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TECHNOLOGY MARATHON

**AI in Practice: Privilege, Work
Product, and Discoverability**

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Tuesday, October 06, 2026 | 1:00-2:00 pm ET

Presenters



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Agenda

- Generative AI (GenAI) & IG/eDiscovery Considerations
- Ethical Implications of GenAI
- New Frontier: Privilege and AI
- Hypothetical Discussion Scenarios
- Considerations & Best Practices
- Q&A

Generative Artificial Intelligence (GenAI) & IG/eDiscovery Considerations

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AI Rollout Needs **Discovery-Ready Governance**

Build governance now so discovery is defensible later.



DISCOVERY-READINESS LIFECYCLE



PRESERVE

Implement holds and preservation controls for AI data and outputs.



IDENTIFY

Find relevant AI-generated information across systems, tools, and data sources.



COLLECT

Collect complete, accurate sets of AI data with clear chain of custody.



REVIEW / PRODUCE

Review, apply privilege protections, and produce with confidence.



When organizations roll out AI, legal teams must know:



What AI creates



Where it lives



How long it is kept

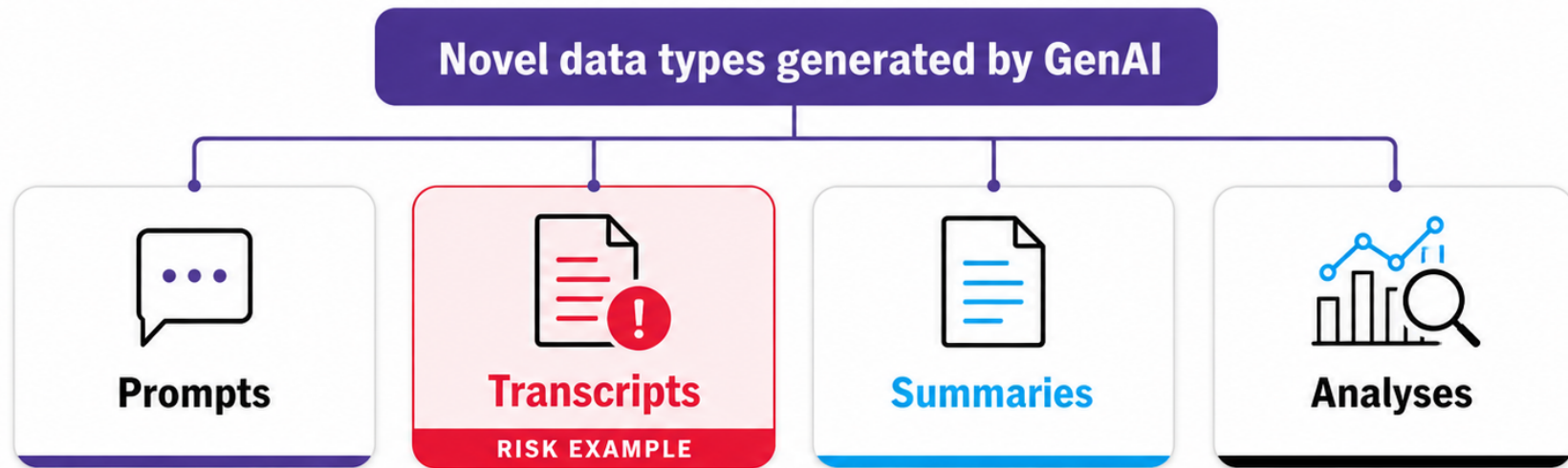


How it can be preserved and collected



Whether the process can be defended later

GenAI Creates Novel Records That Must Be Governed



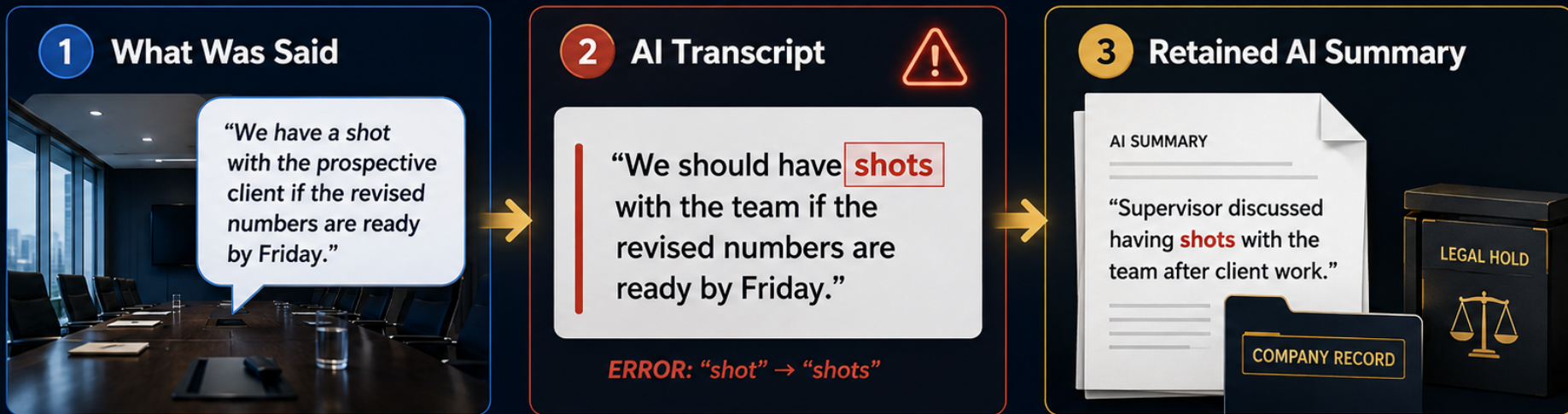
May be relevant to current or future disputes or investigations.



GenAI prompts and outputs should be part of an information governance and retention strategy.

When AI Transcripts Are Not Validated

A small transcription error can become a damaging company record.



MEETING



AI OUTPUT



RETAINED RECORD



INVESTIGATION / CLAIM



Nobody said it. Nobody wrote it. But the **unvalidated AI output created the record.**



Governance questions: validate AI-generated transcripts and summaries; decide what derivative AI records should be created, retained, preserved, and collected.

Ethical Implications and Considerations of GenAI

The background is a dark, abstract digital space. It features a dense field of binary code (0s and 1s) in various sizes and colors, including white, blue, and yellow. Some characters are larger and more prominent, while others are small and scattered. There are also glowing, streaky lines of light in blue and yellow, suggesting data flow or digital energy. The overall effect is a sense of a complex, high-tech environment.

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ABA Rules

Rule 1.1 (Competence)

Rule 1.6
(Confidentiality)

Rule 3.3 (Candor to the
Tribunal)

Rule 3.4 (Fairness to
Opposing Counsel and
Counsel)

Rule 5.1
(Responsibilities of
Supervisory Lawyers)

Rule 8.4 (Misconduct)



ABA Op. 512: GenAI Tools (July 29, 2024)

"To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide **competent** legal representation, to **protect** client information, to **communicate** with clients, to **supervise** their employees and agents, to advance only **meritorious claims** and contentions, to ensure **candor** toward the tribunal, and to charge **reasonable fees**."

Rule 1.1

Duty of 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.

CA Bar Guidance for the Use of GenAI in the Practice of Law

Before using GenAI, a lawyer should ***understand to a reasonable degree how the technology works, its limitations, and applicable terms of use and other policies*** governing the use and exploitation of client data by the product.

Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment. ***AI-generated outputs can be used as a starting point but must be carefully scrutinized.*** They should be ***critically analyzed for accuracy and bias, supplemented, and improved, if necessary.***

The duty of competence requires more than the mere detection and elimination of false AI-generated results.

Hallucinations v. Accuracy – Importance of Validation

Damien R. Charlotin has identified over 2,149 international cases as of October 6, 2026 (1,473 in the US) in which legal filings or decisions contain AI-produced hallucinated content – either fake citations or false legal arguments.

- Not just lawyers, but
- Pro se Litigants
- Judges/Arbitrators
- Experts

THE HUMAN ELEMENT: SAVING LAW FROM AI HALLUCINATION

THE THREAT:
AI HALLUCINATION

HUMAN INTERVENTION:
“SAVING THE DAY”

THE RESULT:
SOUND LEGAL GUIDANCE



Rule 1.3

Duty of Diligence –

A lawyer shall act with reasonable diligence and promptness in representing a client.



Is there (or will there be) an obligation to use AI tools if they aid in effective representation?

"I heard somebody say employers are risking malpractice by relying too much on AI. I think ***there may come a point where it's the opposite — where you're committing malpractice if you don't incorporate AI into your practice.***"

- District Judge Jesse Furman (S.D.N.Y.)
Chair of the Judiciary's Advisory Committee on Evidence Rules

Rule 1.6

Confidentiality –

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

CA Bar Guidance for the Use of GenAI in the Practice of Law

Lawyers should:

- Not input any confidential information of the client into any generative AI solution that lacks **adequate confidentiality and security protections**.
- **Anonymize client information** and avoid entering details that can be used to identify the client.
- Consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information **adheres to stringent security, confidentiality, and data retention protocols**.
- Review the **Terms of Use** or other information to determine how the product utilizes inputs.
- Ensure that the **provider does not share inputted information with third parties or utilize the information for its own use** in any manner, including to train or improve its product.

AI Ethics Update

Competence,
supervision, fees, and AI
meeting tools



Are AI obligations becoming part of the professional standard of care?

- **Alabama Formal Op. 2026-01:** basic due diligence on how GenAI and agentic AI tools work, what they can get wrong, and vendor/platform risk.
- **California COPRAC proposed amendments:** AI duties may become disciplinary.
- **Virginia LEO 1901/N.C. Op. 2024-1:** billing for AI-assisted work, alternative fees.
- **NYC Bar Formal Op. 2025-6:** AI notetakers, recording, transcription, summarization, client conversations, and privilege.
- **Florida Ethics Op. 24-1 / RPC amendments:** review GenAI work product (just like paralegal work) and verify AI research for accuracy and sufficiency.

**AI Governance is no longer just a technology issue.
It is becoming an ethics, supervision, billing, confidentiality, and privilege issue.**

New Frontier: Privilege and Discoverability of AI

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***United States v. Heppner* (S.D.N.Y. Feb. 17, 2026)**

- Judge Jed Rakoff of the S.D.N.Y. addressed a claim that documents generated by a publicly available AI tool (Claude) were privileged and protected as work product
- Held that the communication with the AI was not privileged



Not a communication with a lawyer



Not made in confidence



Not for the purpose of providing or receiving legal advice

- Not protected as work product as no attorney was involved
- Dicta suggests result would be different had the AI been secure and counsel involved – *Kovel* analysis

***Warner v. Gilbarco* (E.D. Mich. Feb. 10, 2026)**

- E.D. Mich. considered a discovery request for documents generated by plaintiff via AI
- The court rejected the request, finding that:

✓ The materials were prepared in anticipation of litigation under Rule 26(b)(3)

✓ A pro se litigant may assert work product protection

✓ Use of ChatGPT does not waive work product protection – waiver requires disclosure to an adversary or an individual that makes it likely it will reach the hands of an adversary, and ChatGPT is not an adversary here

Morgan v. V2X, Inc. (D. Colo. Mar. 30, 2026)

- Judge Braswell is part of the Executive Council of the Judicial AI Consortium (JAIC)
- Considered whether (1) a pro se litigant's use of AI is protected work product and (2) courts may restrict AI use in protective orders
- The court's findings:



Work product doctrine applies to a pro se litigant's AI use, including outputs



However, litigant must disclose the identity of the AI tool used



Court amended protective order to restrict use of AI with confidential information absent specific safeguards

Fortis v. Krafton | Factual Background

Delaware Chancery (March 16, 2026)

Krafton bought Unknown Worlds with a large earnout and seller-side operational-control rights; Subnautica 2 launch timing later became the flashpoint.

Factual Chronology

Oct. 2021

Acquisition and earnout framework

Krafton acquired Unknown Worlds for \$500M upfront plus up to \$250M in contingent earnout; EPA preserved Key Employees' operational control, including launch decisions.

2022-24

Post-closing operating model evolves

Cleveland and McGuire focused on Moonbreaker and later shifted toward film / special projects; Gill handled studio operations and Krafton communications.

Spring 2025

Subnautica 2 enters launch window

Unknown Worlds targeted an August 2025 early-access launch; internal Krafton projections showed a successful release could trigger a major earnout payment.

June 2025

Project X and control-point strategy

Kim consulted ChatGPT; Krafton pursued Project X, sought leverage on the earnout, locked down Steam publishing access, and posted public website messages.

July 2025

Terminations, data dispute, and lawsuit

Krafton terminated Cleveland, McGuire, and Gill, replaced them on the Board, and Fortis sued on July 10 after the disputed loss of operational control.

Key Factual Context

\$500M

upfront consideration

\$250M

potential earnout cap

- **Protected decision rights**
EPA gave the key employees control over roadmap, launch, planning, budgeting, partnering, and employee matters.
- **Krafton had visibility into role shifts**
Communications to Park / Kim and title, salary, and role changes appeared in Krafton-facing systems.
- **Launch timing drove the dispute**
Subnautica 2 early access was the studio's community-development model and the event tied to earnout exposure.
- **Data-download dispute**
Around the terminations, Key Employees downloaded large volumes of company data; the materials were later returned.

How the CEO's ChatGPT Use Came to Light

Fortis Advisors v. Krafton | Discovery + trial record | Generative AI evidence

ChatGPT use surfaced through the litigation record – produced internal messages, circulated strategy materials, and testimony.

Three Evidence Channels

- 1 Produced internal messages**
Kim discussed ChatGPT output with Park, including that the earnout would be “difficult to cancel.”
- 2 Circulated AI strategy materials**
Kim shared a “Response Strategy to a No-Deal Scenario” with Yoon, outlining pressure and takeover steps.
- 3 Trial testimony and deleted logs**
Kim admitted using ChatGPT and deleting relevant logs; the specific cancellation chat was gone.

Why It Mattered

The court connected AI output to later conduct: Project X, Steam access restrictions, public messaging, and legal defense preparation.

That trail supported the narrative that Krafton's stated reasons were post hoc, pretextual, and credibility-damaging.

Practical Takeaway

GenAI prompts, outputs, shared summaries, and chat history decisions can become evidence of intent, motive, and credibility.

Generative AI Use Became Evidence of Pretext

Fortis Advisors v. Krafton – key takeaways from the post-trial opinion

AI Evidence Chain

1 ChatGPT consulted during earnout dispute
CEO explored whether the sellers' contingent earnout exposure could be avoided or reduced.

2 AI response sharpened the strategy problem
The opinion notes ChatGPT said the earnout would be "difficult to cancel," followed by takeover planning.

3 "Project X" mapped to AI-generated tactics
Strategy materials included pressure, control points, public messaging, and legal-defense preparation.

4 Subsequent actions tracked the plan
Krafton locked Steam access, posted website messages, and built post hoc litigation justifications.

Why It Mattered

The AI trail helped the court connect motive, planning, and conduct.

- GenAI prompts and outputs can become discoverable intent evidence.
- AI-generated tactics may be compared against later corporate actions.
- AI use did not excuse the breach; it amplified pretext and credibility issues.
- Deal teams should treat GenAI use as preservation-, privilege-, and governance-sensitive.

Practical Takeaway

Use approved AI tools, preserve relevant outputs, and involve counsel before prompting on live disputes.

Hypothetical Discussion Scenarios

The background is a complex digital collage. It features a dark blue and black base with vibrant streaks of red, orange, and yellow light. Scattered throughout are numerous binary digits (0s and 1s) in various sizes and colors, some appearing to float or move. There are also faint, glowing rectangular shapes and lines that suggest a sense of depth and digital connectivity.

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Hypothetical No. 1

Customer Care AI, Confidentiality and Attorney-Client Privilege

- The Customer Care team begins piloting a GenAI tool to summarize customer complaint calls and company app support chats — loyalty account disputes, fuel and point-of-sale billing errors, and food safety complaints — and to draft follow-up communications to customers.
- The tool is provided by a third-party vendor. While the contract contains general confidentiality language, it is unclear whether prompts and outputs may be retained, reviewed, or used to train the model.
- To improve the summaries, employees paste call transcripts, loyalty account records, transaction and fuel purchase history, and customer correspondence into the tool.
- Employees also input general guidance from the Legal Department to inform the responses.
- In subsequent litigation with a customer over a disputed transaction and a related data privacy claim, the customer seeks production of all prompts and outputs from the tool.

Hypothetical No. 1 (cont.)

Customer Care AI, Confidentiality and Attorney-Client Privilege

?

Does the interaction with the GenAI breach confidentiality and/or data Privacy?

- What controls protect the customer's personal, loyalty, and payment card / transaction data?

?

Was the interaction with the GenAI privileged?

- Privilege requires a communication with counsel, not a GenAI.
- Did Legal direct the submission to the tool?
- Was the communication generated for the purpose of seeking or receiving legal advice?

?

Did submission of legal advice to the GenAI waive privilege?

- Were the legal materials submitted marked as protected?

?

Did submission of legal advice to the GenAI waive work product protection?

Does the answer change if counsel directed the employee to use the GenAI?

Hypothetical No. 2

AI-Assisted Legal Analysis

- An in-house lawyer is asked to advise on a potential regulatory issue involving marketing and disclosure practices for the company Rewards loyalty program and a fuel-savings promotion.
- To work more efficiently, the lawyer uses an enterprise version of a generative AI tool to summarize internal emails, draft a legal risk assessment, and generate proposed revisions to consumer-facing program terms and advertising copy.
- The lawyer includes excerpts from privileged communications with outside counsel, internal legal analysis, and notes prepared in anticipation of a possible regulatory inquiry (for example, an FTC or state attorney general consumer-protection review).
- In a subsequent regulatory investigation, the company asserts attorney-client privilege and work product protection over both the prompts and the outputs of the GenAI tool.

Hypothetical No. 2 (cont.)

AI Assisted Legal Analysis

?

Is the interaction with the GenAI privileged?

- Does the GenAI tool protect the confidentiality of information submitted?
- Generated by counsel?
- In anticipation of litigation?
- What does the user agreement say?

?

Is the interaction with the GenAI protected as work product?

- Did disclosure to the GenAI waive protection?

?

Would the outcome be different if the lawyer used Westlaw's AI Research tool?

Hypothetical No. 3

Use of GenAI to create Compliance Sensitive Content

- A marketing team uses a publicly available GenAI tool to brainstorm and wordsmith a social media campaign for a new food promotion and a fuel price / savings offer.
- While the content is engaging and compelling, it uses imprecise and overly broad savings and pricing claims that are not consistent with approved disclosures.
- Before submitting the campaign for legal approval, the team submits prior legal feedback to the tool to help it provide targeted guidance and learn the company's approach.
- The marketing team views the exercise as preliminary and so does not involve or advise Legal.

Hypothetical No. 3 (cont.)

Use of GenAI to create Compliance Sensitive Content

?

Does uploading legal advice to a public tool waive privilege?

- Was the interaction confidential?
- Does the tool retain and train on the submitted information?
- Was Legal informed and/or involved?

?

Does this increase risk to Compliance?

- Legal did not have the opportunity to review.
- Did a human verify and confirm the language (e.g., the pricing and savings claims)?

Hypothetical No. 4

HR / Employment Use of AI

- The People/HR team pilots a GenAI tool to screen applicant résumés for hourly associate roles and to summarize internal investigation interview notes (for example, a harassment or wage complaint).
- Employees paste applicant data, associate personnel information, and investigation notes into the tool; some notes reflect guidance from the Legal Department about the investigation.
- The vendor terms are unclear on retention, human review, and model training.
- In subsequent litigation — a discrimination charge or a wage and hour claim — the plaintiff seeks production of the tool's prompts and outputs and challenges the AI-assisted screening.

Hypothetical No. 4 (cont.)

HR / Employment Use of AI

?

Does the interaction breach confidentiality and/or employee data privacy?

?

Was the interaction with the GenAI privileged, and did submitting the investigation notes waive privilege or work product protection?

- Did Legal direct the use of the tool for the investigation?

?

Does AI-assisted résumé screening raise adverse-impact / anti-discrimination exposure requiring separate review?

?

Was there human oversight of the screening and investigation outputs before any decision?

Considerations & Best Practices

The background is a dark, abstract digital space. It features a dense field of binary code (0s and 1s) in various sizes and colors, including white, blue, and orange. Some digits are sharp and clear, while others are blurred, creating a sense of depth and motion. There are also glowing blue and orange lines and shapes, possibly representing data streams or network connections, scattered throughout the scene.

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Best Practices for Legal Team

Use Approved Enterprise Platforms

Use only authorized enterprise GenAI tools and approved use cases to protect confidentiality and compliance.

Maintain Human Oversight

GenAI does not replace legal judgment; human review and validation of AI-generated content is essential.

Protect Privilege & Work Product

Assume GenAI content is discoverable; explicitly indicate when legal advice is given; label and limit sharing.

Special Considerations for GenAI Meeting Tools

Require approval, participant controls, and post-meeting review; refrain from using GenAI tools for highly sensitive discussions.



Best Practices for Non-Lawyer Employees

Use Approved Enterprise Platforms

Use only authorized enterprise GenAI tools and approved use cases to protect confidentiality and compliance.

Review and Correct for Accuracy

Educate nonlawyers that GenAI content is discoverable and may be subject to production; responsible use requires human review and correction of inaccurate statements.

Direct Legal Questions to Human Lawyers

Train non-lawyers to direct all legal questions/requests to in-house counsel; do not seek legal advice or analysis from GenAI tools.

Protect Privilege & Work Product

When using GenAI at the direction of counsel, label prompts/outputs accordingly and limit sharing.



The background is a dynamic, abstract digital composition. It features a dark blue and black color palette with vibrant streaks of light blue and white. Binary code (0s and 1s) is scattered throughout, some appearing as large, semi-transparent characters and others as smaller, more numerous digits. Glowing lines and patterns suggest data flow or digital architecture. The overall effect is one of high-tech, futuristic digital space.

Q&A

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Tara Lawler is a recognized leader at the intersection of technology, data, artificial intelligence (AI), and litigation risk. Tara is the deputy practice group leader of the firm's data analytics and governance practice. With 25 years of experience in eDiscovery, information governance, data privacy, and security, she helps clients manage the complex legal and technical issues that arise throughout the data lifecycle. Clients value her experience as national discovery counsel, including her ability to implement consistent and defensible discovery strategies across portfolios of litigation and investigations.

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Matthew J. Hamilton is a civil litigator and eDiscovery counsel with more than 30 years of experience representing clients in complex pharmaceutical and medical products liability, data breach, antitrust, and commercial litigation, with an emphasis on the defense of federal multidistrict litigation (MDL), coordinated state court actions, class actions, and other complex matters. His practice encompasses all phases of eDiscovery, from preservation and collection to cost-effective review and production. Matt also counsels clients on the legal and practical implications of the use of generative artificial intelligence (AI). Matt is certified in legal project management and legal lean sigma, with a singular focus on client value.

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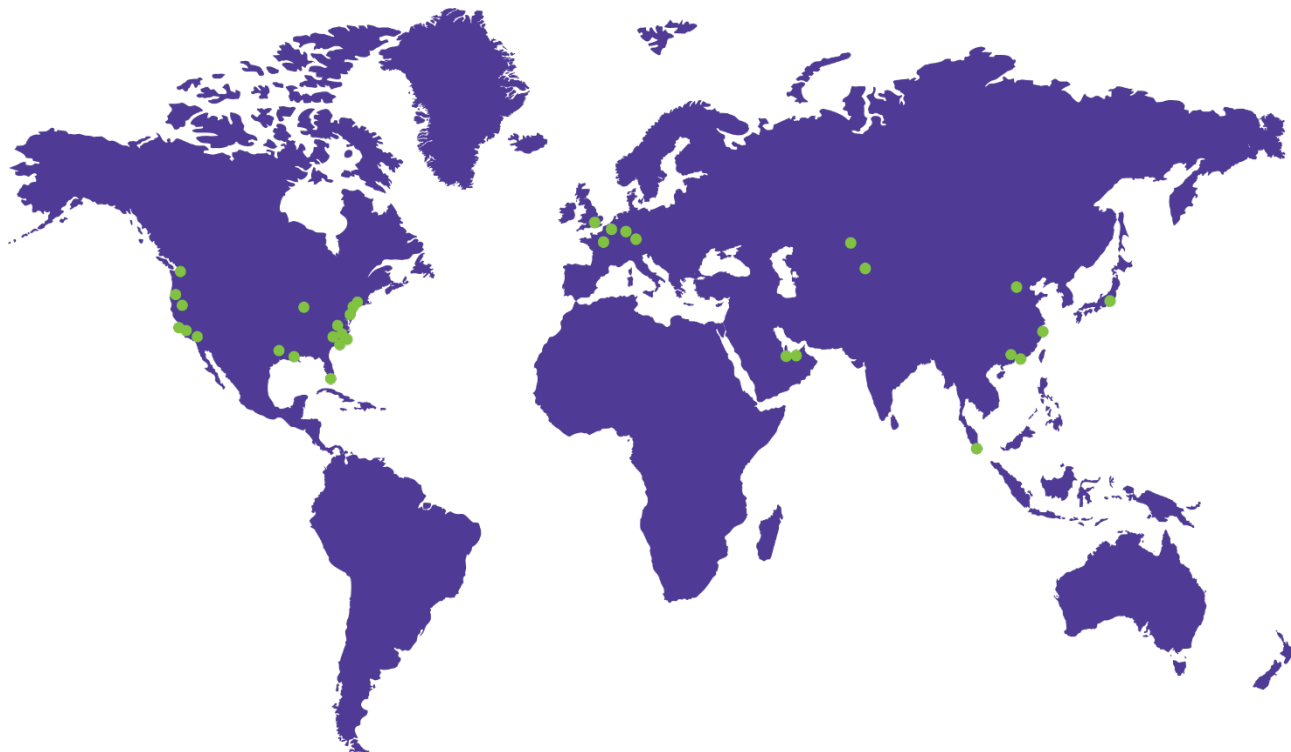
Leonard Impagliazzo advises clients at the intersection of complex litigation, data, and emerging technology. His practice focuses on eDiscovery, internal investigations, information governance, and data privacy, with particular emphasis on large-scale disputes and investigations. He develops practical and defensible strategies for the preservation, collection, review, privilege analysis, and production of electronically stored information (ESI), helping clients manage legal risk, cost, and operational complexity.

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