

Virtual

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Corporate Counsel Institute Series

Session III: Tues., Aug. 11, 2020

11 a.m. - 2 p.m.



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A promotional graphic for the Bar Association of Metropolitan St. Louis (BAMSL). The background is a blue-tinted photograph of the Gateway Arch and the Missouri State Capitol building. At the top, a dark blue banner contains the text 'CAREER ENHANCEMENT | EXCLUSIVE EVENTS | COMPELLING EDUCATION | OUTREACH PROGRAMS' in white. Below the banner, the text 'THE BAR ASSOCIATION OF METROPOLITAN ST. LOUIS' is written in white, with '1874' in a small font above 'OF'. Underneath, the slogan 'BUILDING BETTER LAWYERS' is displayed in large, bold, white letters. At the bottom, the website 'BAMSL.ORG' is shown in white, followed by the call to action 'BECOME A MEMBER TODAY!' in large, bold, white letters on a dark blue background.

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2020 Virtual Corporate Counsel Institute (CCI) Agenda

SESSION III: Tuesday, August 11, 2020 3.0 MO MCLE

- 10:45 - 11:00 a.m. Zoom call open for check-in and troubleshooting
- 11:00 - 11:10 a.m. Welcome
Brian Parsons, Senior Counsel, Litigation, Macy's Corporate Services, Inc.
President, Association of Corporate Counsel, St. Louis Chapter
- Robert Tomaso, Partner Husch Blackwell LLP
President-Elect, Bar Association of Metropolitan St. Louis
- 11:10 - 12:00 p.m. Navigating the Shifting Landscape of Data Privacy (1.0 MO MCLE)
Polsinelli
Dan Glowski, Vice President & Assistant General Counsel, Reinsurance Group of America
Rebecca Frigy Romine, Shareholder and Privacy Officer, Polsinelli
L. Hannah Ji, Associate, Polsinelli
- 12:00 - 12:10 p.m. Break
- 12:10 - 1:00 p.m. When the Tables Turn: Strategies to Prepare In-House Counsel When Deposed as Witnesses (1.0 MO MCLE)
Husch Blackwell LLP
Sarah Hellmann, Partner, Husch Blackwell LLP
Urmila P. Baumann, Associate Chief Counsel, Cigna/Express Scripts
- 1:00 - 1:10 p.m. Break
- 1:10 - 2:00 p.m. All Things AI : Dealing with Privacy, Intellectual Property and Commercial Aspects of AI in Your Business (1.0 MO MCLE)
Gowling WLG
Kelsey O'Brien, Senior Legal Counsel, Accenture LLP - St. Louis
Jahmiah Ferdinand Hodkin, Partner, Gowling WLG - Ottawa
Selina Kim, Partner, Gowling WLG - Toronto
Todd Burke, Partner, Gowling WLG - Ottawa (Moderator)

FACULTY



Urmila P. Baumann, Associate Chief Counsel, Cigna/Express Scripts

Urmila Paranjpe Baumann is Associate Chief Counsel for Litigation at Express Scripts, based in St. Louis, Missouri. She has served as in-house counsel for Express Scripts since April 2012, managing commercial litigation matters and also assisting her business clients address and resolve disputes before litigation ensues. Prior to her tenure at Express Scripts, Urmila was a partner with Husch Blackwell, LLP, focusing on complex commercial litigation matters.

Todd Burke, Partner, Gowling WLG - Ottawa



Todd Burke practices in the areas of complex commercial litigation, insurance defense, professional liability, and crisis management. He also provides clients with risk and crisis management advice.

With over 25 years in practice, Todd has represented national and international clients in several sectors, including manufacturing, finance, technology, transportation, health, and nuclear energy.

In civil and arbitration mandates, he delivers effective representation, proven value, and excellent client service. In a 2018 trade secret case, the judge commented that an expert "was largely destroyed" based on Todd's cross-examination. Recent mandates have focused on shareholder disputes, oppression claims, real estate disputes, software implementation, environmental contamination, construction disputes, professional negligence, and disciplinary proceedings before various professional colleges.

Todd also has extensive experience in domestic and international arbitration, cross-border issues and in obtaining injunctions.

In 2018, Todd was the winner of the Client Choice Award for Litigation in Ontario. In addition, Todd has been top ranked in Lexpert, Best Lawyers in Canada and Benchmark Litigation.

Given his broad experience, Todd is available to act as an arbitrator on cases in the commercial, insurance and professional liability fields.

As part of his practice, Todd is a frequent lecturer on crisis management. He also has a special interest in the risks created by artificial intelligence (AI) and has given numerous presentations, as well as written articles on this topic. His most recent article published is entitled "Emerging legal issues in an AI-driven world."

Todd leads the Ottawa Commercial Litigation Group and is co-leader of the firm's Lloyds of London Client Service Team. In the past, Todd has led the national Commercial Litigation Group, the firm's US Initiative and was the lead trustee of the firm's Canadian Board of Trustees.



Jahmiah Ferdinand Hodkin, Partner, Gowling WLG

Jahmiah Ferdinand-Hodkin is a litigation partner in Gowling WLG's Ottawa office, practicing civil litigation with a focus on commercial litigation, professional liability, entertainment and sports litigation and insurance defense.

In addition to her litigation practice, Jahmiah is certified in risk management. She provides consulting services to clients looking to identify, mitigate and respond to risks. She has worked with organizations both who have their own internal risk & incident managers and those who do not have a risk management team. She develops business continuity, incident management, crisis management and risk management plans as well as provides workshops and seminars geared towards empowering Boards and management with the appropriate tools and knowledge to confidently move forward with their plans.

In her litigation practice, Jahmiah has represented clients in a wide range of commercial disputes, including oppression, environmental contamination and remediation, cross-border disputes, banking and financing matters, construction litigation and liens, contract disputes, and bankruptcy and insolvency litigation. She is experienced in managing complex, multi-party litigation matters.

In the professional liability area, Jahmiah represents health professionals (including psychologists, physiotherapists, occupational therapists, speech language pathologists, pharmacists, dental hygienists and veterinarians) in responding to College complaints, investigations and appeals, as well as in civil, privacy and human rights claims. She has also represented engineers and financial advisors.

Jahmiah works closely with all her clients to provide pre-litigation and early litigation advice to assist them in assessing and evaluating their claims, risks and strategies. She promotes frequent communication, early case assessment, risk assessment, project management and effective budgeting.

Jahmiah has successfully represented clients across Ontario in litigation and arbitration proceedings. She has appeared before the Ontario Superior Court of Justice, the Divisional Court, the Ontario Court of Appeal, as well as before Colleges, Tribunals and Boards.

Jahmiah practices law in both English and French.



Rebecca Frigy Romine, Shareholder and Privacy Officer, Polsinelli

In a regulatory environment where even the most minor details matter, Rebecca Frigy Romine thrives on helping clients find practical and creative solutions and action plans.

Her practice focuses on many facets of the general health care business with a specific emphasis on the privacy and security of health information and medical staff issues.

Rebecca regularly assists our M&A and transactions teams with diligence, transactional documentation and considerations, transition services agreements, and post-closing compliance considerations and tasks. Her experience is deep across the spectrum of types of health care providers, which includes hospitals.



Dan Glowski, Vice President & Assistant General Counsel, Reinsurance Group of America

Chief Compliance Counsel with responsibility for developing, administering, and managing company-wide domestic and international compliance policies, training, monitoring, and reporting.

Manage complex litigation, arbitrations, and dispute resolution.

Provide legal advice and assistance regarding regulatory and legal compliance, OFAC, anti-bribery, anti-trust, data privacy, reinsurance claims, intellectual property, contracts, employment, marketing, and general corporate law.



Sarah Hellmann, Partner, Husch Blackwell LLP

Sarah is a skilled and artful litigator representing clients in high-stakes and complex litigation all over the country. She has extensive experience representing large companies in a broad range of commercial matters.

Sarah also has considerable first- and second-chair trial experience in federal and state courts, as well as arbitration proceedings. She routinely

appears in federal courts nationwide to defend against emergency temporary restraining orders (TROs) and other injunctive relief.

Sarah is adept at working closely with general counsel and in-house counsel teams, both to avoid litigation as well as manage pending litigation. She appreciates the burden litigation can place on a company and works to ensure that cases are handled efficiently and effectively to minimize disruption. She aims to protect business interests and tailors her strategies to meet the individual goals and objectives of each client. As a result, Sarah and the Husch Blackwell team have been recognized as a Value Champion by the Association of Corporate Counsel for

their collaboration with Express Scripts in implementing legal project management to improve efficiencies in the delivery of legal services.



L. Hannah Ji, Associate, Polsinelli

Hannah Ji is a privacy & technology transaction attorney with ample experience working in-house and at a law firm. She is well-versed in assisting businesses to build their global privacy compliance programs from the ground up. Hannah is dedicated to understanding each client's needs regarding their business model, practices and objectives to protect and profit from their investment in data and technologies. She utilizes her experience to advise various industries, including global manufacturers, health care conglomerates, software providers, insurance companies, digital marketers, retailers, and global e-commerce platforms. Hannah frequently represents clients on privacy, data security, and various technology transactional matters.



Selena Kim, Partner, Gowling WLG - Toronto

Selena Kim is a partner in Gowling WLG's Toronto office, practicing in the areas of intellectual property litigation, patent prosecution, transactional intellectual property work, and strategic intellectual property portfolio management. Her practice touches on all aspects of intellectual property, including patents, designs, copyright, and trademarks.

Selena has been certified by the Law Society of Upper Canada as a specialist in intellectual property (patent, trademark, and copyright), and is the first woman to have achieved this designation for patents in the Law Society's history. Selena's litigation experience includes work before all levels of court in Canada, involving patents for complex mechanical, electronic, and chemical inventions. Most recently, she achieved a significant win and a permanent injunction for a patentee at trial involving a patented manufacturing procedure for polymer pipes.

Selena provides strategic advice to clients on all aspects of their intellectual property portfolios, including infringement and validity assessments, and freedom to operate opinions. She also conducts patent and design agency work before the Canadian Intellectual Property Office.

Selena has a technical background, having completed a graduate degree in molecular biology, and conducted laboratory research in genetics, gene expression, and pharmacology. She is a registered patent agent before both CIPO and the United States Patent and Trademark Office.

Selena is an active member of several professional associations, including the Intellectual Property Institute of Canada and the American Bar Association, and is a contributing member of several committees reviewing patent legislation and legal developments. She is a member of the editorial board of the *Journal of Intellectual Property*, published by the Federated Press. Since 2012, Selena has served as a chair of GROW, Gowling WLG's women's networking and professional development group.



Kelsey O'Brien, Senior Legal Counsel, Accenture LLP - St. Louis

Kelsey has been with Accenture for over 11 years, where she is currently Senior Legal Counsel – Senior Manager, a position she has held for over four years.

Kelsey is a solution-oriented corporate attorney with broad experience structuring, drafting, and negotiating complex agreements. She works closely with business leadership in key strategic areas of the company to develop innovative solutions in alignment with business strategy.

Kelsey received her B.A., *Magna Cum Laude*, from Miami University and her J.D. from Saint Louis University School of Law.



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With over 1,400 lawyers in 31 offices across North America, Europe, the Middle East and Asia, Bryan Cave Leighton Paisner LLP is a fully integrated global law firm that provides clients with connected legal advice, wherever and whenever they need it. The firm is known for its relationship-driven, collaborative culture, diverse legal experience and industry-shaping innovation and offers clients one of the most active M&A, real estate, financial services, litigation and corporate risk practices in the world.

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NAVIGATING THE SHIFTING LANDSCAPE OF DATA PRIVACY

DAN GLOWSKI

VICE PRESIDENT & ASSISTANT GENERAL COUNSEL
REINSURANCE GROUP OF AMERICA

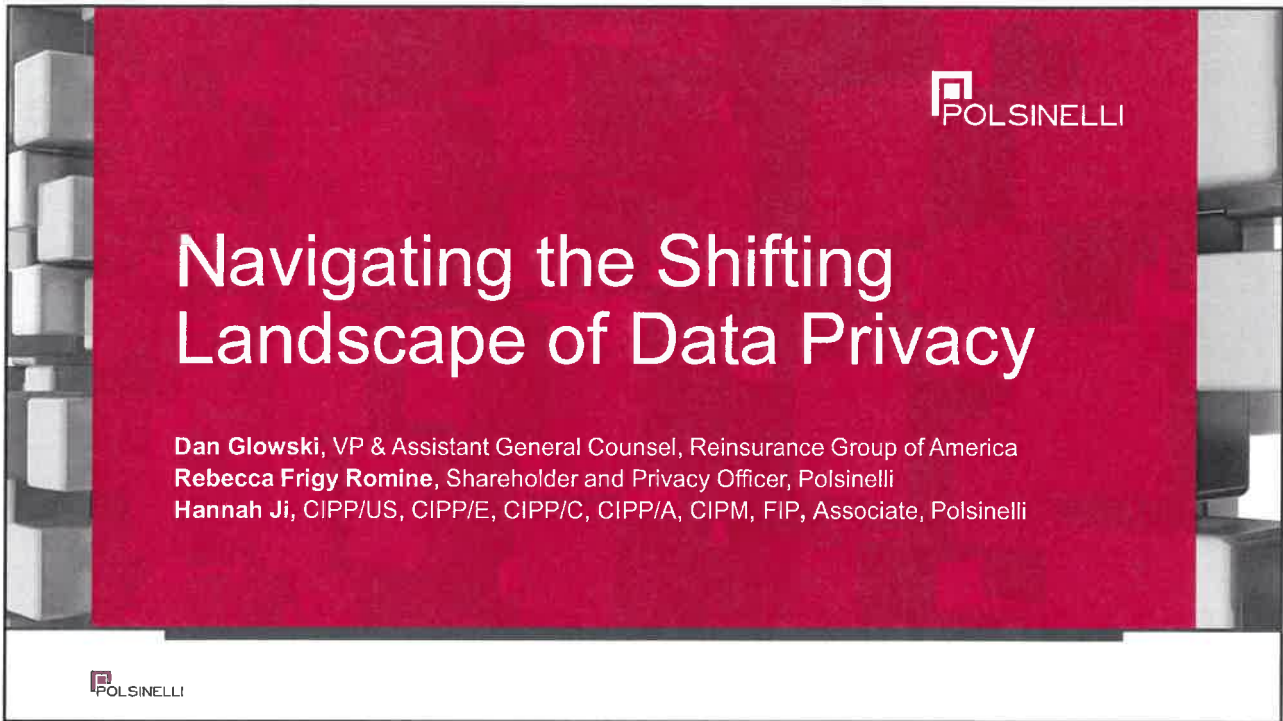
REBECCA FRIGY ROMINE


SHAREHOLDER AND PRIVACY OFFICER
POLSINELLI

L. HANNAH JI

ASSOCIATE
POLSINELLI






 POLSINELLI

Navigating the Shifting Landscape of Data Privacy

Dan Glowski, VP & Assistant General Counsel, Reinsurance Group of America
Rebecca Frigy Romine, Shareholder and Privacy Officer, Polsinelli
Hannah Ji, CIPP/US, CIPP/E, CIPP/C, CIPP/A, CIPM, FIP, Associate, Polsinelli

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Overview of the Legal Landscape

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International

- Europe
 - General Data Protection Regulation (“GDPR”)
 - The Invalidation of Privacy Shield
- Asia
 - Data localization requirements in China



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The United States - Federal

- **Federal**
 - Unfair and deceptive trade practices under the FTC Act
 - The Telemarketing and Consumer Fraud and Abuse Act (TCPA)
 - The CAN-SPAM Act
 - Children’s Online Privacy Protection Act (COPPA)
 - Sectorial Laws:
 - Financial Sector: Gramm-Leach-Bliley Act, Fair Credit Reporting Act, Truth in Lending Act
 - Healthcare Sector: Health Insurance Portability and Accountability Act; Health Information Technology for Economic and Clinical Health Act (HITECH); 42 CFR Part 2
 - Education Sector: Family Educational Rights and Privacy Act (FERPA)



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The United States - State

- **The California Consumer Privacy Act of 2018 (“CCPA”)**
 - Effective January 1, 2020; Enforcement started July 1, 2020
 - Statutory damages are “\$100 to \$750 per consumer per incident.”
- **New York’s Stop Hacks and Improve Electronic Data Security Act (“SHIELD Act”)**
 - Went into effect on March 21, 2020
 - The SHIELD Act does not create a private right of action.
- **Illinois Biometric Information Privacy Act (“BIPA”)**
 - Passed in 2008, it was the first of its kind, it is one of the only ones concerned with biometric data, it often comes into conflict with other state laws.
 - The Act prescribes \$1,000 per violation, and \$5,000 per violation if the violation is intentional or reckless.



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How to Build an Effective Compliance Program

6

Steps to Take

- Closely Monitor Development in this Field
- Encourage Cross-Departmental Collaboration
- Understand How Data Flows in the Organization
- Focus on Pre-Emptive Measures



7

Closely Monitor Development

- Trusted Advisors
- Published Resources
 - [Polsinelli on Privacy Blog](#)
 - [International Association of Privacy Professionals](#)
 - Law360, Bloomberg Law
 - Government agency subscribed alerts (e.g., FTC, OCR, State AG office, etc.)



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Cross-Departmental Collaboration

- Engage various departments in your organization
 - C-Suite, Legal, IT & Inforsec, HR, Marketing, Accounting & Finance, Procurement, Research & Development
- Consequences for violations are persuasive to promote internal compliance
 - Data breaches, class actions, regulatory fines, loss of trust and diminished reputation
- Compliance incentives
 - Marketing to the data-conscious consumers
 - Competitive business advantages



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Data Mapping

- What types of data do you collect?
 - Different types of data are subject to different restrictions. Without knowing what you have it is difficult to create a solid compliance plan.
- Where/who does your data come from?
 - Direct from consumer or as a B2B service provider?
 - The age and residency of the data subjects can trigger obligations under federal (e.g., COPPA) and state (e.g., CCPA) laws that often carry strict penalties for even single violations.
 - Organically developed database vs. purchased/leased database



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Data Mapping

- Where do you store and process data?
 - If the company use servers located in jurisdictions with data export controls, it's necessary to have legal mechanisms to enable cross-border data flows.
- How do you use and share your data?
 - The “sale” of personal information under the CCPA



11

Focus on Pre-Emptive Measures

- Developing Policies and Procedures
 - Consider your organization's P&P documents relating to privacy as the first line of defense
- Employees Training & Practice
 - Periodic employee privacy trainings
 - Breach tabletop exercises
 - Internal compliance incentives
- Consider Insurance Coverage
 - Traditional litigation insurance is not sufficient




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Contact Us

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Rebecca's practice focuses on many facets of the general health care business with a specific emphasis on the privacy and security of health information and medical staff issues.

Rebecca has significant experience in and frequently writes on these topics and remains abreast of regulatory changes and best practices that develop in the following areas:

- Addressing compliance issues and developing policies and procedures under HIPAA, the HITECH Act, state law, and 42 CFR Part 2 (alcohol and drug abuse treatment records)
- Negotiating business associate agreements
- Assisting clients navigate issues related to electronic health records, including the meaningful use program requirements and issues specific to health information exchanges
- Assisting clients with medical staff bylaws interpretations and revisions to ensure compliance with The Joint Commission standards and to address medical staff operational challenges


L. Hannah Ji
Associate
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Hannah Ji is a privacy & technology transaction attorney with ample experience working in-house and at a law firm. She is well-versed in assisting businesses to build their global privacy compliance programs from the ground up. Hannah is dedicated to understanding each client's needs regarding their business model, practices and objectives to protect and profit from their investment in data and technologies. She utilizes her experience to advise various industries, including global manufacturers, health care conglomerates, software providers, insurance companies, digital marketers, retailers, and global e-commerce platforms. Hannah frequently represents clients on privacy, data security, and various technology transactional matters. Hannah has extensive certifications in this space, including:

- Fellow of Information Privacy (FIP)
- Certified Information Privacy Professional; U.S. Private Sector (CIPP/US), Europe (CIPP/E), Canada (CIPP/C), Asia (CIPP/A)
- Certified Information Privacy Manager (CIPM)


Dan Glowski
VP and Asst. General Counsel at RGA Reinsurance Company



Dan Glowski is Vice President and Assistant General Counsel and is RGA's Chief Compliance Counsel. Dan moved in-house from private practice in 1991, first with General American Life Insurance Company, and with RGA since 2003. Among his many duties, he provides legal support to the claims and underwriting departments.


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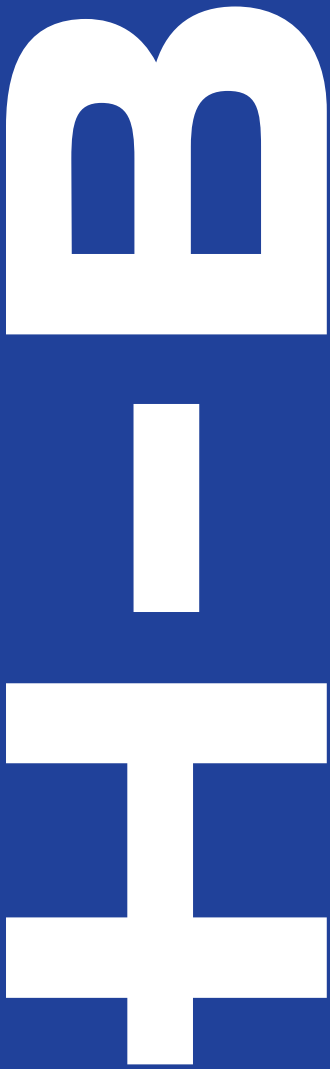
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Husch Blackwell is driven by the pursuit of excellence — for our people and for those who put their trust in us. That means clearly understanding client goals, streamlining service, achieving optimal outcomes and reducing costs.

Our entire firm takes this commitment to heart. We are proud to be the only law firm to date to be recognized by both the CLOC (Corporate Legal Operations Consortium) LIO Project and ACC Value Champion award series.

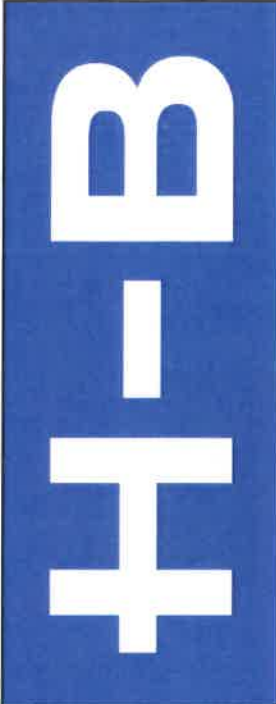


WHEN THE TABLES TURN: STRATEGIES TO PREPARE IN-HOUSE COUNSEL WHEN DEPOSED AS WITNESSES

SARAH HELLMANN
PARTNER
HUSCH BLACKWELL LLP

URMILA P. BAUMANN
ASSOCIATE CHIEF COUNSEL
CIGNA/EXPRESS SCRIPTS

The logo for Husch Blackwell, featuring the word "HUSCH" in a large, bold, blue sans-serif font above the word "BLACKWELL" in a smaller, bold, black sans-serif font. The text is centered and set against a light, textured background.




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**When the Tables Turn:
Strategies to prepare in-house
counsel to avoid risks and pitfalls
when serving as witnesses**

Sarah C Hellmann, Partner
sarah.hellmann@huschblackwell.com

Urmila Paranjpe Baumann, Associate Chief Counsel, Express Scripts/Cigna
upbaumann@express-scripts.com

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Agenda

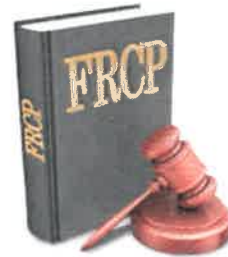
- Application of Federal Rules of Civil Procedure to In-house Counsel
- Key Court Decisions
- Business Advice vs. Legal Advice
- Deposition Preparation and Ethical Concerns
- Tactics for Responding to Deposition Notices or Subpoenas

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Application of Federal Rules of Civil Procedure to Depositions of In-House Counsel



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Fed. R. Civ. P. 26(b)(1)

DISCOVERY SCOPE AND LIMITS.

Scope in General. . . Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case.** . .

Information within this scope of discovery need not be admissible in evidence to be discoverable.

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2015 Amendments: Proportionality Test

Limits discovery to matters “proportional to the needs of the case.” Factors to consider include:

- The importance of the issues at stake in the action
- The amount in controversy
- The parties’ relative access to relevant information
- The parties’ resources
- The importance of discovery in resolving the issues
- Whether the burden or expense of the proposed discovery outweighs its likely benefit

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Fed. R. Civ. P. 30(a)

WHEN A DEPOSITION MAY BE TAKEN.

(1) *Without Leave*. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). **The deponent's attendance may be compelled by subpoena under Rule 45.**

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Fed. R. Civ. P. 30(b)(6)

NOTICE OF THE DEPOSITION; OTHER FORMAL REQUIREMENTS.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization.

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Key Court Decisions Impacting Depositions of In-House Counsel



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Shelton v. Am. Motors Corp.

Requires the party seeking to take the deposition to show that:

- (1) no other means exist to obtain the information than to depose opposing counsel,
- (2) the information sought is relevant and non-privileged, and
- (3) the information is crucial to the preparation of the case.

*If all three prongs are not met, a court may prohibit the deposition.

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In re Subpoena Issued to Dennis Friedman

- The “Flexible Approach”
- Attempts to more closely follow the broad discovery application of Rule 26
- Does deposition impose an inappropriate burden or hardship on the responding party?
- Requires that the party opposing the discovery carry the burden of showing that it exceeds the scope of Rule 26
- Requires that the opposing attorney appear at the deposition and object on a question-by-question basis. See *Kirtos v. Nationwide Ins. Co.*, 2008 WL 564875, at *3 (Ohio Ct. App. 2008)

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Why is a Different Standard Applied to In-House Counsel?

- In-house counsel often perform non-legal business functions within their organizations and the law requires that privilege analysis to distinguish the two
- Having attorneys serve in dual capacities is the most frequently-cited factor as a basis for denying a claim for privilege

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Identifying and Protecting Privileged Information



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Privileged Communications

- The attorney-client privilege applies to confidential communications between client and lawyer made for the purpose of seeking, obtaining, or providing legal advice
- The privilege is intended to foster candor in attorney-client relationships and thereby improve the quality of the legal representation provided

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“Primary Purpose” Test

The main test courts apply for determining whether a communication is privileged is whether the “primary purpose” of the communication was to solicit legal, rather than business, advice. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 80 F.Supp.3d 521, 530 (S.D.N.Y. 2015)

Other helpful guidance:

- *Fed. Trade Comm’n v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264, 1268 (D.C. Cir. 2018)
 - A court may find that attorney-client communications have “multiple purposes” and are privileged as long as “legal advice was one of the significant purposes of the communications...”
- *Isom v. Bank of America*, 628 S.E.2d 458, 462 (N.C. Ct. App. 2006)
 - A document, which is not privileged in the hands of the client, will not be imbued with privilege merely because the document was handed over to the attorney.”)

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Legal Capacity vs. Business Capacity

- In-house counsel must meet the burden of showing any documents at issue were received in a legal capacity, rather than primarily a business capacity
 - Business advice is not protected by the attorney client privilege
- If document would have been prepared irrespective of in-house counsel, more likely that it will not be protected by privilege
- A court may find that attorney-client communications have “multiple purposes” and are privileged as long as “legal advice was one of the significant purposes of the communications”

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Legal Capacity vs. Business Capacity (cont.)

- The fact that in-house counsel frequently wear two hats, both legal and business, can complicate claims to privilege. *See, e.g., Solis v. Milk Specialties*, 854 F. Supp. 2d 629 (E.D. Wis. 2012)
 - In-house lawyers often have roles that require more than simply providing legal advice to their corporate employers; many participate in the decision-making process and are privy to confidential business information
- Courts will consider whether in-house attorneys have “dual capacities,” both legal and business, within the corporate structure. *See, e.g., Hardy v. New York News, Inc.*, 114 F.R.D. 633, 644 (S.D.N.Y. 1987)
 - Dual titles, such as “Corporate Secretary,” “Vice President,” or “Board Member,” are also factors

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Factors to Consider

- Is the subject “ordinary business activities”?
 - Would the document have been prepared whether or not the attorney was sent a copy?
- Do the documents specifically request legal advice or, if generated by counsel, reference the request for legal advice?
- Was the communication marked as confidential; does the communication itself reveal any confidential information?

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Factors to Consider (cont.)

- Did the attorney have only “limited involvement” in the matter?
 - Whether the document is addressed to a number of individuals, only one of whom is in-house counsel
 - “Copying the lawyer” does not create a privileged document
 - An entity cannot shield its business transactions from discovery simply by funneling its communications through an attorney

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Factors to consider (cont.)

- Did the attorney have only “limited involvement” in the matter?
 - Whether the document is addressed to counsel vs. “cc” and whether many others, outside of the legal function, are addressees
 - Whether the document refers to her as “counsel”
 - Whether the documents were segregated from other, non-privileged documents

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Examples of Potentially “Non-Legal” Functions

- Conducting investigations
- Fact-gathering regarding issues that may later be the subject of litigation
- Regulatory compliance issues
- Matters concerning the functioning of the entity
- Negotiating a transaction

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Attachments to Emails

- A separate analysis even if the email itself is deemed privileged
- Attachments have been required to “independently earn that protection” and are increasingly found not to be privileged independent of the email to which it is attached
- “Attachments which do not, by their content, fall within the realm of the attorney-client privilege cannot become privileged by merely attaching them to a communication with the attorney



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H-B

Use of Auditors

- *Ravenall v. Avis Budget Group, Inc.*
 - Where in-house counsel hired the auditor to disseminate and collect questionnaires for an audit and then asked the auditor to review the responses to make an initial assessment regarding classification as exempt or non-exempt, court found that asking the auditor to review and assess the questionnaires waived the company’s privilege (even though disseminating and collecting them was permissible)



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H-B

Protecting Legal Advice

- Limit the roles of in-house attorneys to ensure information remains privileged
- Outline written job responsibilities for the role of in-house counsel
 - Distinguish between business and legal roles
- Separate documents created in the ordinary course of business (not protected) from those created in anticipation of litigation (protected)
- Mark documents with “confidential” or “attorney-client privilege.”
 - Only one factor in court’s determination
 - Better practice: Prefatory phrase in written communication
 - “In response to your request for advice concerning the legal impact of”
 - “You have asked me to report on the legal implications of”

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H-B

Responding to Deposition Notices or Subpoenas



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H-B

Quash the Subpoena/Deposition Notice if Possible – Try to Limit the Scope if Not

- Know the law of the relevant jurisdiction – you may have grounds to object and move to quash the subpoena/deposition notice and/or for a protective order limiting the scope of length of your deposition
- The following factors are considered by many courts when considering objections and other challenges to in-house counsel depositions:
 - Is the information sought relevant and non-privileged?
 - Is the information sought crucial to the requesting party's case preparation?
 - Is there no less intrusive means to obtain the information?
 - Are the in-house counsel "necessary witnesses"?
 - See *Dewey v. Bechthold*, No. 2018CV1739, unpublished slip. op. (E.D. Wis. Oct. 23, 2019)
- Consider proposing a substitute witness, or negotiating for interrogatories in lieu of deposition

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H-B

Motions to Quash

- Expect to file a fairly specific affidavit supporting the motion
- If possible, the affidavit/declaration should both state and demonstrate that:
 - In-house counsel's involvement in the matter was related solely to his/her role as in-house counsel;
 - The party seeking discovery has not exhausted other options to obtain the discovery it seeks and the information is likely available from those options;
 - The attorney-client privilege and/or work product doctrine applies to the discovery requested by way of specific examples and arguments if possible without waiver; and/or
 - Other potential deponents that will have the same or similar information as in-house counsel.

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H-B

Deposition Preparation



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H-B

Get Counsel and Starting Preparing

- Assuming efforts to quash fail, you should get separate outside counsel to represent you
 - Eliminates potential conflicts of interests
 - Helps ensure you receive unbiased, focused advice on privilege and ethics issues
- Thorough preparation – with your outside counsel – is critical to protecting the privilege at your deposition
- You need to understand the company's position regarding your potentially privileged communications and work product well ahead of deposition
- You must be mindful of your own ethical obligations

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H-B

Preparation for Deposition

- Understand the subject matter and any other limitations on your deposition:
 - Is there a protective order or agreement limiting the scope of your deposition?
 - Is the adversary prohibited from inquiring about certain types of communications or thought processes?
 - Will the court be available to determine privilege objections on the spot?
 - Has the company identified for you the communications it considers to be privileged and its position regarding waiver?
 - If you wear multiple hats within your company, which apply to your deposition?
 - In what capacity are you being deposed?

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H-B

Preparation for Deposition (cont.)

- What are the duration and distance limitations for the deposition?
- Which objections are subject to potential waiver?
- On what good faith bases may you refuse to answer?
- Do the parties have a “clawback” agreement to cover the inadvertent disclosure of privileged communications?
- Can you obtain agreement that your deposition transcript will be sealed for a reasonable period to accommodate a privilege review and any necessary further action?
- When are you permitted to confer with counsel during the deposition, and are your communications during breaks considered potentially discoverable in the relevant jurisdiction?

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H-B

Ethical Duty of Confidentiality

- In-house counsel must abide by the duty of confidentiality embodied in Model Rule 1.6
 - Rule 1.6(a): “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”
 - Confidential information is broader than privileged information
 - All information that came into attorney’s possession arising from the representation of the client
- Ensure that, if you are deposed, you are authorized to reveal the information being asked

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H-B

Know the Boundaries to Protect the Privilege

- Thoroughly re-acquaint yourself with the contours of the attorney-client privilege, the work product doctrine, the joint-defense privilege and any other potentially applicable limitations on discovery (i.e., trade secrets, privacy obligations, etc.)
 - Understanding the general principles is not enough; you need to know the state of the law in the relevant jurisdiction
 - Make sure your understanding of the law is consistent with that of your outside counsel and, if possible, your company
 - You should closely review with your outside counsel any privilege or other discovery orders in the litigation, as well as any other significant privilege or relevant discovery decisions previously issued by the court

Confidential Document
Attorney-Client Privilege

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H-B

Know the Boundaries to Protect the Privilege (cont.)

- Your outside counsel and counsel for the company should discuss how privilege objections will be handled; your outside counsel should prepare you for the mechanics of potential objections and accompanying instructions
- To properly protect the privilege, you need to know what is considered a waiver and how the scope of waiver is determined
 - Although the privilege belongs to the company, even inadvertent disclosure of privileged communications in discovery can lead to a finding of waiver
 - Waiver may extend to all privileged communications regarding the same subject matter, and can go even further in some circumstances
 - Using the privilege as a sword does not work; selective waiver is almost always a bad idea in litigation, especially where the waiver is made “on the fly” during a deposition
 - Again, preparation is key. Work with your outside counsel to identify areas of anticipated questioning likely to implicate potentially privileged communications

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H-B

Consider Confidentiality Concerns

- As you work to identify areas of deposition inquiry likely to raise potential privilege issues/concerns, consider whether your legal advice was sought and provided in confidence
 - Were the participants in your privileged communications (including cc's) appropriately limited to a need-to-know basis?
 - Has the confidential nature of your privileged communications been consistently respected and maintained?
 - Are your privileged emails and other written communications clearly identified as such?
 - Does your company have any policies and procedures concerning the solicitation and provision of legal advice from inhouse counsel? Have they been consistently followed?

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H-B

Consider Roles and Responsibilities as In-House Counsel

- You need to consider your various roles within your organization and how they might impact your deposition testimony, as well as your ability to identify and protect potentially privileged communications
 - Do you have legal and business roles and responsibilities within the company? Have those different roles always been clearly defined and delineated?
 - Do you have a written job description? Is it accurate? Is it complete?
 - Have you consistently made clear in what capacity you are providing advice, information and input to your colleagues?
 - Do your colleagues respect the distinct nature of your roles when they seek your legal advice, as opposed to business advice or counsel?

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H-B

Preparation of Rule 30(b)(6) Witness

- Rule 30(b)(6) witnesses are expected to be adequately prepared regarding what the entity should reasonably know, to the extent information is reasonably available
- Some courts have held that Rule 30(b)(6) witnesses must testify regarding facts they learned from conversations with counsel and from review of work product
 - Questioning that would elicit the mental impressions or opinions of counsel are generally prohibited

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H-B

Counsel as Rule 30(b)(6) Witness



- Designating an in-house attorney as a Rule 30(b)(6) witness creates particular risks
- If the designation is because counsel is most knowledgeable about facts:
 - Was the knowledge obtained over time through Attorney-Client privilege communications?
- May be difficult to make distinction between “facts” and communications
 - Was the knowledge obtained when the in-house lawyer was acting in a business capacity?
 - If the in-house lawyer also acted in legal capacity regarding the same subject matter, it may be difficult to draw lines
- Has the in-house lawyer been involved in litigation preparation generally?

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H-B

Best Practices

- Make strategic decisions regarding which types of documents to protect
- Reconsider dual titles and dual functions, where possible
- Make a practice of specifically referencing the “request for legal advice” or the “legal advice” being provided
- Address communications to counsel rather than using “cc”
- Label documents to be protected as “Attorney-Client Privileged” and “Confidential” (but perhaps not a label to every email transmitted)

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H-B

Best Practices (cont.)

- Separate factual recitations and business considerations from actual legal advice as much as possible, i.e. “here is what the law is” or “here is my legal advice”
- Create a new email rather than hitting the “Reply” option as an initial email may affect whether the reply is privileged
- Consider the information to be disclosed at board meetings and attendees
- Except where absolutely necessary, assume the privilege does not exist
- Where absolutely critical to protect privilege, involve outside counsel

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Best Practices (cont.)

- Avoid making in-house counsel an occurrence witness after an event
 - Verifying interrogatories
 - Submitting factual statement in support of an insurance claim
 - Signing employment termination letter
- Avoid designating in-house counsel as a 30(b)(6) or Most Knowledgeable Person witness

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H-B | 

Questions?

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St. Louis

Southern Illinois

Washington, D.C.

ALL THINGS AI: DEALING WITH PRIVACY, INTELLECTUAL PROPERTY AND COMMERCIAL ASPECTS OF AI IN YOUR BUSINESS

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GOWLING WLG – TORONTO

TODD BURKE

PARTNER
GOWLING WLG - OTTAWA
(MODERATOR)





ALL THINGS AI:

DEALING WITH THE PRIVACY, INTELLECTUAL PROPERTY AND COMMERCIAL ASPECTS OF AI IN YOUR BUSINESS

Corporate Counsel Institute – Virtual Meeting


T. BURKE, J. FERDINAND, S. KIM, K. O'BRIEN
August 11, 2020

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AGENDA

Topic	Speaker
1. Introduction	T. Burke
2. AI & Intellectual Property	S. Kim
3. Transactions Involving Data	K. O'Brien S. Kim
4. Ethics of AI & Privacy	J. Ferdinand-Hodkin
5. Practical Tips – Structuring AI Deals	K. O'Brien

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2

1. INTRODUCTION




3

1. INTRODUCTION

AI PRIMER


- *AI is everywhere. It is changing our lives and transforming the way we do business.*
- *Why now? More data, increased computing power and better algorithms.*
- *Increasing impact on the work we do as lawyers from the deals we do to the risks we advise on.*
- *Thank you for joining us for this primer on AI and the law.*



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1. INTRODUCTION

SPEAKERS




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1. INTRODUCTION

TODD J. BURKE



- Over 25 years of experience as a commercial litigator.
- Ranked in *Lexpert*, *Best Lawyers in Canada* and *Benchmark Litigation*. Recipient of the Client Choice Award for litigation in Ontario.
- Litigates complex commercial litigation and professional liability matters in a number of sectors including the technology industry.
- Former National Commercial Litigation Group Leader, former Leader of the firm's US Initiative and former Lead Trustee of the firm's Canadian Board of Trustees.
- Frequent lecturer on the legal risks of artificial intelligence.




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1. INTRODUCTION

KELSEY O'BRIEN



- Legal Lead for Accenture Operations North America
- Over 10 years experience practicing exclusively in the area of technology services
- Admitted to the Missouri Bar with a Juris Doctorate from Saint Louis University School of Law
- Member of the Association of Corporation Counsel, the American Bar Association, and the Bar Association of Metropolitan St. Louis

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1. INTRODUCTION

SELENA KIM



- Have practiced for 18 years exclusively in intellectual property
- Lawyer and Patent Agent qualified before the Canadian Intellectual Property Office and the United States Patent and Trademark Office
- Certified Specialist in Patent Law
- Active member of American Bar Association, ACC, National Asian Pacific American Bar Association

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1. INTRODUCTION

JAHMIAH FERDINAND-HODKIN



- Over 12 years of experience as a civil litigation lawyer
- Currently the Ottawa office lead for Commercial Litigation at Gowling WLG
- Certified in Risk Management
- Mother of three boys-7 and under (i.e. experienced negotiator)

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2. AI & INTELLECTUAL PROPERTY



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2. AI & INTELLECTUAL PROPERTY

Q. What is AI?

- Information technology that performs tasks that would ordinarily require biological brainpower to accomplish.
 - Examples: making sense of spoken language, learning behaviours, or solving problems.
- AI also includes a system's ability to correctly interpret external data, to learn from that data, and to use those learnings to achieve specific goals and tasks through adaptation.



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2. AI & INTELLECTUAL PROPERTY

PATENTING CONSIDERATIONS

Q. Has AI brought about changes in terms of protecting intellectual property?

- Is a patent even available?
 - Software patent issues in different jurisdictions.
- Will a patent be useful to you?
 - Enforceability can be more difficult – hard to know if others are using your technology.
 - Slow to acquire, and 20 year term may not fit technology life cycle.
- What are your competitors doing?
 - Trade secret / open source
 - Once a critical number start patenting in your field, not following that course can be risky.

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3. TRANSACTIONS INVOLVING DATA







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3. TRANSACTIONS INVOLVING DATA

Q. What do you need to take into consideration when entering into a transaction?

It is important to specify the **sources of the data** and **necessary data rights** so terms are scoped appropriately, and specify **which party will procure third party data** if applicable.

<p>For Client data provided for AI purposes...</p> <ul style="list-style-type: none">  Prerequisites for the data to be included to enable the correct training of the AI (e.g. data to be complete, correct, of sufficient quantity)  Usage rights for the technology service provider to both use the data for training the algorithm of the AI solution and improve their other related service offerings and AI  Appropriate regulated data and/or personal information processing terms if the AI accesses such data 	<p>With respect to procured third party data...</p>
---	--



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3. TRANSACTIONS INVOLVING DATA

AI-RELATED IP ASSETS IN TRANSACTIONS

Q. Are there other IP considerations when putting a transaction together?

- **Understand how the AI relates to the core assets:**
 - at the level of hardware, software, and data – this will help tailor the buyer's diligence.
- **Open Source Considerations**
 - Often come with obligations that need to be addressed.
- **Existing Licenses**
 - Which licenses in place and how they are being used need to be reviewed during investor due diligence.

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3. TRANSACTIONS INVOLVING DATA

RISKS & MITIGATION

Q. Are there ways to mitigate the risk of AI applications going awry?

When implementing an AI solution with human impacts, then lawyers should ask developers the following questions to validate the fairness of the AI system (design and delivery) proposed.



Use Cases

- Is building or implementing the AI Solution/ Machine Learning System a fair approach for the use case, based both on the existing client process and on the specific ML system we are proposing?



Approach

- When making the AI Solution/Machine Learning System, is the developer using a fair and explainable technical approach?



Results

- Once the AI Solution/Machine Learning System has been built, will the results be "fair" and responsible?
- Do the outputs of the algorithm correspond to what would constitute a fair response by a human?
- Are we periodically checking the outputs of the system to correct for bias?

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4. ETHICS AI & PRIVACY




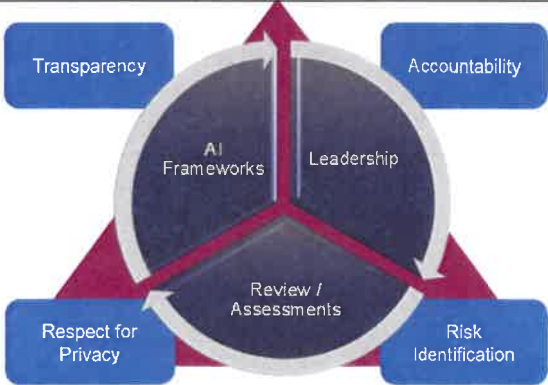
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4. ETHICS OF AI & PRIVACY

KEEPING ETHICS IN FOCUS

Q. How does an organization keep ethical issues associated with AI in focus?

- Ethics-by-design approach, tailored to the particular context and embedded throughout the organization.
- Revisit existing structures:
 1. Evaluate AI development processes;
 2. Implement audit systems for data inputs and generated outputs; and
 3. Document key decisions and develop tools to enhance decision-making traceability.
- Stay informed.



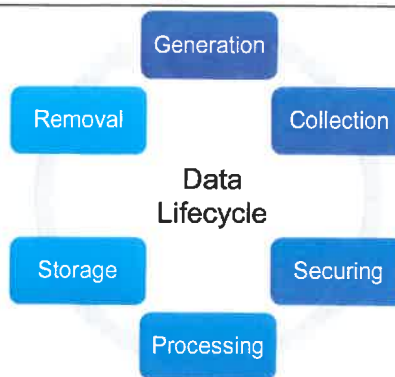
18

4. ETHICS OF AI & PRIVACY

PRIVACY ISSUES ASSOCIATED WITH AI

Q. What are some of the specific privacy issues associated with AI?

- Privacy and data security risks are generated throughout the AI product lifecycle.
- AI systems depend on the collection, transmission and analysis of large volumes of high-quality data.
- Privacy laws continue to apply.



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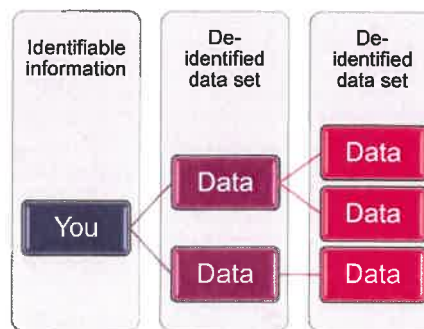
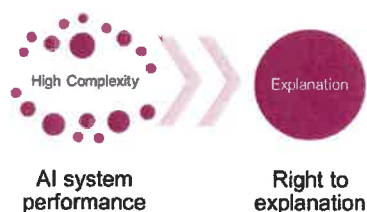
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4. ETHICS OF AI & PRIVACY

PRIVACY ISSUES ASSOCIATED WITH AI

Q. What are some of the specific privacy issues associated with AI?

- Risks of re-identification.
- AI may challenge privacy principles that form the basis of current privacy laws:
 1. Consent
 2. Purpose
 3. Limiting collection
 4. Right to an explanation



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4. ETHICS OF AI & PRIVACY

REGULATOR'S RESPONSE

Q. How are regulators in Canada and the United States responding to privacy concerns?

- Decentralized approaches to AI:

CANADA

- | | |
|--|--|
| Information and Privacy Commissioners | <ul style="list-style-type: none"> Consultation on the OPC's Proposals for ensuring appropriate regulation of artificial intelligence Joint Resolution |
| Treasury Board of Canada | <ul style="list-style-type: none"> Directive on Automatic Decision-Making |
| Legislative Instruments | <ul style="list-style-type: none"> <i>Act to Establish a Legal Framework for Information Technology</i> (Québec) |

UNITED STATES

- | | |
|-----------------------------------|---|
| Orders, Resolutions, Plans | <ul style="list-style-type: none"> Executive Order on Maintaining American Leadership in Artificial Intelligence (No. 13,859) |
| Bills | <p>In the areas of:</p> <ul style="list-style-type: none"> Algorithmic accountability Facial recognition technology Transparency |

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5. PRACTICAL TIPS – STRUCTURING AI DEAL



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5. PRACTICAL TIPS

Q. What are some practical tips when structuring an AI deal?



Scope

- Do a proof of concept or evaluation agreement initially
- Determine who will own the AI being developed and how the AI will be deployed
- Handle custom services work through a custom services contract



Flow Ups

- Flow up pertinent third party terms or obligations on which delivery is dependent
- Do not commit to accuracy or availability levels if third party vendors are not providing such commitments



SLAs

- Avoid hard-contractual commitments on the outcomes or strict SLAs
- Remove financial penalties associated with "accuracy"
- Ensure joint responsibility to investigate and refine algorithms / data



Pricing

- Price based on time & materials if possible since fixed price is higher risk
- Ensure payment will occur regardless of outcomes
- Include third party provider costs in the bundled fees

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QUESTIONS?

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Resume No.	Review 1	Review 2	Review 3	Review 4	Result
1	Discuss	Discard			Discuss
2	Discard	Discard			Discard
3	Keep	Keep	Keep		Keep
4	Discard	Discard	Discard		Discard
5	Discuss	Discuss	Keep		Discuss
6	Discard	Discard	Discard		Discard
7	Discard	Discard			Discard
8	Keep	Discuss	Keep		Keep
9	Discard	Discuss			Discuss
10	Discard	Keep			Discuss
11	Discard	Discard			Discard
12	Discard	Discuss	Discard		Discuss
13	Discuss	Discard			Discuss
14	Discuss	Discuss	Keep	Keep	Keep
15	Keep	Keep	Keep		Keep
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39	Discuss	Discuss	Keep		Discuss
40	Keep	Keep	Keep	Keep	Keep
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42	Discard	Discard	Discard		Discard
43	Discard	Discard			Discard
44	Discard	Discuss	Keep		Discuss
45	Keep	Keep	Keep		Keep

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PARTNER ED DOWD HAS BEEN HONORED BY BEST
LAWYERS AS “LAWYER OF THE YEAR” IN THE FIELD OF
CORPORATE COMPLIANCE LAW IN ST. LOUIS IN 2016,
2018 AND 2020.

PARTNER JIM BENNETT WAS HONORED BY BEST
LAWYERS AS “LAWYER OF THE YEAR” FOR BET-THE-
COMPANY LITIGATION IN ST. LOUIS IN 2019. HE WAS
ALSO RECOGNIZED IN 2017 AND 2018.

WITH DEEP EXPERIENCE AND PEER
RECOGNITION, DOWD BENNETT STANDS
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