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SILICON VALLEY FIRST CUP OF COFFEE SEMINAR SERIES

UPCOMING SEMINARS:

Artificial Intelligence (AI) Boot Camp

- | | |
|------------|---|
| January 12 | Computer-Implemented Inventions in Biotechnology and Healthcare, Patentability from European and US Perspective |
| January 13 | M&A and Investment into AI Companies |
| January 19 | Software As a Medical Device: US FDA Regulatory and Legal Framework |
| January 20 | Patent and Trade Secret Protection for Inventions That Use AI |
| January 21 | AI in Hiring and Recruiting |
| January 28 | AI and Copyright |



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- | | |
|-------------|--|
| February 2 | The Ethics of Artificial Intelligence for the Legal Profession |
| February 3 | AI and Data Privacy |
| February 4 | Patents for MedTech AI: Opportunities and Pitfalls |
| February 9 | IP Landscape of AI Hardware Startups |
| February 10 | The Risks of Bias and Errors in AI-Enabled Decision-Making |
| February 11 | AI in Digital Advisory Offerings: Regulatory Considerations |
| February 16 | Bias Issues and AI |

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THE ETHICS OF ARTIFICIAL INTELLIGENCE FOR THE LEGAL PROFESSION

Tess Blair and Andrew J. Gray IV

February 2, 2021



Presenters



Tess Blair

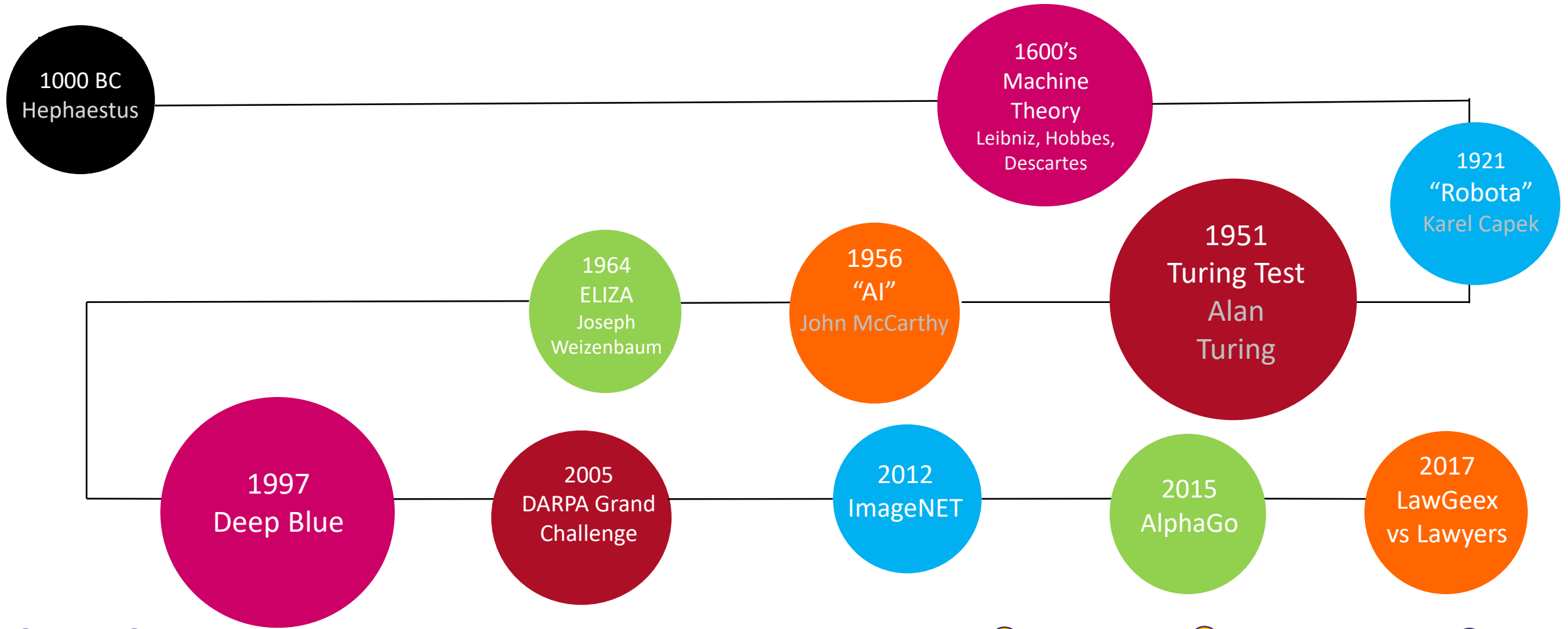


Andrew J. Gray IV

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Historical Perspective



Adoption of AI in the Legal Profession

- Necessity is the Mother of Adoption
 - 2005: Anne Kershaw publishes scholarly article “Automated Document Review Proves Its Reliability”
 - 2006: NIST and DoD establish TREC Legal Track
 - 2009: Recommind tries to trademark “Predictive Coding”
 - 2012: Courts Approve “TAR”
 - 2014: Machine Learning and natural language processing enters Legal
 - 2016 to present: Concentrated adoption of machine learning and natural language processing in discovery and contract management
 - 2021 and beyond: Process automation, predictive analytics, semantic analysis will offer broader application across controversy and transactional practices

LEGAL AI NOW



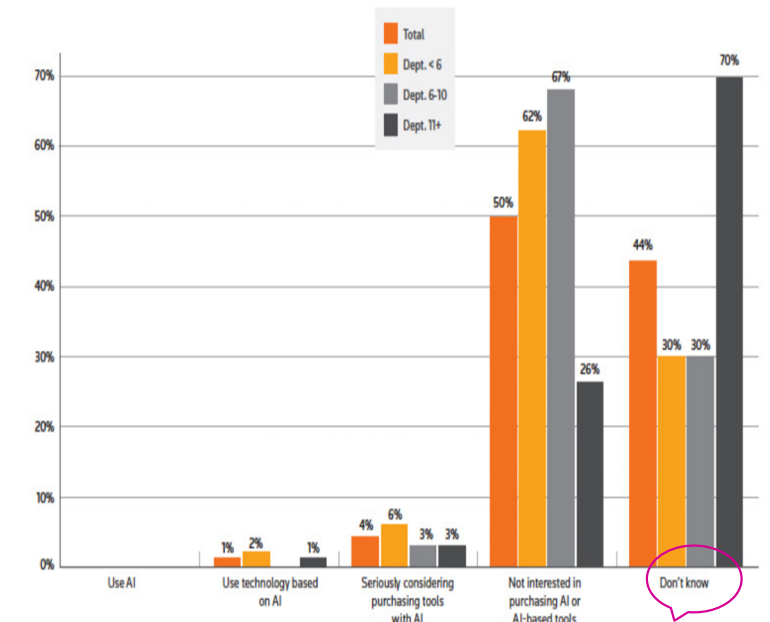
Current Perceptions of AI use in Legal Department

	TOTAL (N=207)	DEPT. < 6 ATTYS (N=105)	DEPT. 6-10 ATTYS (N=30)	DEPT. 11+ ATTYS (N=72)
Not familiar with AI in Corp Legal	34%	45%	35%	30%
Still in beta/infancy	6%	7%	7%	6%
Could be effective/helpful	6%	2%	7%	11%
Best suited for large departments	5%	6%	-	6%
Negative/can't replace humans	8%	7%	7%	19%
None	22%	27%	27%	14%

Not Familiar

Negative: Can't Replace Humans

Current or Planned AI use in Legal Departments



Don't Know

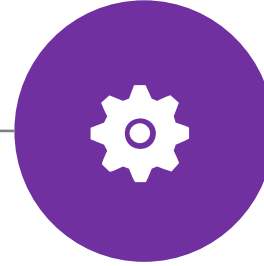


LEGAL AI NOW

CLASSIFICATION TOOLS

Platforms that use machine learning algorithms to identify, extract, categorize and organize information.

Example Use: Find all change of control provisions in a large group of contracts.



AUTOMATION TOOLS

Platforms that use machine learning algorithms to automate a task or systematize a process.

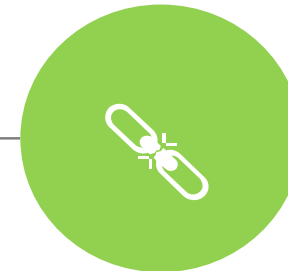
Example Use: draft documents using automation software that requires completion of a simple worksheet.



RESEARCH TOOLS

Platforms that use machine learning algorithms and NLP to search and retrieve information relevant to a legal question and then deliver the information in an accessible fashion.

Example Use: Ask a chatbot a question about employment law.



PREDICTION TOOLS

Platforms that digest unstructured data to provide information and make predictions.

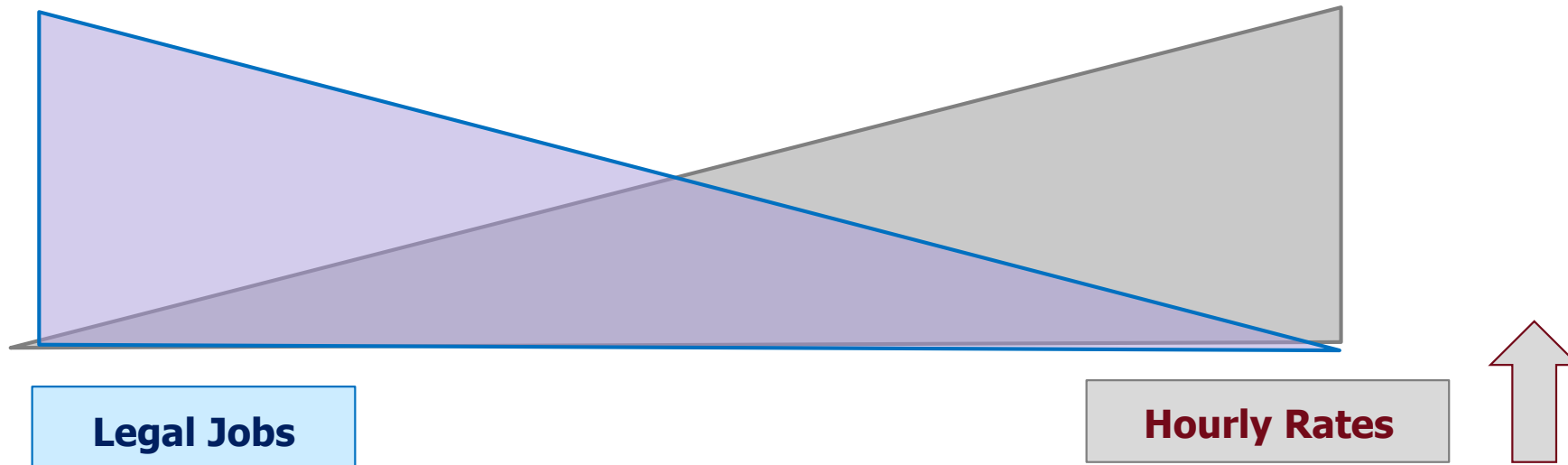
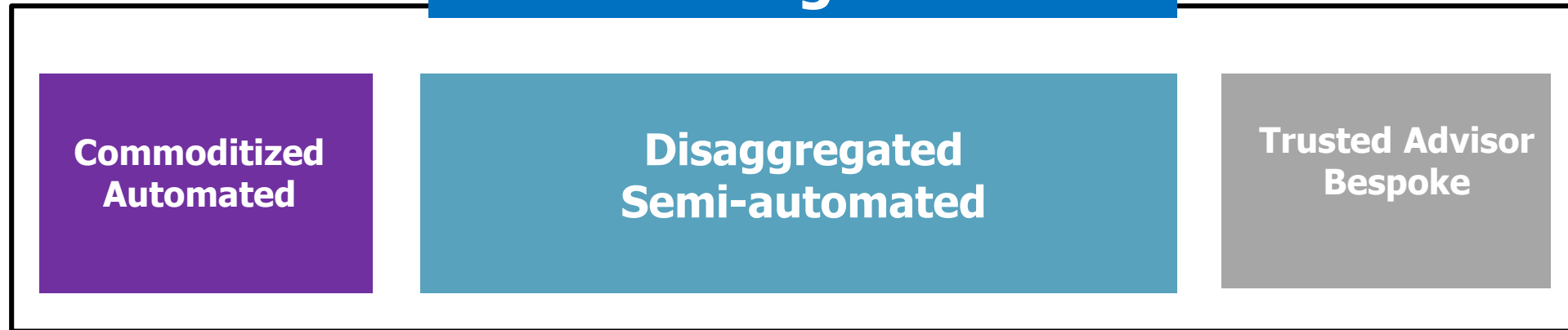
Example Use: What is the likelihood this judge will grant summary judgment?



Image Recognition	Facial recognition, image analysis or find all the cats on the internet
Recommendation Systems	Based on user profile and activity, system makes user specific recommendations
Machine Learning	Predict future outcomes from analysis of historical data
Anomaly Detection	Analyze data to identify patterns and anomalies (noise and signal) to distinguish between expected or normal activity and aberrant or unexpected activity
Network Analysis	Identify linked activities or behaviors across networks or demarcated constituent groups
Multi-Dimensional	Identify patterns, connections and relationships by evaluating layered diverse datasets



Practice Segmentation



We've still got some time ...

Machine Learning



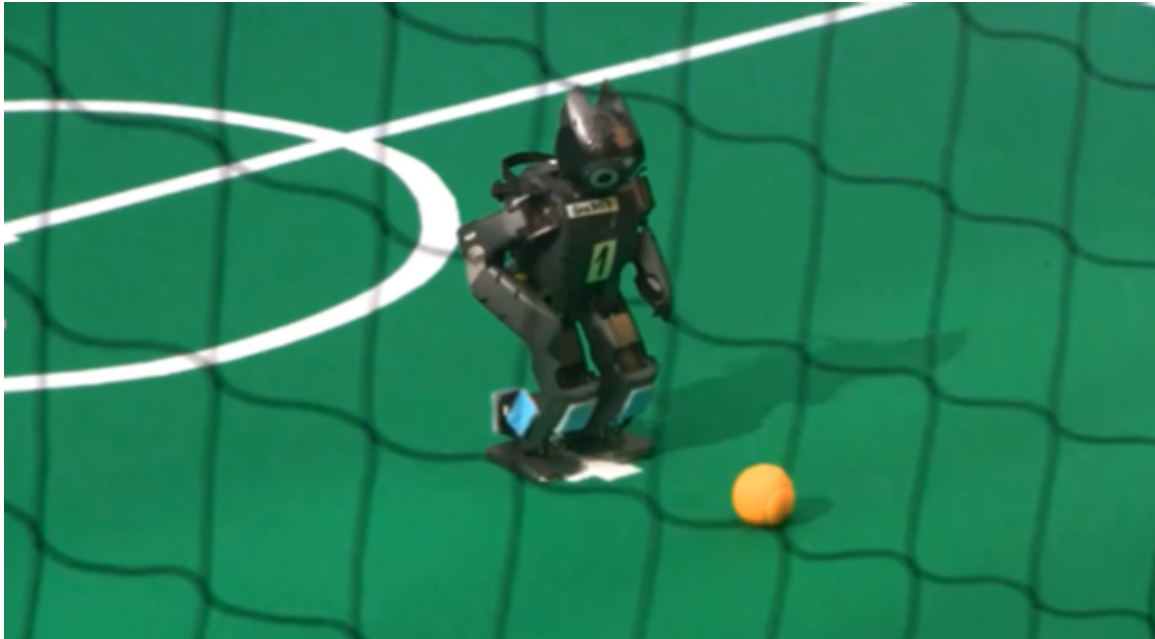
Natural Language Processing



“Beyonce brought the house down last night!”

But maybe not that much ...

Deep Learning



2015

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2020

The Lawyer's Perspective

Advising Clients Developing or Using AI

- Bias
- Privacy
- Interpretability
- Moral Dilemmas

Policy Questions

- UBI
- The Singularity
- Extinction

Using AI in the Practice of Law

- Competence
- Confidentiality
- Supervision
- Unauthorized Practice

THE ETHICS OF AI

ADVISING CLIENTS

Advising Clients Developing or Using AI

- Bias
- Privacy
- Interpretability
- Moral Dilemmas

Bias



Built in Bias?

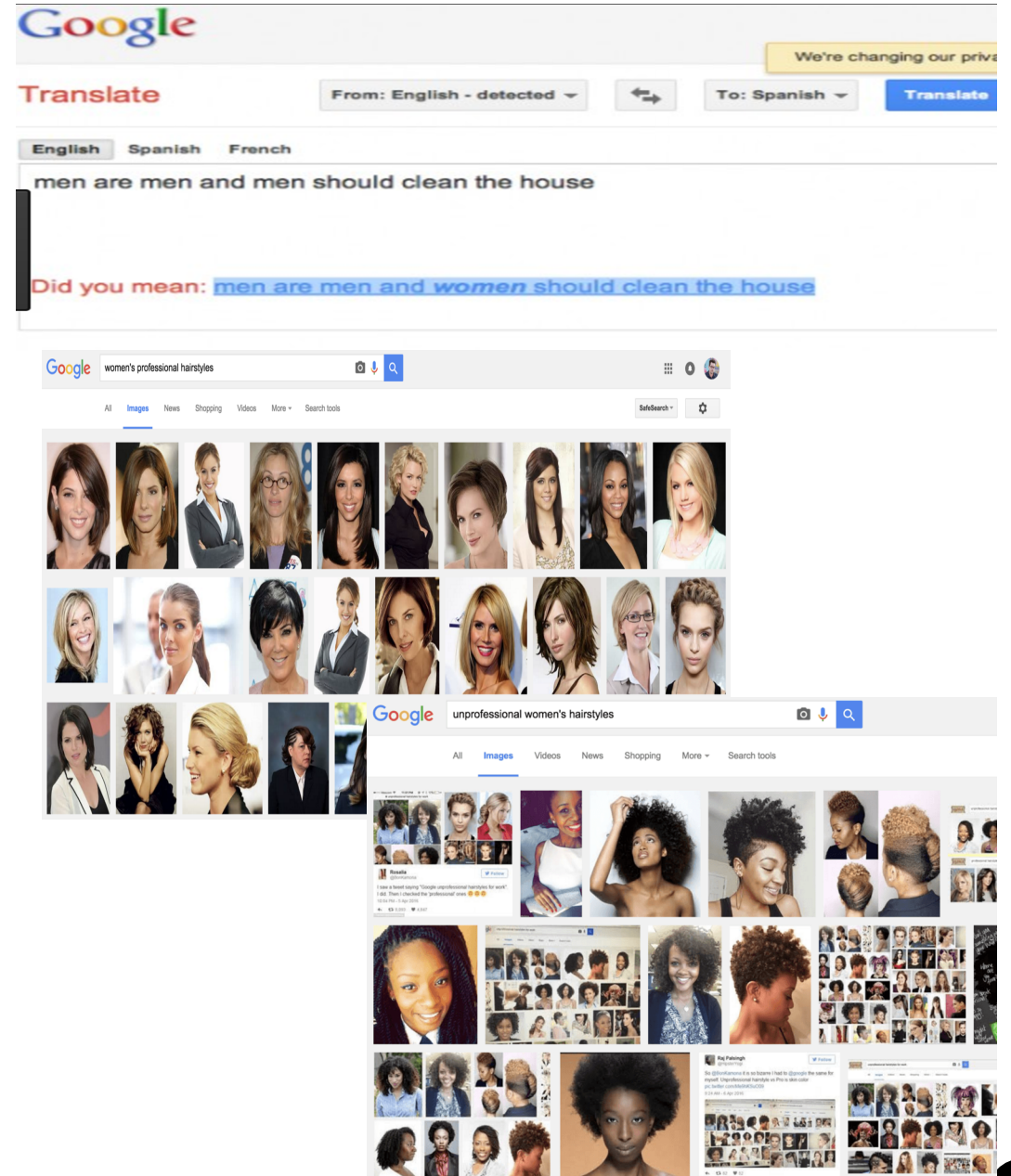
Studies reveal that AI can embed bias in automated systems. Machine learning can easily detect and learn from explicit and implicit human bias in data. Bias is a persistent problem for AI but elimination of it has proven vexing.

AI developers and AI platform sponsors are cautioned to be vigilant and to build bias detection into any process that uses AI-based tools to select or exclude.

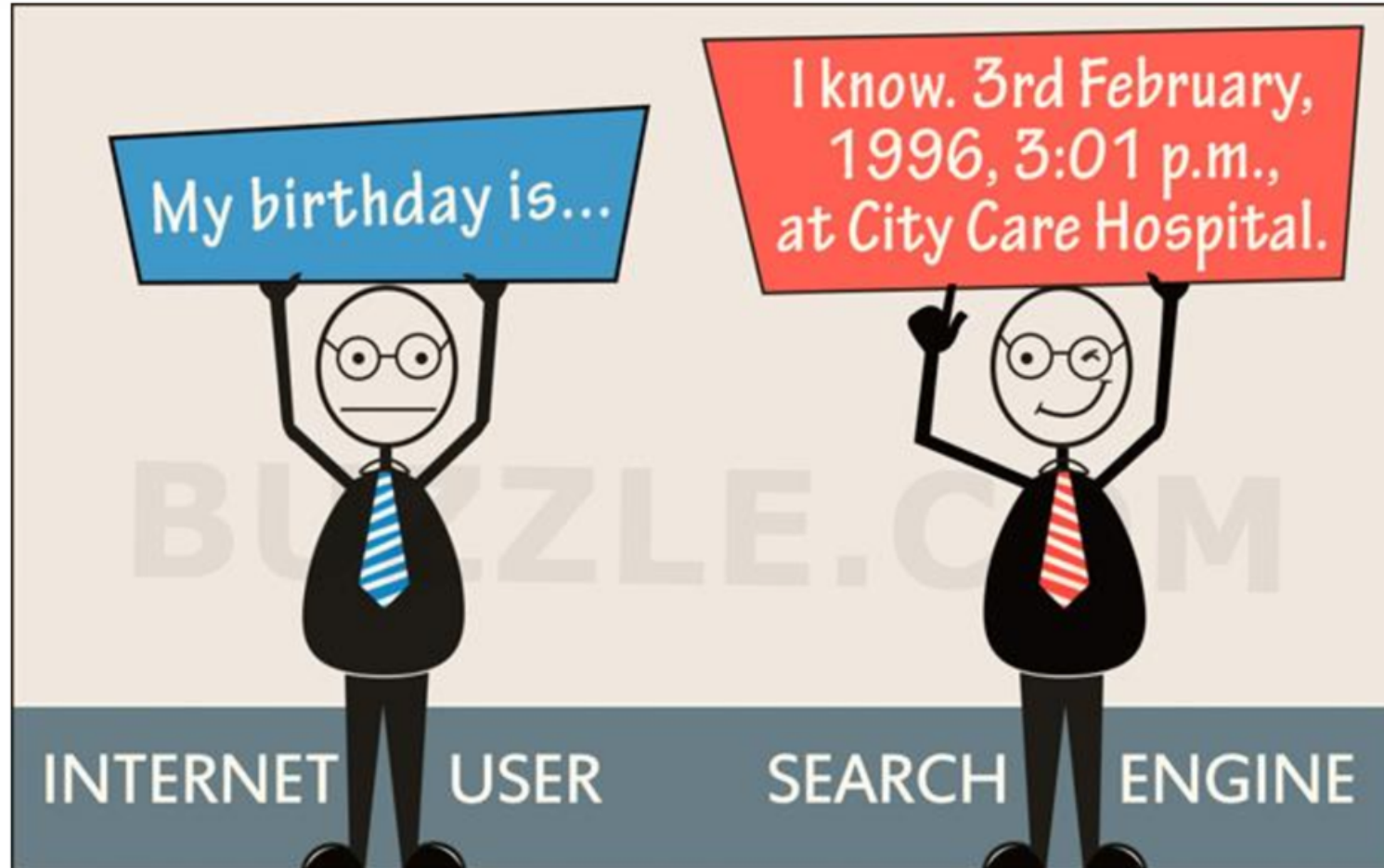
Observable Sources of Bias:

- Data
- Users
- Personalization/Bubble
- Similarity

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Privacy



<https://techspirited.com/ethical-issues-of-internet-privacy>

Privacy:

- **AI requires massive amounts of data and huge engines to work:**
 - Acquisition of data is necessary to aid machine learning and predictive output
 - GDPR, CCPA and emerging domestic data protection laws across the country rely in large part on user consent, often freely given in accepting terms of service in order to access applications
 - Caution should be used in relying on consent. Acquirers of such data may be prohibited from using this data beyond stated purpose for which consent was given.
 - Apps that track and collect user+ data face claims of privacy violations even where Terms of Service seek consent.



Interpretability



The Problem of Interpretability

- Most AI technology is a black box. Based on outcomes, **we know it works, but we don't know how or why**. The technology is too complex for humans to comprehend how it makes decisions.
- “No one really knows how the most advanced algorithms do what they do. That could be a problem.”
 - -MIT Technology Review



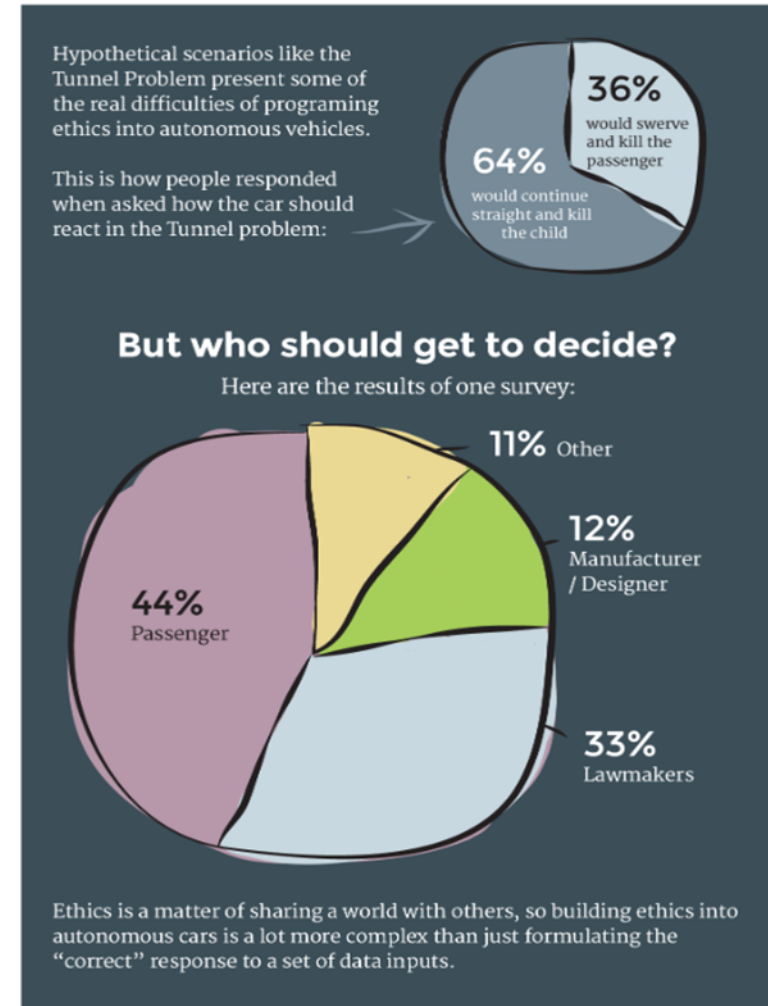
Moral Dilemma



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Moral Dilemma: AI and the problem of moral decisions

- Can we regulate or prohibit AI decisions that have moral consequences?
- Who should decide:
 - The designer
 - The user
 - The law
- The Tunnel Problem
- www.moralmachine.mit.edu



Current Regulation of AI

Partnership on AI:

- created by MS, Amazon, Google, IBM, Facebook and DeepMind
- Goal of developing best practices for using AI to benefit people and society

EU parliament:

- Calls for legislation to regulate, including ethical standards requiring respect for human dignity

DARPA:

- Developing rules and standards, including ethics to ensure safe and trustworthy use

Obama Administration:

- Called for fairness, safety and governance in AI development

Current Laws and Regulations

- Illinois Biometric Information Privacy Act
- Illinois Artificial Intelligence Video Interview Act
- State v. Loomis

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<https://www.thedrum.com/industryinsights/2020/03/11/ai-and-ethics-time-talk-about-responsibility>

Practicing with AI

Using AI in the Practice of Law

- Competence
- Confidentiality
- Supervision
- Unauthorized Practice

Using AI in Practice

- Practicing with AI:
 - Can a lawyer perform her professional responsibilities **competently** where she does not understand how the technology works?
 - Is that bot practicing law?
 - How does a lawyer provide adequate supervision where the lawyer does not understand how the work is being done or even “who” is doing it?
 - How will a lawyer explain decisions made if he does not know how those decisions were derived?

Current Guidance

- Rules of Professional Responsibility
 - Rule 1.1: Duty of Competence
 - Rule 1.6: Confidentiality
 - Rules 5.1 & 5.3: Supervision
 - Rule 5.5: Unauthorized Practice
- ABA Resolution 112 issued August 2019
- Case law

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.

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

Comment 8 to Rule 1.1 adopted in 2012

Under Rule 1.1, lawyers also must have a basic understanding of how AI tools operate. While lawyers cannot be expected to know all the technical intricacies of AI systems, they are required to understand how AI technology produces results. As one legal commentator notes, “[i]f a lawyer uses a tool that suggests answers to legal questions, he must understand the capabilities and limitations of the tool, and the risks and benefits of those answers.”²⁸

ABA Resolution 112, August 2019

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.

How does a lawyer protect the confidentiality of client information when using AI? When using a service provider that uses AI? When using a service provider that uses AI in the cloud? When using a service provider that uses AI in the cloud that crowdsources its algorithms or training?

Under ABA Model Rule 1.6, lawyers owe their clients a generally duty of confidentiality. This duty specifically requires a lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”³³ The use of some AI tools may require client confidences to be “shared” with third-party vendors. As a result, lawyers must take appropriate steps to ensure that their clients’ information appropriately is safeguarded.³⁴ Appropriate communication with the client also is necessary.

To minimize the risks of using AI, a lawyer should discuss with third-party AI providers the confidentiality safeguards in place. A lawyer should inquire about “what type of information is going to be provided, how the information will be stored, what security measures are in place with respect to the storage of the information, and who is going to have access to the information.”³⁵ AI should not be used in the representation unless the lawyer is confident that the client’s confidential information will be secure.

ABA Resolution 112, August 2019

Rule 5.1/5.3

Duty to Supervise - A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct ... [and] a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

How does an attorney supervise an algorithm if the code is not visible and the calculations happen across a vast pool of data at a rate of millions per second?

In 2012, the ABA adopted of an amendment to Model Rule 5.3 which changed the title of Rule 5.3 from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance.”

“The change clarified that the scope of Rule 5.3 encompasses non-lawyers, whether human or not.”

There are some tasks that should not be handled by today’s AI technology, and a lawyer must know where to draw the line. At the same time, lawyers should avoid underutilizing AI, which could cause them to serve their clients less efficiently.³⁹ Ultimately, it’s a balancing act. Given that many lawyers are focused on detail and control over their matter, it is easy to see why “the greater danger might very well be underutilization of, rather than overreliance upon, artificial intelligence.”⁴⁰

ABA Resolution 112, August 2019

Rule 5.5

Unauthorized Practice of Law - A lawyer who is not admitted to practice in this jurisdiction shall not, except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Under Lola, is document review considered the practice of law? Is legal research? What about due diligence? Negotiating an NDA? (All of these can be done by machine).

In 2015, the Second Circuit distinguished between tasks performed by machines and tasks performed by lawyers (*Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, No. 14-3845 (2d Cir. 2015)). The Second Circuit found that **tasks that could otherwise be performed entirely by a machine could not be said to fall under the practice of law**. Consequently, Lola raises the possibility that machines can reclassify tasks that were traditionally considered the practice of law as now falling outside of the scope of the practice of law. ([JD Supra - AI and Professional Conduct](#))

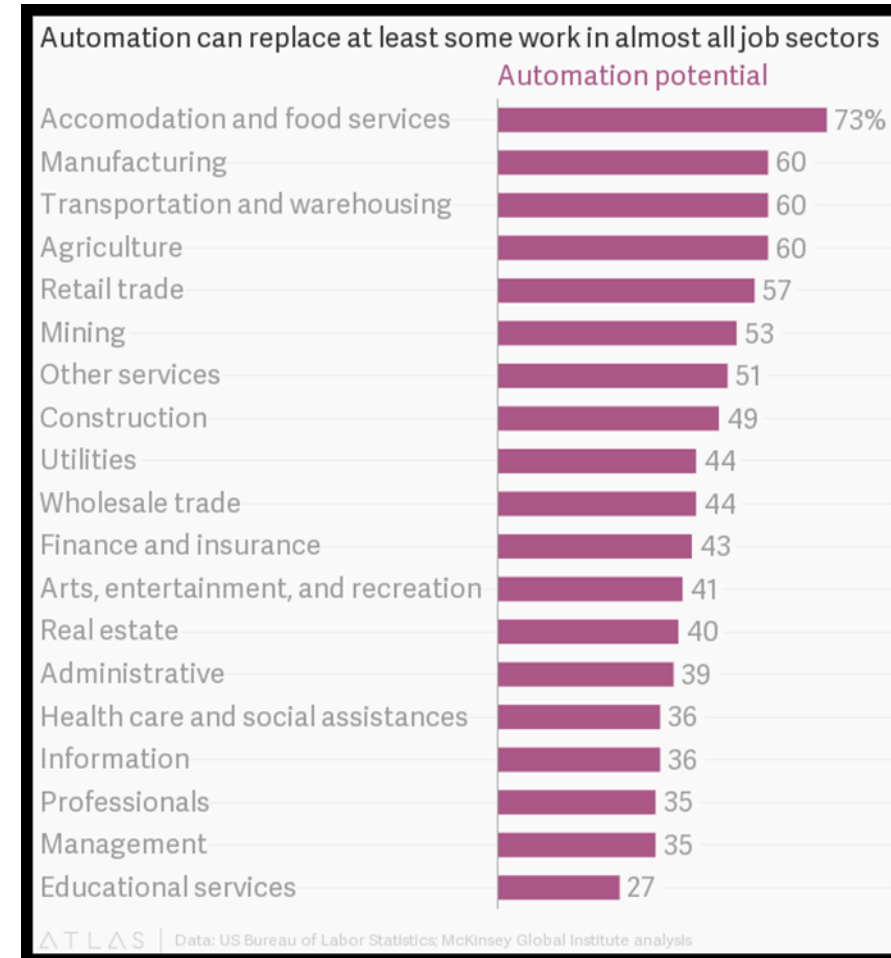
Policy Questions

Policy Questions

- UBI
- The Singularity
- Extinction

Future of Work: Will AI result in mass human displacement in the workforce?

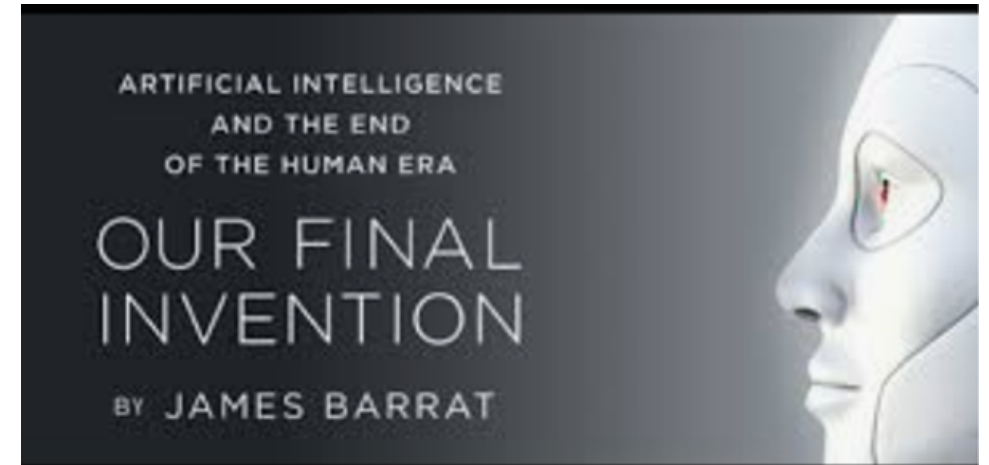
- Oxford University Study in 2013 predicted that 47% of US jobs are at risk of automation/AI replacement.
- Bank of America predicts that by 2025 the “annual creative disruption impact’ from AI will be \$14 to \$33 Trillion, including \$9 Trillion in reduced labor costs of knowledge workers, \$8 trillion reduction in manufacturing and healthcare and \$2 trillion from self-driving vehicles and drones.
- McKinsey calculates that AI is happening ‘ten times faster, at 300 times the scale, with 3000 times the impact of the industrial revolution.’
- Routineness of job, not labor or education required, is the primary indicator of automation.



The Singularity: The point at which technology becomes smarter than humans.

- Should developers of AI tools be concerned with technology that exceeds human cognition?
- Do computers smarter than us present a threat?
- Do those threats outweigh potential benefits and opportunities?
- Should brakes be built into AI systems?
- Should governments regulate AI development? Can they?
- Can these competing concerns even be balanced by humans? Who decides?

**2045. Be
there.**



Is AI an Existential Threat to Humanity?



I'm sorry Dave. I'm afraid I can't do that.



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APPENDIX

RECOMMENDED READING/VIEWING

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Recommended

- Rise of the Robots: Technology and the Threat of a Jobless Future by Martin Ford (2016).
- AlphaGo, a documentary about a challenge match between Google's Deep Mind AI Algorithm and Lee Sedol, the legendary Go Master. www.alphagomovie.com. **Streaming on Prime Video.**
- **Underwater Dreams (or the Hollywood version called Spare Parts): High school robotics team beats MIT team building an underwater robot from Home Depot parts.** www.underwaterdreamsmovie.com. **Also on Prime Video.**
- NOVA: Rise of the Robots, streaming on PBS.
- DARPA Robotics Challenge, **on Prime Video.**

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- Gricks, Ambrogi, A Brief History of Technology Assisted Review, Law Technology Today, November 17, 2015. <https://www.lawtechnologytoday.org/2015/11/history-technology-assisted-review/>

APPENDIX

MODEL RULES OF PROFESSIONAL RESPONSIBILITY

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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.

An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law.

THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT FORMAL OPINION NO. 2015-193

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

Comment 8 to Rule 1.1 adopted in 2012

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ABA Resolution 112, August 2019

Rule 1.4

Duty to Communicate - A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.

Must an attorney obtain her client's consent if she intends to use AI? When she intends to use her client's data to train AI? What if the AI does not retain any information about the client?

A lawyer should obtain approval from the client before using AI, and this consent must be informed. The discussion should include the risks and limitations of the AI tool.³⁰ In certain circumstances, a lawyer's decision *not* to use AI also may need to be communicated to the client if using AI would benefit the client.³¹ Indeed, the lawyer's failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer's fees to be reasonable. Failing to use AI technology that materially reduces the costs of providing legal services arguably could result in a lawyer charging an unreasonable fee to a client.³²

ABA Resolution 112, August 2019

Rule 1.5

Fees - A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include ... the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

Must an attorney use AI if it would lower a client's fees?

Rule 1.5 requires that a lawyer not enter into an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Relevant factors to consider in determining reasonableness is time/labor, novelty of the issue, and customary fees. If using AI can reduce significantly the time it takes to conduct legal research, complete first drafts of routine documents, or review a contract for defined terms and consistency, then failing to use such technology may ultimately result in charging the client an unreasonable fee, a violation of Rule 1.5.

<https://insolvencyintel.abi.org/bankruptcyarticles/ethical-use-of-artificial-intelligence-in-the-legal-industry-the-rules-of-professional-conduct>

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QUESTIONS?

AI

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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/
topics/coronavirus-
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



Biography



Tess Blair

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Tess Blair is a litigator and legal entrepreneur who has practiced at the intersection of law, technology, and design for more than two decades. Tess is the founder and leader of Morgan Lewis's eData practice, a data-driven practice that combines great lawyering with technology and design to enhance the delivery of legal services.

Biography



Andrew J. Gray IV

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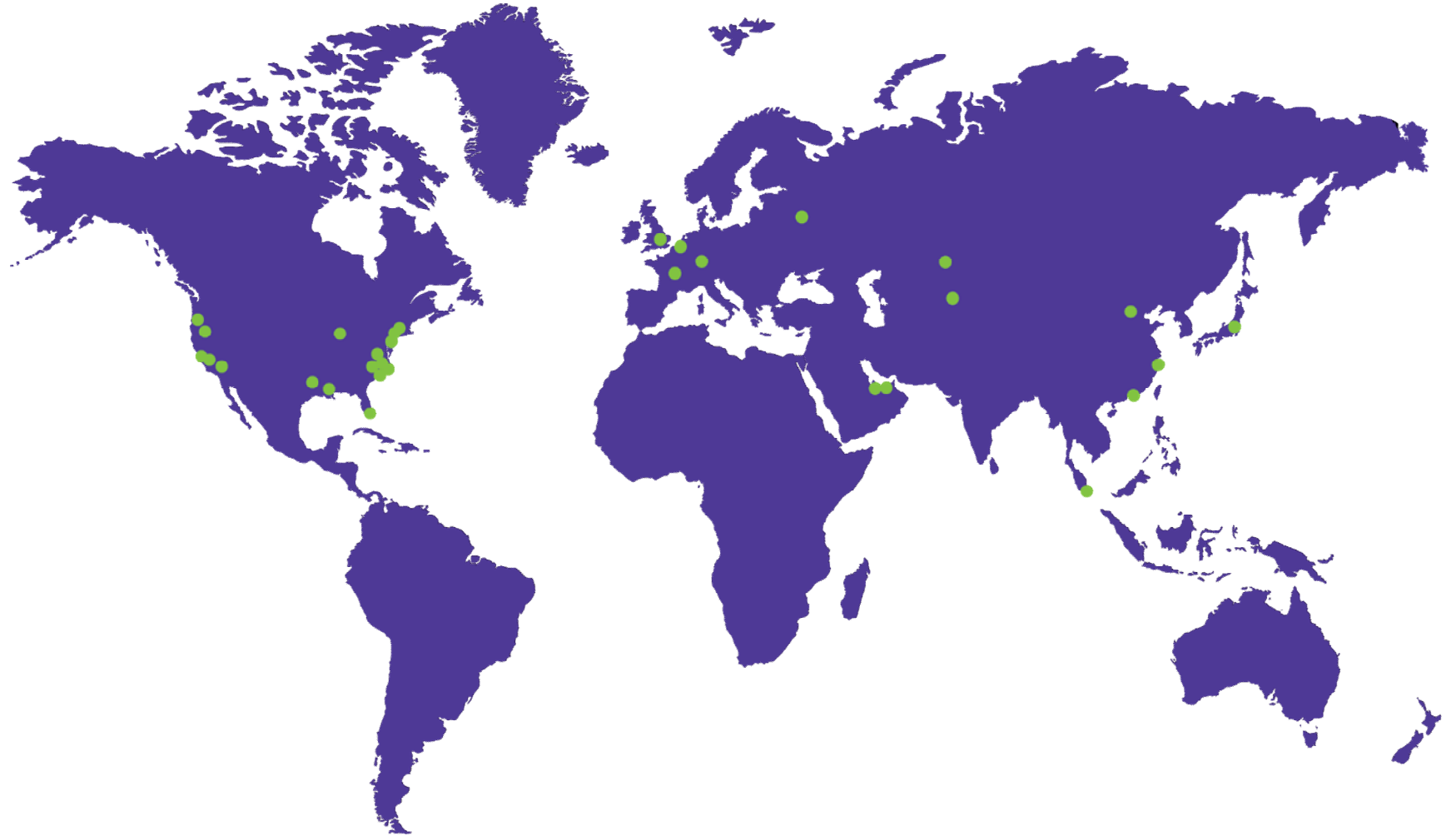
Serving as the leader of Morgan Lewis's semiconductor practice and as a member of the firm's fintech and technology practices, Andrew J. Gray IV concentrates his practice on intellectual property (IP) litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
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