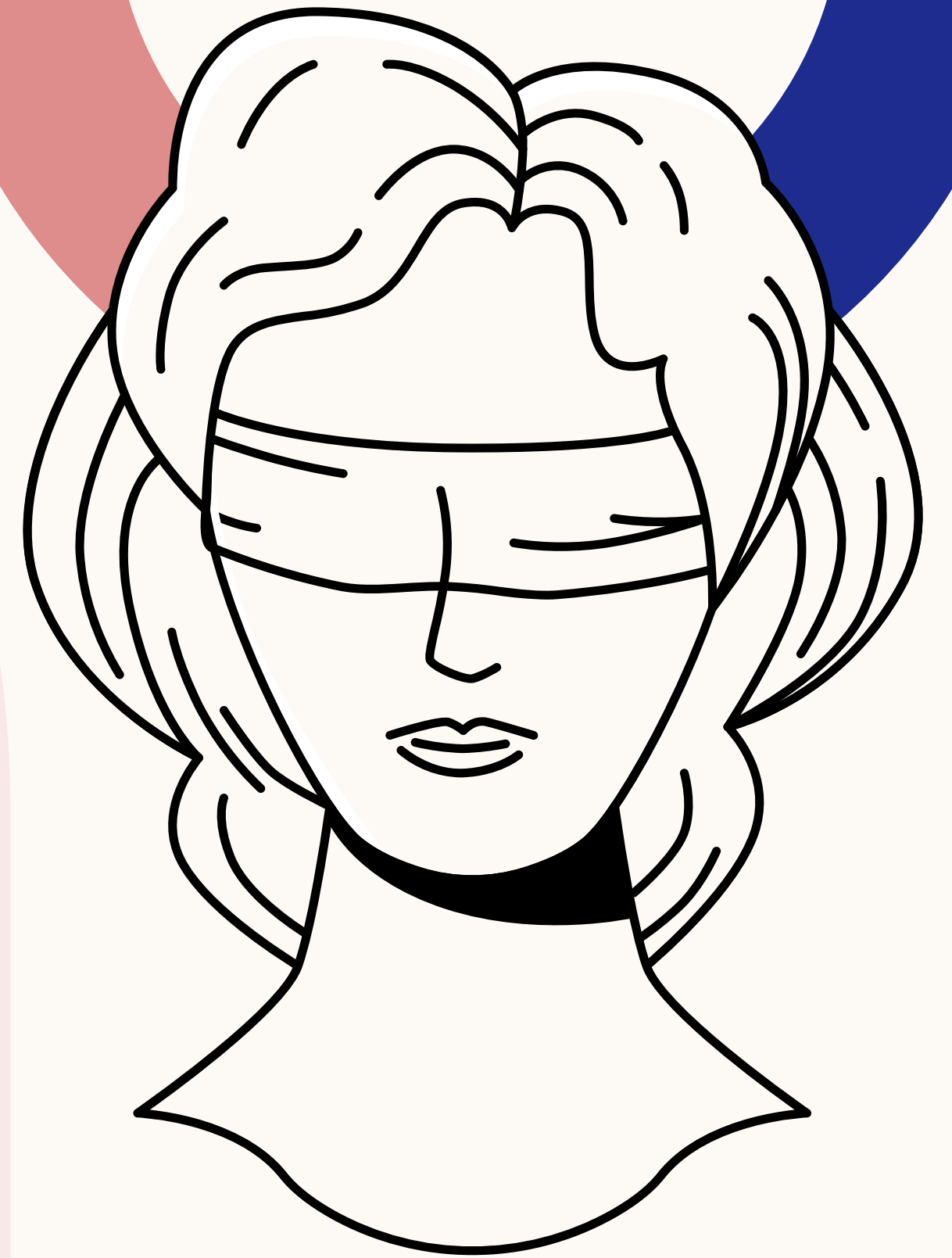
AI can: predict case outcome, offer the value of a claim, estimate the cost of litigation, draft a complaint and initial discovery request, translate “legalize” to plain language, map options, outcomes and translate narratives into legal actions.

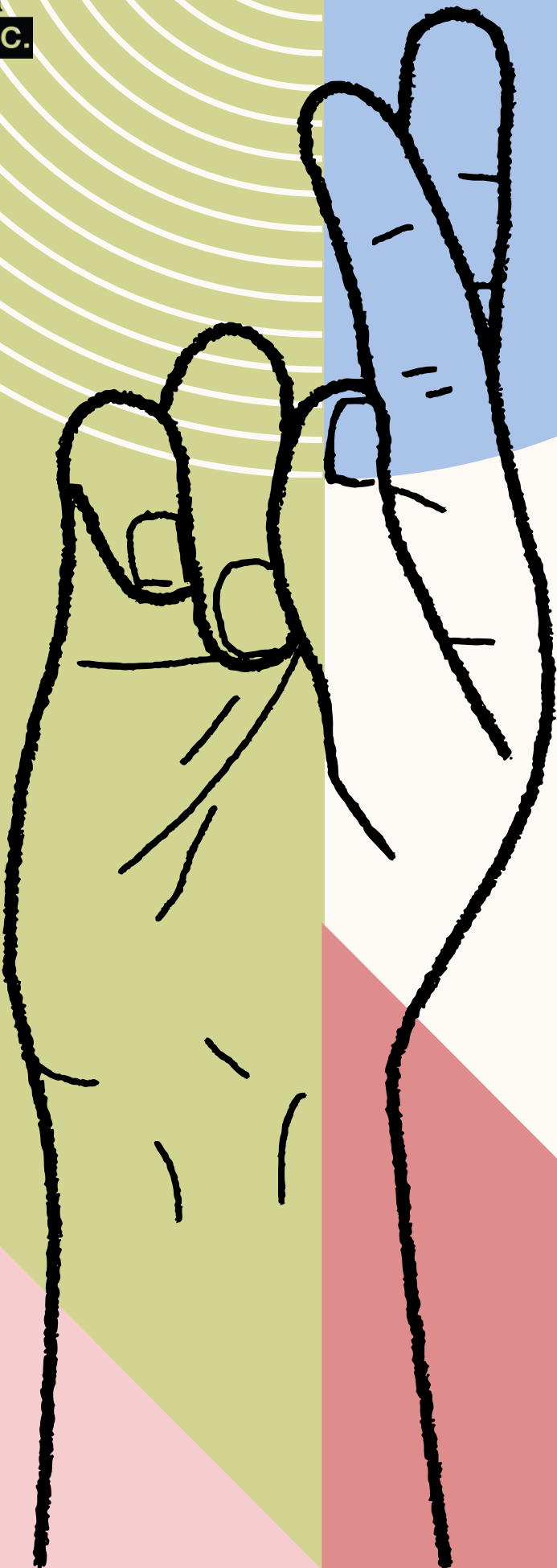


How might Generative AI enable non-represented parties to competently draft submissions?

Author of article, “Why do Blue States Keep Prioritizing Lawyers over Low Income Litigants?”
<https://slate.com/news-and-politics/2022/10/blue-states-legal-services-lawyers-fail.html>

TRUTH TELLING IN MEDIATION





(a) A lawyer shall not ***knowingly*** 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....

California Rule of Professional Conduct 3.3

California Rules of Professional Conduct: Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not **knowingly**:

- (a) make a false statement of **material fact** or **law** to a third person;* or
- fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

Comments

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. ...

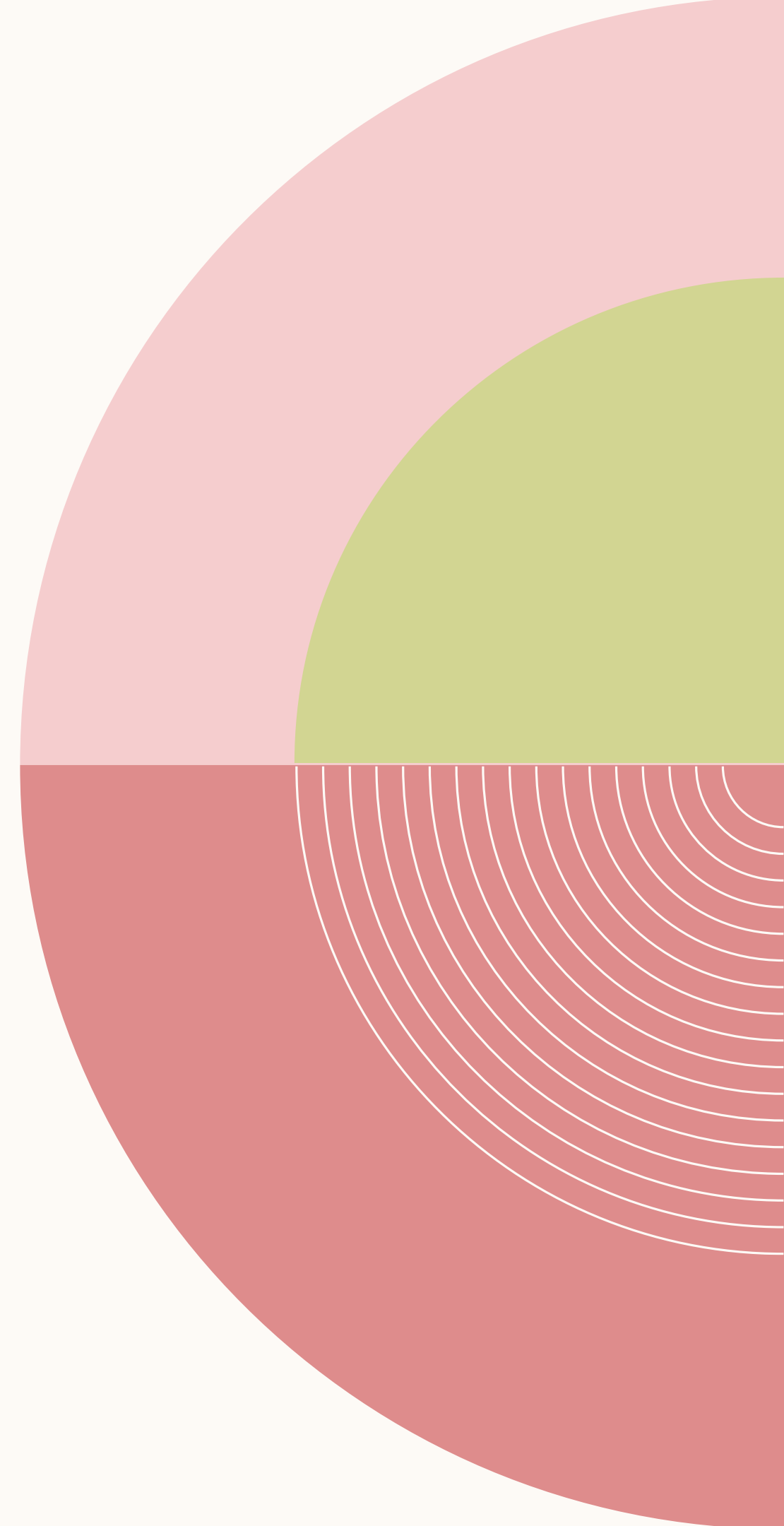
[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category...

Lies? Or Posturing?

Bottom Line	Authority to Settle	Coverage
Top Line	Authority to settle at a certain amount?	Solvency/ Bankruptcy Facts
Desire to Settle	Decision Makers Present	Witnesses

HOW TO REDUCE THE AMOUNT OF LYING IN YOUR NEGOTIATION OR MEDIATION

- Prepare
- Put it in Writing
- Negotiate in Person or on Video Screen
- Take Your Time in the Negotiation
- Work Collaboratively
- Verify Lawyer's Claims
- Diligently Find Lies of Omission and Commission
- Use a Test Question
- Frame Proposals as Gains
- Not Helpful to Call Someone a Liar



The background consists of several overlapping geometric shapes: a large light pink circle, a blue circle partially overlapping the pink one from the top right, a blue triangle on the left side, and a red triangle overlapping the blue triangle and the pink circle. The text is centered within the pink circle.

MEDIATION CONFIDENTIALITY

3 WAYS WE DISCUSS CONFIDENTIALITY IN MEDIATION

Formal Rules of Evidence

govern admissibility of
evidence in court &
whether material is
subject to discovery

Confidentiality in Caucus

when a party wants to
tell us private
information and ask us
not to repeat it to the
other side

Broader Sense

of keeping information
private so that others
outside the mediation
will not learn of the
mediation
communication

CONFIDENTIALITY

Statutory Protections

Federal Rules of Evidence, Rule 408 – Evidence of compromise offers and negotiations are inadmissible to prove validity and invalidity of a claim or to impeach prior inconsistent statements in a civil proceeding. This carves out criminal proceedings & public investigative and regulatory enforcements. Seemingly allows the communication for collateral purposes.

California Evidence Code sections 1115-1123 – Basically say anything done, said or written in a mediation is inadmissible in non-criminal proceedings. Applies to mediators, parties & attorneys.

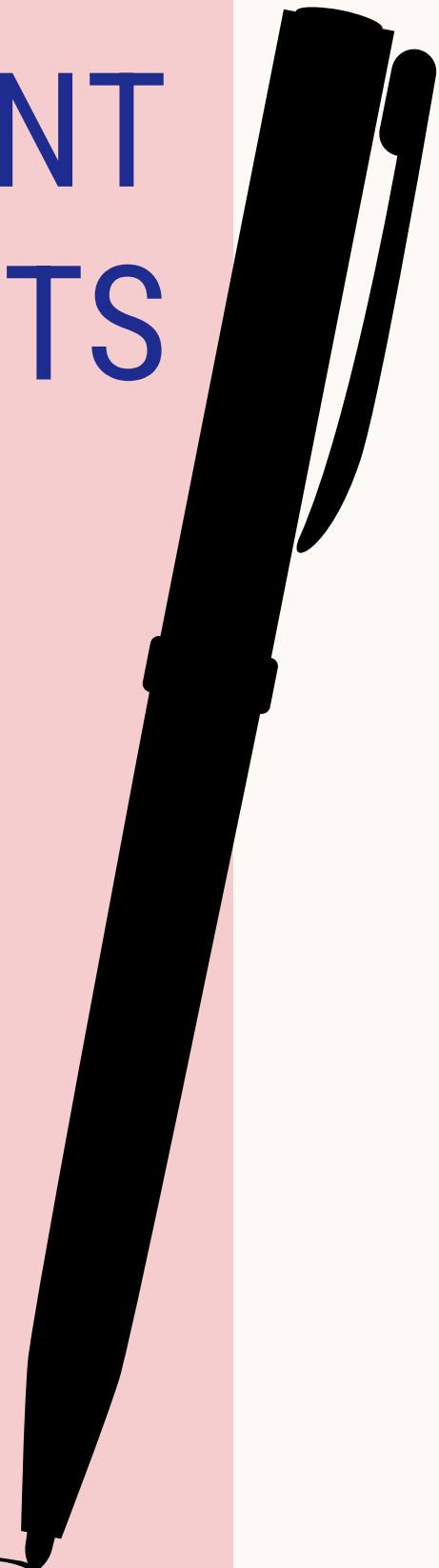
- Policy is to encourage people to share information and compromise to resolve disputes by making their communications inadmissible. They need to know efforts to compromise won't be used against them should case not settle.
- Mandatory Settlement Conferences are different – governed by rules of court

Evidence Code section 1123 makes settlement agreements inadmissible unless any of the below conditions are met—

- Parties make it clear that the agreement is admissible or subject to disclosure;
- The agreement provides that it is enforceable or binding (or words to that effect)
- All parties to the agreement expressly agree to its disclosure
- The agreement is used to show fraud, duress or illegality

Advice: for clarity, make sure to waive Section 1123 and then add in some of the other language as well.

SETTLEMENT AGREEMENTS

A stylized, handwritten signature in black ink, appearing to read "J. G. [unclear]", is positioned at the bottom left of the pink graphic area. The signature is written in a cursive, flowing style.

WHEN IS THE MEDIATION FINISHED? (Impacts Confidentiality)

Fully executed written agreement	10 days with no communication between the mediator and any of the parties	Agreement by parties to terminate the mediation
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LIMITS TO CONFIDENTIALITY

***Not as protective as most lawyers think – problematic because information is power & mediators want it**

1. Only applies to admissibility of evidence in a civil proceeding

- (a) Does not make information “private”
(note: most mediators tend to treat it as such)
- (b) Does not protect information from being revealed in a criminal proceeding
- (c) Maybe admissible for impeachment in California State court

LIMITS TO CONFIDENTIALITY

(2) Confidentiality statutes do not really protect communications from discovery

- No worries if past discovery cut-off date
- If discovery ongoing, be careful with this (strategic for trial vs. trying to settle the case)

LIMITS TO CONFIDENTIALITY

(3) States Have Different Confidentiality Protections

- CA is a bit unclear because not much case law regarding mediation confidentiality & seemingly not very protective
- Other states, like NJ, adopt the Uniform Mediation Act (UMA) & have much more robust protections
- So which state laws apply?
- Forum state v. state where mediation communication was made?
- Forum state judge decides which law applies

UNIFORM MEDIATION ACT

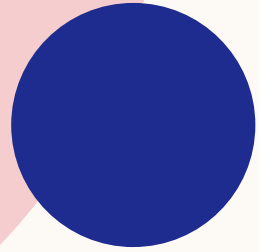
(adopted by approx. 13 states, including NJ)

EXCEPTIONS TO CONFIDENTIALITY

Agreement signed by all the parties	Plans to conceal an ongoing crime	Evidence is not otherwise available
Documents required to be kept open to the public	Information needed by mediator to respond to claims made against him	Need for evidence outweighs need to keep information confidential
Threats to commit bodily injury or violence	Situations involving child abuse or neglect	Evidence offered in court involving felony or litigation over the contract reached in mediation

Confidentiality Protects Communications Offered in a Different Civil Proceeding

- ***Cassel v Superior Court (2011) 51 Cal 4th 113, 244 P. 3d 1080, 119 Cal Rptr 3d 437*** - Supreme court says confidentiality provisions apply to a different legal malpractice case & told state legislature to pass a different bill if they didn't want confidentiality to be so robust as to protect a lawyer from malpractice during a mediation
- September 11, 2018: SB 954 passed- it revises Evidence Code section 1122 and add section 1129 –require attorneys to get written acknowledgement from their clients prior to mediation that mediation communications are confidential and inadmissible at trial.



WHAT CAN WE DO GIVEN THE LIMITS TO CONFIDENTIALITY?

Contract - Confidentiality Agreement

(1) Make stricter protections

- Ex. No sharing any mediation communications with anyone outside the mediation room or with specific people (co-workers, neighbors, media, etc)

(2) Contract for Which State Law Applies –

- Although some courts do not uphold (Larsen v Larsen – Wyoming Court did not uphold confidential communications made in CO despite an agreement saying CO confidentiality rules apply on the grounds of public policy reasons because confidential communication was allowed under the Wyoming).
- Judges probably want the relevant mediation communications to be produced because they want to make good decisions
- Be Careful Here – Should not be a default setting to sign a confidentiality agreement because it can take away some of your clients' legal protections. Instead, perhaps write your intent to be bound by Evid Code sections 1115 et seq. even when making stricter protections so that they do not nullify these protections as well.

CAUCUS AFFORDS ANOTHER LAYER OF CONFIDENTIALITY PROTECTION

3 MAIN MODELS USED BY MEDIATORS

Explicit Permission Model

Mediator does not share any information without express permission

Explicit Reservation Model

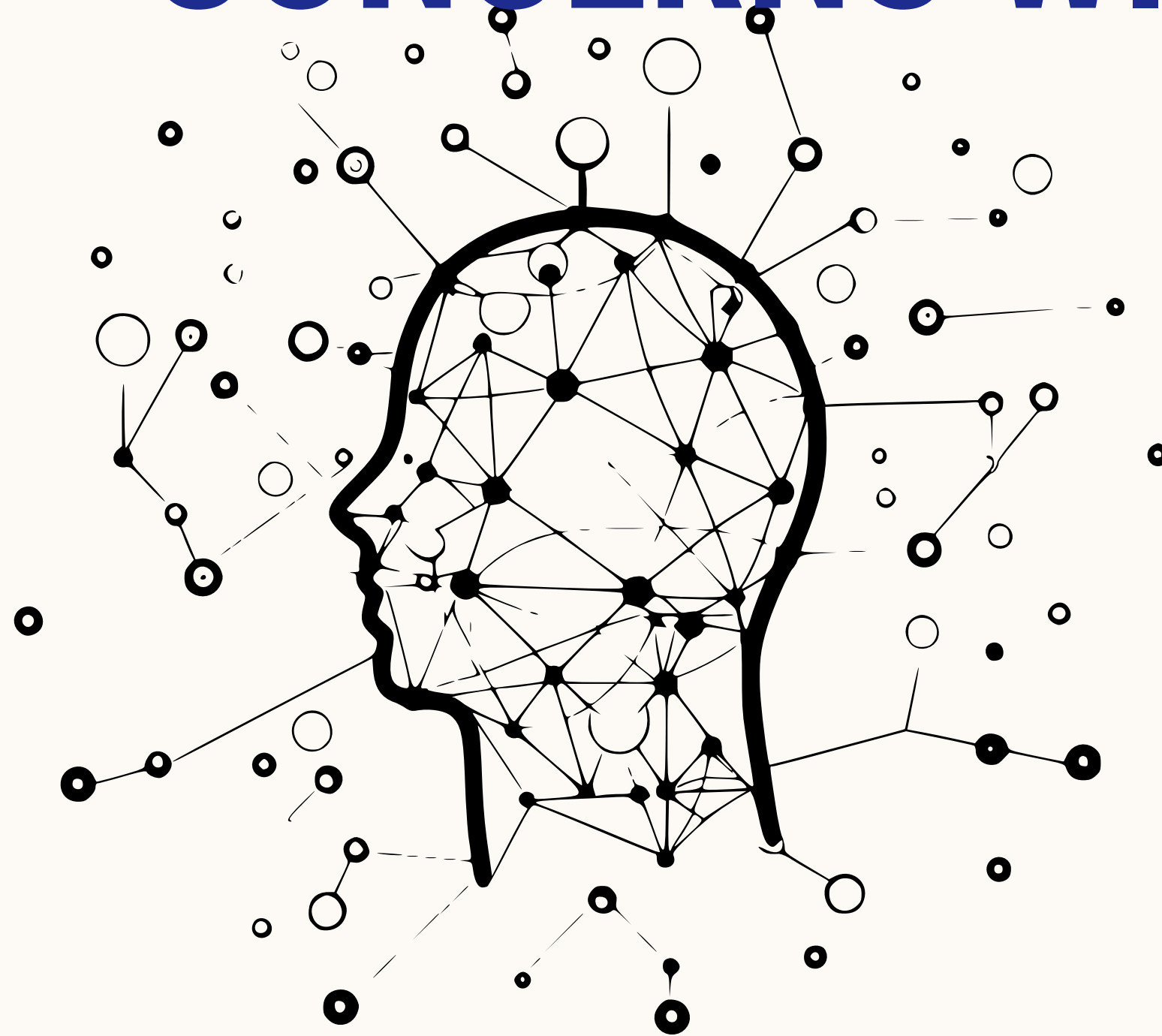
Mediator can share information unless told otherwise.

Carte Blanche Model

Mediator uses his or her best judgment

***Lawyers – be clear with your mediator regarding how and what information to share – know which model works best for you**

CONFIDENTIALITY CONCERNS WITH AI



I DECIDED TO USE AI TO HELP ME DESCRIBE THE DIFFERENCE BETWEEN CONFIDENTIALITY IN MEDIATION AND A SETTLEMENT CONFERENCE.

Using Bing AI:

Settlement Conferences v Mediation:

According to the California Evidence Code, the main difference between confidential mediations and settlement conferences is the level and scope of confidentiality that applies to each process.

[Confidential mediations are protected by a broad confidentiality rule that covers anything that was said or done during the mediation, and also prohibits the mediator from communicating with the court without the consent of the parties¹ Settlement conferences, on the other hand, are not confidential themselves, and the confidentiality rule only applies to offers of compromise and the conduct and statements made in negotiation of an offer² However, this rule does not prevent the use of offers of compromise for other purposes, such as impeachment or discovery, and it only applies to the claim that is the subject of the offer³](#)

1. Marinbar.org
2. Amblaw.com
3. Bing.com

I DECIDED TO USE AI TO HELP ME DESCRIBE THE DIFFERENCE BETWEEN CONFIDENTIALITY IN MEDIATION AND A SETTLEMENT CONFERENCE.

Comparing the response from Co-Counsel Chat GPT-4:

Confidentiality in the context of settlement and mediations is not always as straightforward as is often thought. [Rules of confidentiality for traditional settlement negotiations, including court mandated settlement conferences, are contained in a different set of codes than is the case for mediations 1. Generally speaking, a higher level of confidentiality applies to mediations, but there are exceptions to both sets of rules that should be understood 1.](#)

[In California, the Evidence Code creates broad confidentiality for mediations covering anything that was said or done and further prohibits a mediator from communicating with the Court, absent consent of the parties 2. In contrast, settlement conferences themselves are not confidential 3. Mandatory settlement conferences \(MSC\) do not have the confidentiality requirement that mediations do, so the record of the conference and the settlement will be public record 4.](#)

- amblaw.com
- bing.com
- horvitzlevy.com
- adrtimes.com

FOLLOWING UP, I ASKED BING AI WHICH EVIDENCE CODE, CA RULES OF PROFESSIONAL CONDUCT, CA RULES OF COURT AND/OR CIVIL CODE SECTIONS APPLY TO MEDIATIONS AND TO SETTLEMENT CONFERENCES.

The redacted reply (note the disclaimer at the beginning and the end):

This is a complex question that may require legal advice from a qualified attorney. I can only provide some general information based on my web search results.

[According to my search, the main CA evidence code sections that apply to settlement conferences are sections 1152 and 1154, which deal with the inadmissibility of offers of compromise and conduct or statements made in negotiation thereof 1 2](#)

[The main CA civil code sections that apply to mediations are sections 1542, 1543, and 1544, which deal with the effect of a general release, the rescission of a contract, and the consent of parties to a contract5](#)

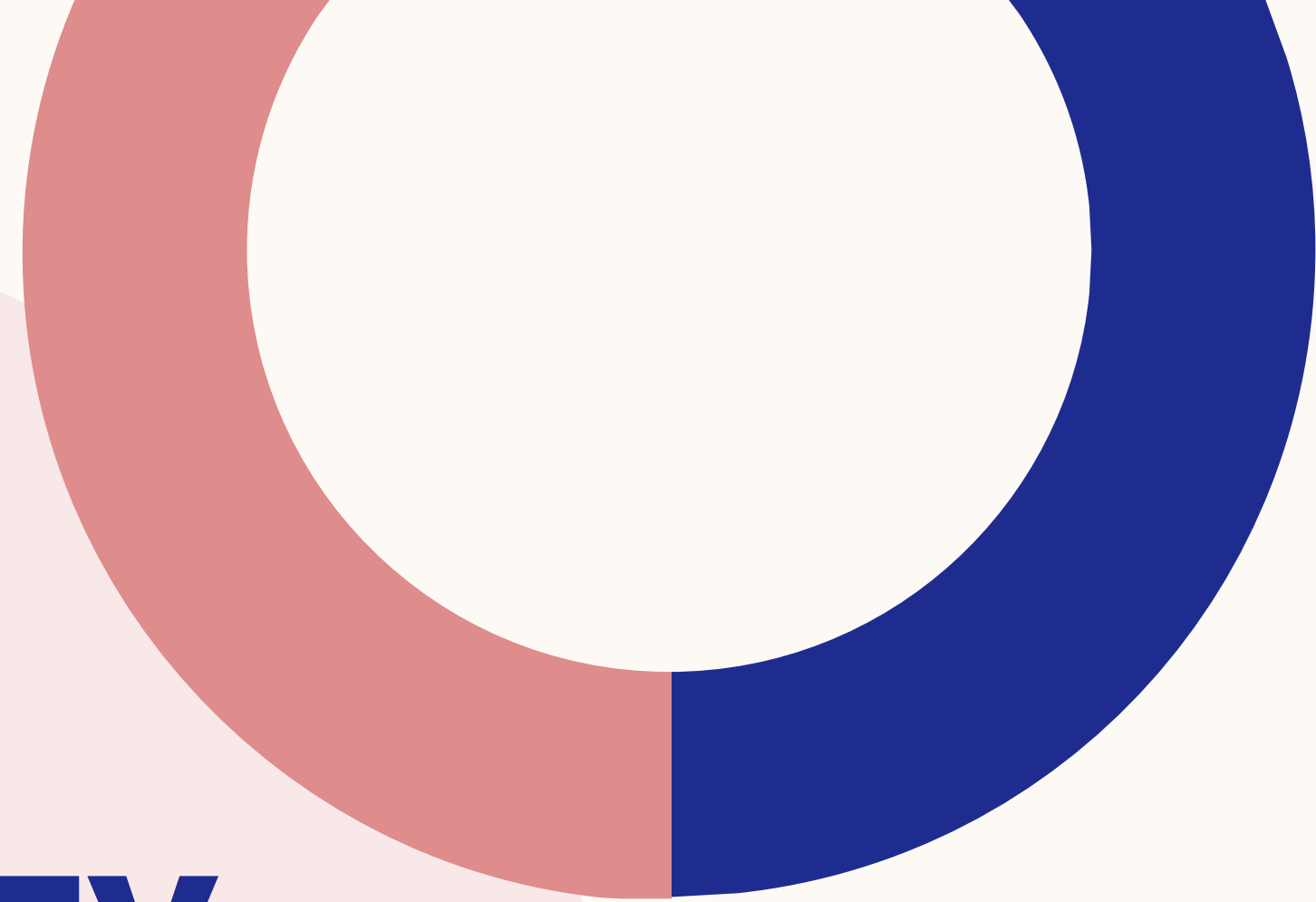
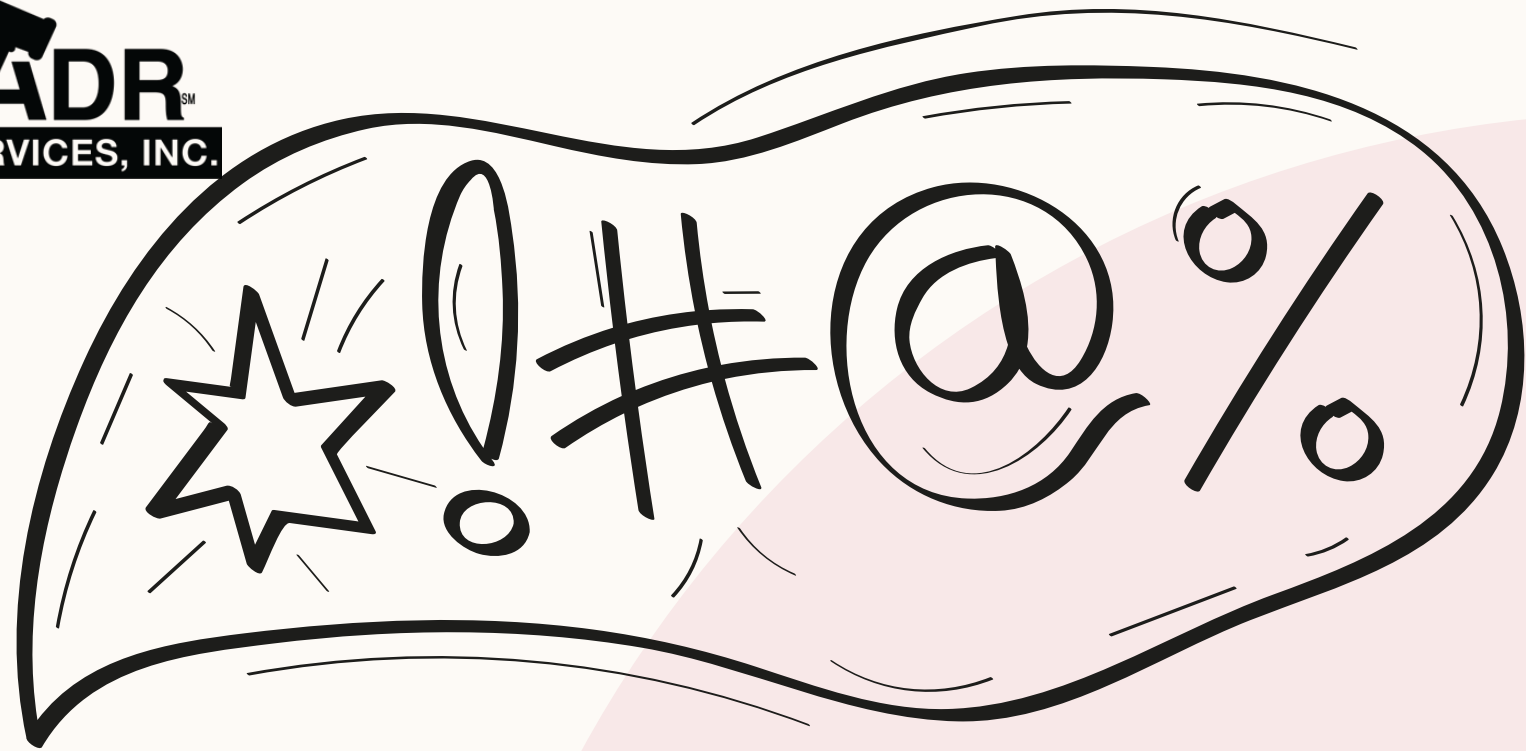
I hope this information is helpful, but please note that it is not a substitute for legal advice. If you have any further questions, you may want to consult a licensed attorney in your jurisdiction. Thank you for using Bing.

Learn more

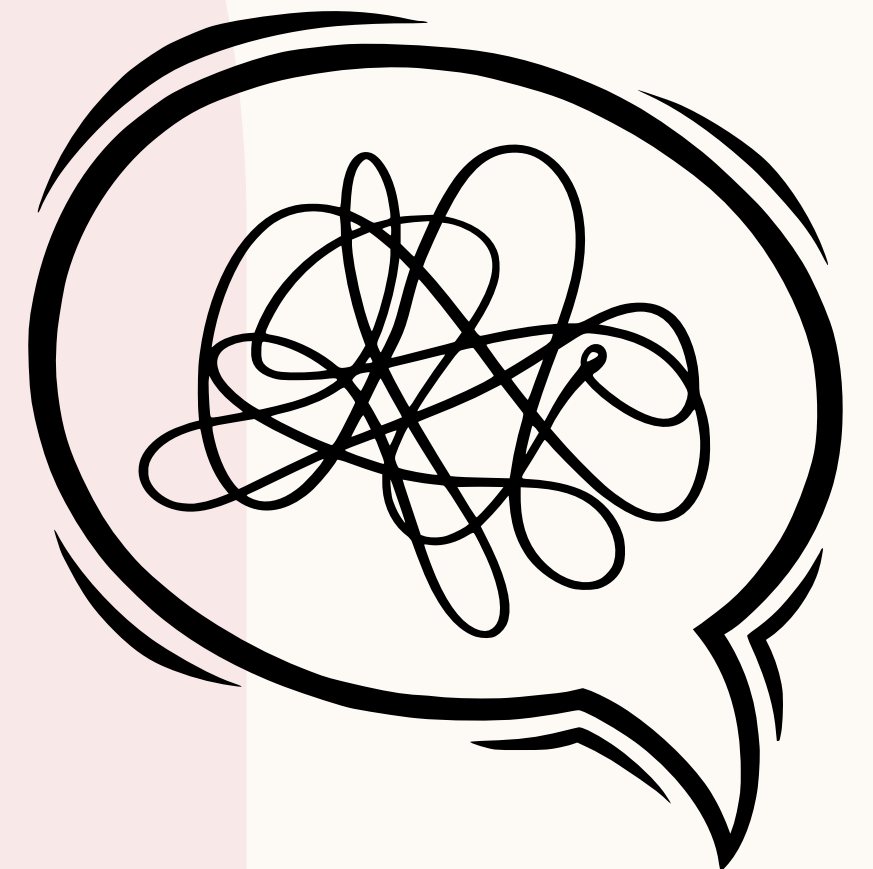
- casetext.co
- evidenceattrial.com
- codes.findlaw.com
- amblaw.com
- courts.ca.gov

SUMMARY

- Be careful & do not just naturally assume comprehensive confidentiality protections when your mediator says everything is confidential. Know what that means.
- Don't blindly sign confidentiality agreements because you may be losing or gaining confidentiality protections for your client – be thoughtful here & draft the agreements yourselves if you want them
- Some judges do not honor the confidentiality agreements so be careful when revealing information even when using these agreements
- Make sure your mediator knows if and when you want to share information.
- Make strategic decision regarding sharing information and when.



(IN)CIVILITY



NEW MCLE REQUIREMENT CIVILITY

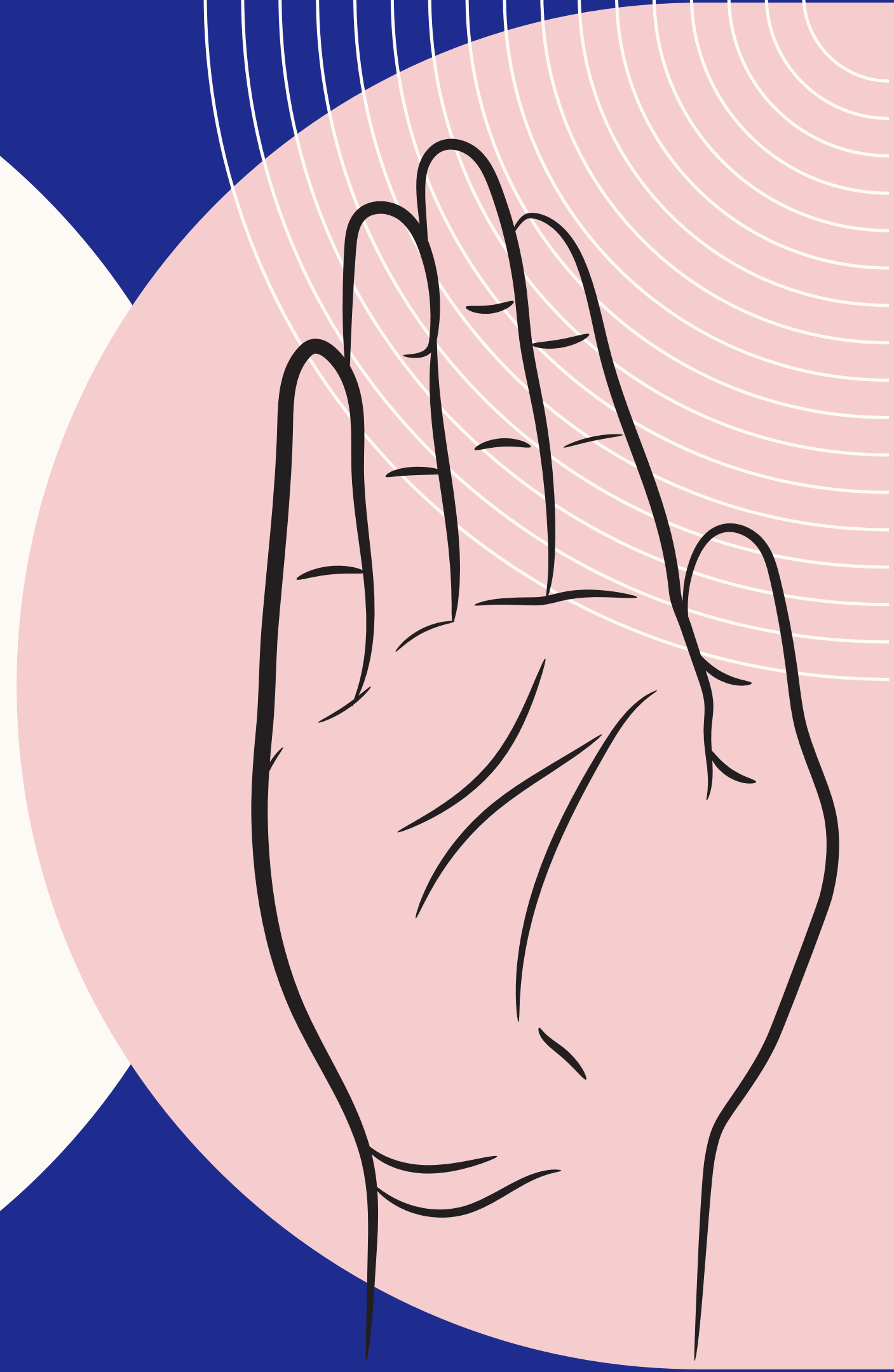
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Civility Requirement – At least one hour of CLE is now required, addressing civility in the legal profession.

"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

In 2014, the California Supreme Court—at the recommendation of the State Bar of California Board of Trustees—took a significant step aimed at improving civility among California lawyers. It adopted what is now Rule 9.7 of the California Rules of Court, adding new language to the attorney oath of admission.

[BEYOND THE OATH: Recommendations for Improving Civility by the CLA and the CJA](#)





- Best way to achieve your goal is play nice - people want to give things to people they “like”
- Mediators **frame** other side’s perspective as positive & respectful - take out toxicity, share compliments
- Make the cognitively biased person like you by actively listening/empathy/validating
- Appreciate concessions
- Smile - positive facial expression
- Trust & rapport building
- Combats reactive devaluation & fundamental attribution error

LIKEABILITY

LEVERAGING AI FOR CIVILITY?

hey jerk, take your settlement offer and SHOVE IT

Fix My Email

*Takes up to 20s for [OpenAI's](#) response

Dear [recipient's name],

I hope this email finds you well. I wanted to discuss the settlement offer that has been presented. I appreciate your efforts in putting forth this proposal; however, after careful consideration, I believe it's necessary to decline it.

Please let me know if you would like to further discuss this matter or explore alternative options.

RESOURCES

- Write.law <https://write.law/cheat-sheets-and-guides> scroll down to Generative AI for Legal Writing for 7 invaluable cheat sheets
- AI in Law/Clio
- CoCounsel/CaseText
- ChatGPT for Lawyers
- Thompson Reuters
- Legal Robot
- [AI Lawyer: The Best for Instant Legal Assistance](#)
- [Lawgeex: Best for Contract Review Process](#)
- [CSDisco: Best for Automation of Legal Processes](#)
 - [Lex Machina: Best for Legal Analytics](#)
- [Latch: Best for Contracting](#)
- [DoNotPay \(Robot Lawyer\): Best for Writing Legal Claims](#)
- [Westlaw Edge: Best for Legal Research](#)
- [Bigle Legal: Best for Contract Management](#)
- [Ghostwriter Legal: Best for Legal Writing Styles](#)
- [Amto AI: Best for Drafting Legal Documents](#)
- [Law Support: Best for Mobile Legal AI](#)
- [Ansarada: Best for Legal and Business Processes](#)
 - [Renaissance Rachel Best AI Legal Tools of 2024](#)
 - [Polite Post](#)

QUESTIONS? THANK YOU.



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