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**2023 ANNUAL
PRIVATE FUND
INVESTORS ROUNDTABLE**

THE ETHICS OF AI IN THE LEGAL PROFESSION

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Presenters



Scott A. Milner
Partner, Philadelphia

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AI Defined



"[U]se of automated, computer-based means by which large amounts of data are processed and analyzed to reach **reasoned conclusions.**"

ABA Op-ed

"A core objective of AI research...has been to automate or replicate intelligent behavior."

The Obama White House

Artificial general intelligence is the intelligence of a machine that could successfully perform any intellectual task that a human being can.

Wikipedia

Weak artificial intelligence, also known as **Narrow AI**, is non-sentient artificial intelligence that is focused on one specific task.

Popular Science

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Related (and more useful) Terms



Machine Learning:

The use of algorithms and statistical models to perform specific tasks without explicit instructions. Instead, these systems rely on patterns and inference, and adapt with supervised learning and feedback.

McKinsey

Natural Language Processing:

Systems that enable computers to understand and process human languages, to get computers closer to a human-level understanding of language.

Wikipedia

Deep Learning/Neural Networks:

A subset of machine learning where artificial neural networks, algorithms inspired by the human brain, learn from large amounts of data. Similarly to how we learn from experience, the deep learning algorithm would perform a task repeatedly, each time tweaking it a little to improve the outcome.

Forbes

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And for Science (Fiction) Buffs

The Singularity:

The tipping point when machines become smarter than humans. Or, when biological and machine intelligence merge and human/machine intelligence can live free of biological constraint.

Ray Kurzweil et al

The Turing Test:

A machine's ability to exhibit behavior indistinguishable from that of a human. Alleged to have occurred for the first time in 2014 by a computer mimicking a 14-year-old-boy named Eugene.

Time Magazine

AI Apocalypse:

Unabated use of AI, without built-in constraint, poses existential threat to humanity.

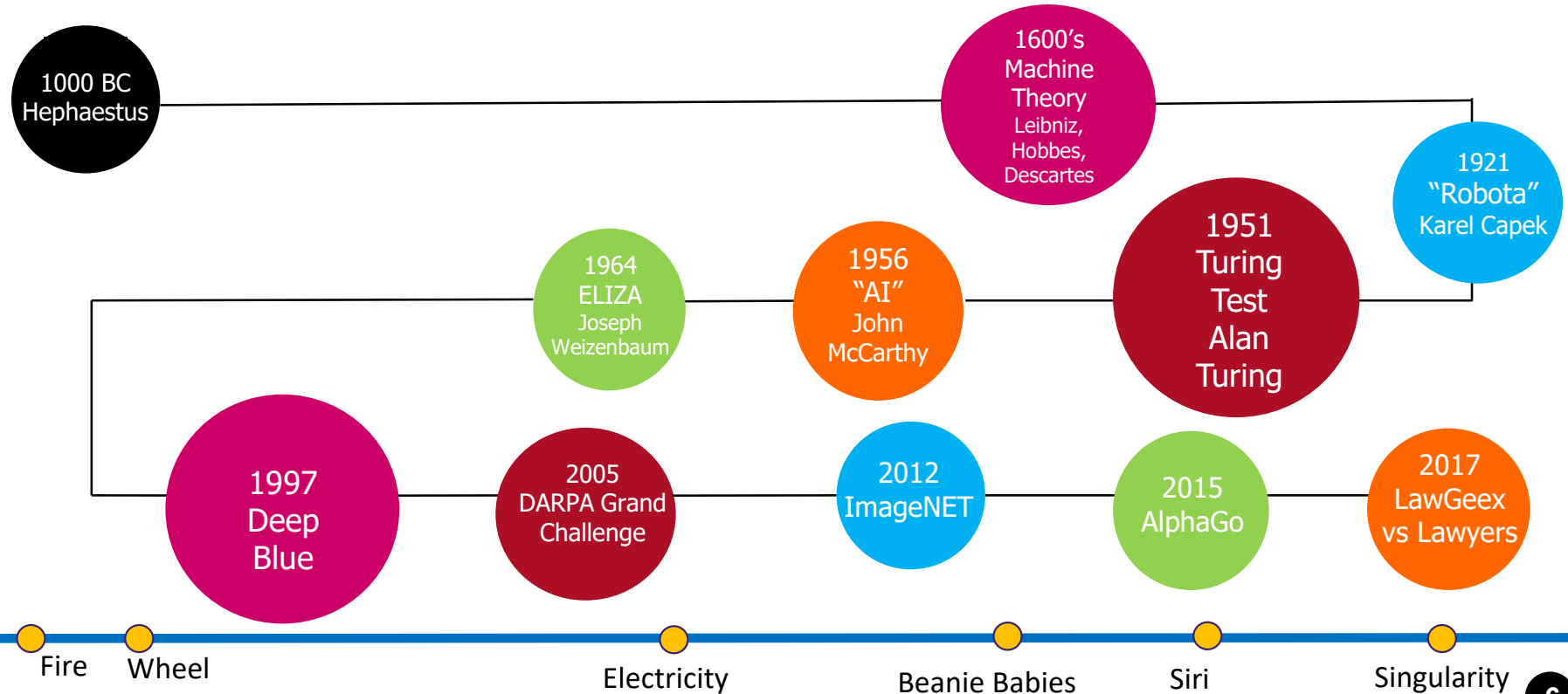
Stephen Hawking

Welcome, Robot Overlords.

MIT Technology Review

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Historical Perspective



Adoption of AI in the Legal Profession

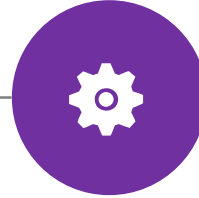
- Necessity is the Mother of Adoption
 - **2005:** Anne Kershaw publishes scholarly article “Automated Document Review Proves Its Reliability”
 - **2006:** NIST and DoD establish TREC Legal Track
 - **2009:** Recommind tries to trademark “Predictive Coding”
 - **2012:** Courts Approve “TAR”
 - **2014:** Machine Learning and natural language processing enters Legal
 - **2016:** Concentrated adoption of machine learning and natural language processing in discovery and contract management
 - **2021:** Process automation, predictive analytics, semantic analysis offer broader application across controversy and transactional practices
 - **2023:** Generative AI tools becoming commonplace in document and correspondence drafting

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.

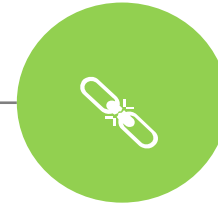
Example Use: draft documents using automation software that requires completion of a simple worksheet.



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?



LEGAL AI NOW

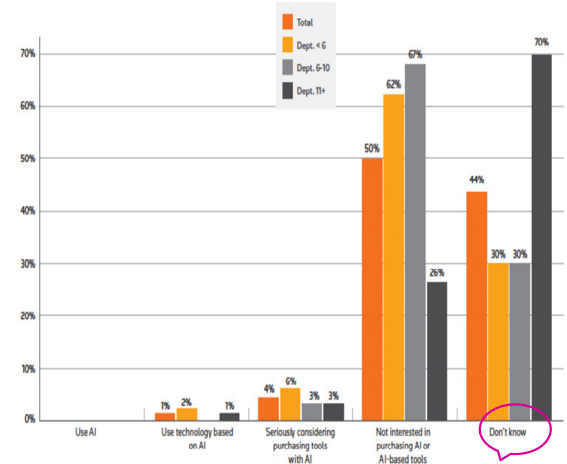
Current Perceptions of AI use in Legal Department

	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%	13%
None	22%	27%	27%	14%

Not Familiar

Negative: Can't Replace Humans

Current or Planned AI use in Legal Departments



Don't Know

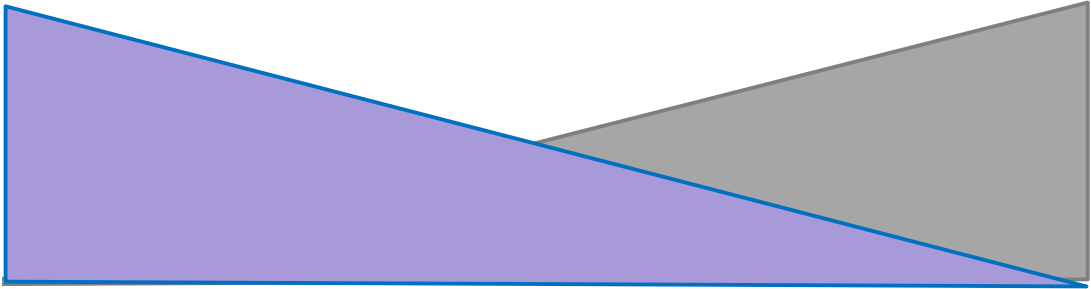
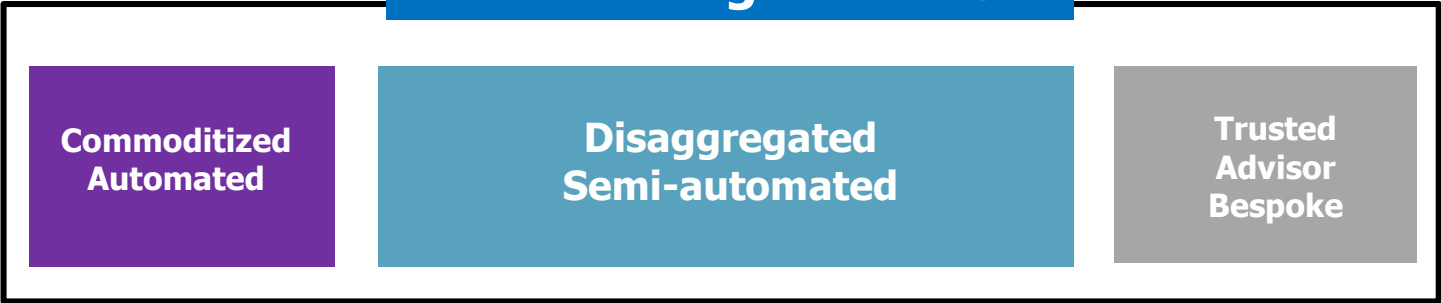
Image Recognition	Facial recognition, image analysis or find all the cats on the internet
Recommendation Systems	Based on user profile and activity, system makes user specific recommendations
Machine Learning	Predict future outcomes from analysis of historical data
Anomaly Detection	Analyze data to identify 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

LEGAL AI NEXT



LEGAL AI NEXT

Practice Segmentation



Legal Jobs

Hourly Rates



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We've still got some time ...

Machine Learning



Natural Language Processing



“Beyonce brought the house down last night!”

But Maybe Not That Much...

With the advancement in AI technology comes new issues and risks attorneys must be aware of. One of the most concerning is the ability to manipulate or fabricate data.

DEEP FAKES

- Deep Fakes are popular in Hollywood and social media.
- AI is utilized to manipulate a user's likeness or voice to replicate that of a famous individual.
- Deep Fakes aren't limited to image and likeness but can include fake text messages, social media posts, bank statements and emails.



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MITIGATING RISK

- Always conduct forensic collections!
- Always request metadata!
- Avoid utilizing screen shots!



*images sourced from google

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

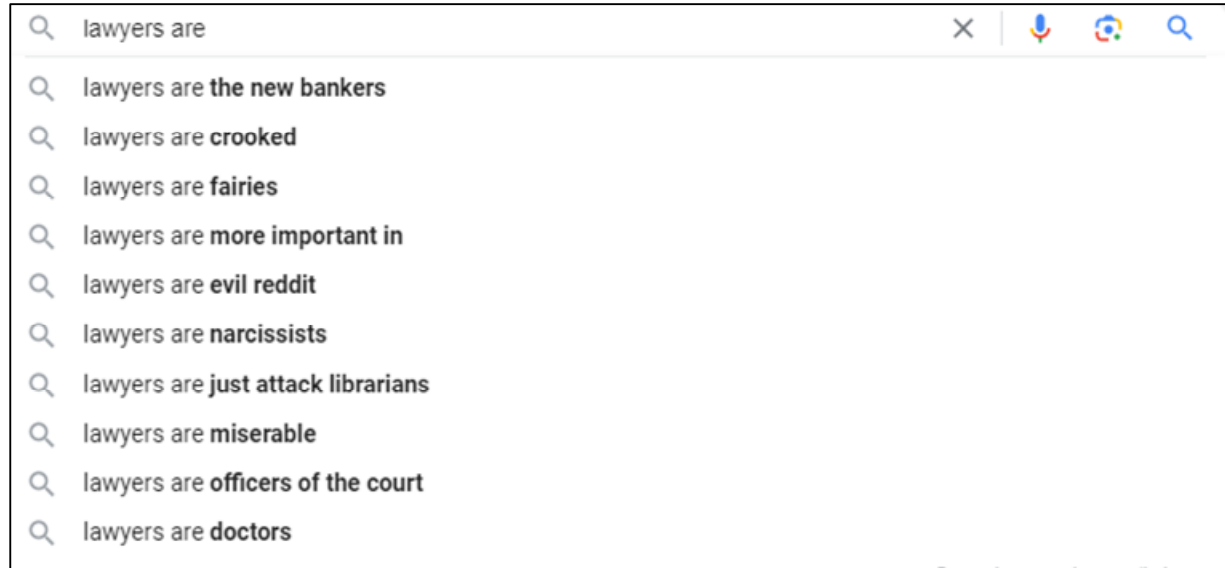
ADVISING CLIENTS

Advising Clients Developing or Using AI

- Bias
- Privacy
- Interpretability
- Moral Dilemmas

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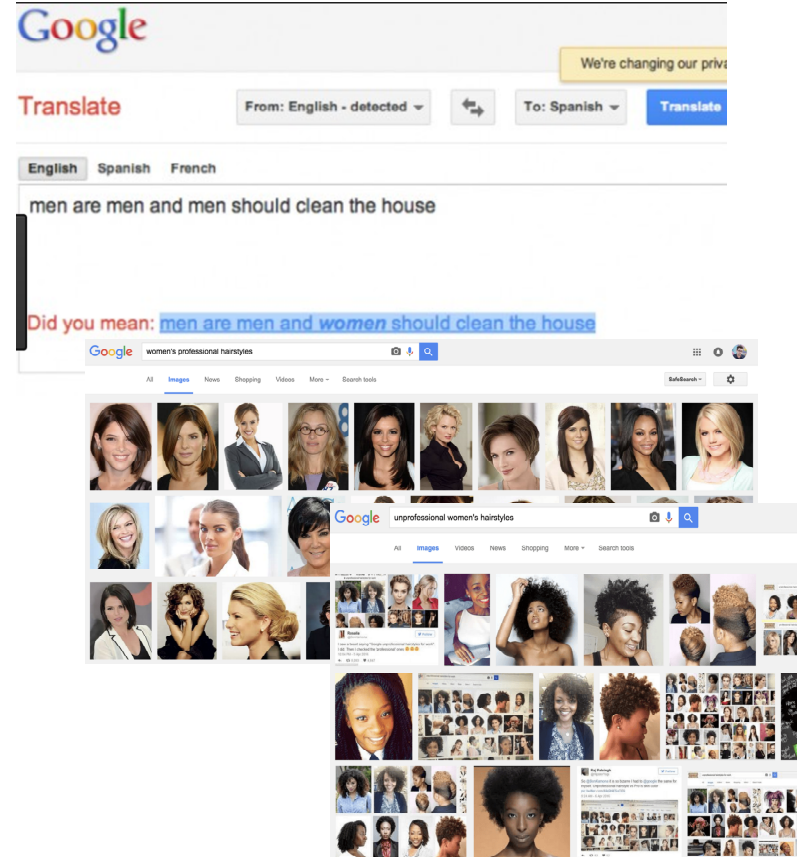
Bias



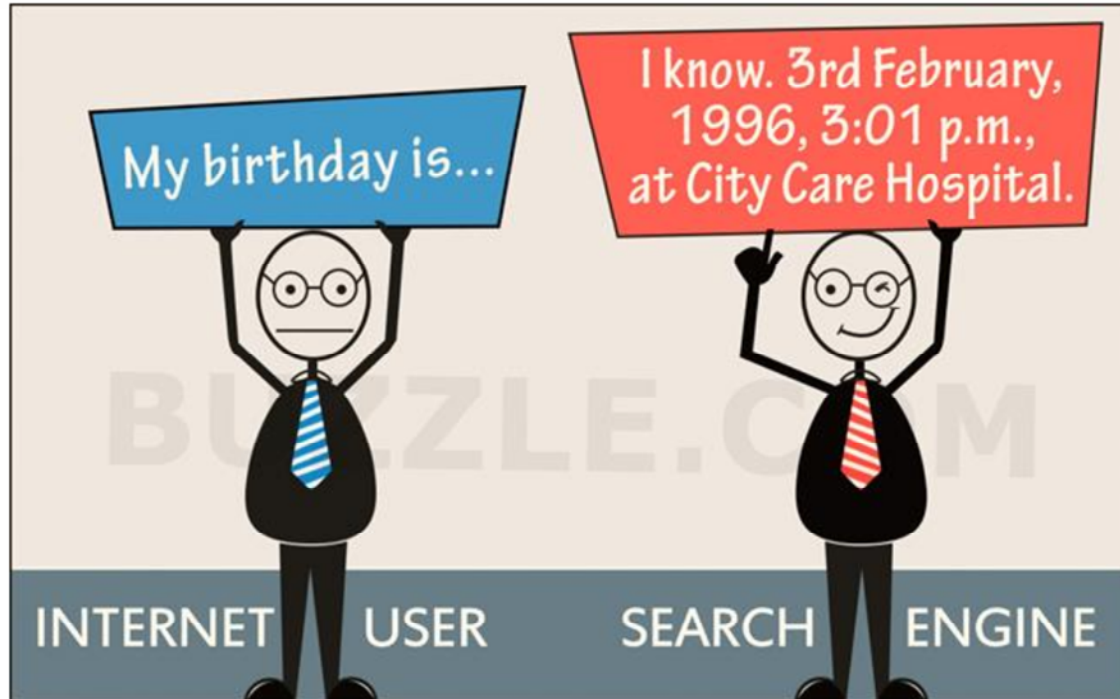
Built in Bias?

- 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. Periodic validation of tool's output should be established as a regular maintenance step.
- 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. Consent may also be revoked and developers should understand how to extract ingested data and retrain the tool to produce accurate results.
 - 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



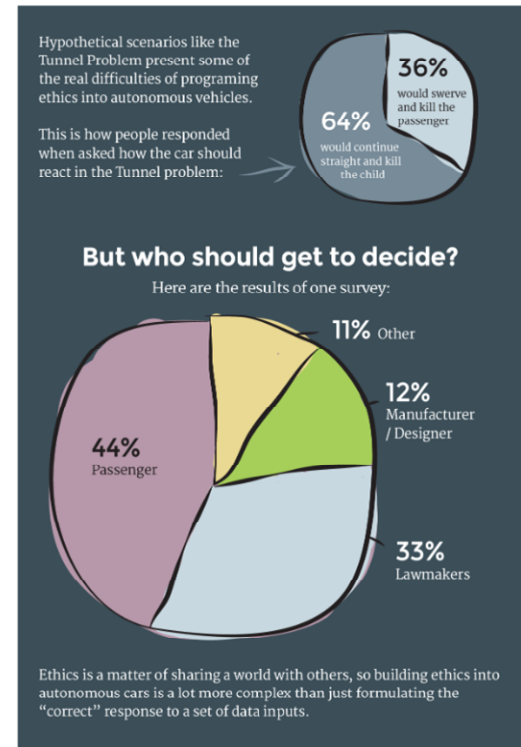
Moral Dilemma



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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
- **EPIC**
 - Established in 1994 to advocate for privacy rights and ethical use of evolving data-driven technologies
- **EU Parliament:**
 - EU AI Act passed in 2023 with the aim of making AI systems transparent and requiring that they are overseen by humans to prevent bias and harmful output
- **Current Laws and Regulations**
 - Dozens of state laws passed and introduced to address AI with respect to consumer privacy, employment, healthcare and insurance issues, as well as to increase transparency around generative AI and reduce harm related to output
 - California Privacy Rights Act, Colorado Privacy Act, Connecticut Data Privacy Act, New York City's Automated Employment Decision Tools, New York Digital Fairness Act, California AI-War Act to name a few
 - AI Disclosure Act of 2023 introduced



<https://epic.org/the-state-of-state-ai-laws-2023/#:~:text=Of%20the%20AI%2Drelated%20laws,blazes%20a%20ath%20for%20AI>

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 and standing orders

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](#))



It's Cite-Check Time

What do these cases have in common?

1. *Varghese v. China Southern Airlines Co., Ltd.*, 925 F.3d 1339 (11th Cir. 2019).
2. *Shaboon v. Egyptair*, 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013).
3. *Peterson v. Iran Air*, 905 F. Supp. 2d 121 (D.D.C. 2012).
4. *Martinez v. Delta Airlines, Inc.*, 2019 WL 4639462 (Tex. App. Sept. 25, 2019).
5. *Estate of Durden v. KLM Royal Dutch Airlines*, 2017 WL 2418825 (Ga. Ct. App. June 5, 2017).
6. *Ehrlich v. American Airlines, Inc.*, 360 N.J. Super. 360 (App. Div. 2003).
7. *Miller v. United Airlines, Inc.*, 174 F.3d 366, 371-72 (2d Cir. 1999)
9. [*In re Air Crash Disaster Near New Orleans, LA.*, 821 F.2d 1147, 1165 \(5th Cir. 1987\).](#)



Mata v. Avianca, Inc.

No. 22-cv-1461 (S.D.N.Y. May 4, May 26, and June 8, 2022)

Judicial Understatement of the Year: “The Court is presented with an unprecedented circumstance.” – *U.S. District Judge P. Kevin Castel, May 4, 2023.*

In opposition to a Motion to Dismiss, Mr. Mata’s counsel filed a submission to the court with non-existent cases. **Why?** He let ChatGPT do his legal research. It was a “Generative AI Hallucination.” **Chat GPT lied.**

Judge Castel contacted the Clerk of Court for the Eleventh Circuit. The Clerk confirmed that the case, *Varghese v. China South Airlines Ltd.*, 925 F.3d 1339 (11th Cir. 2019) does not exist.

Order to Show Cause on Sanctions

So the question is: How and how much should legal teams use Generative AI?

Judicial Guidance

In the wake of *Mata v. Avianca*, several courts have issued standing orders requiring lawyers to disclose their use of AI.

Northern District of Texas

Judge Brantley Starr issued a standing order requiring attorneys and pro se litigants to certify that they will not use generative AI in any filings, or that, if they do, all AI-generated content will be checked for accuracy by a human.

Northern District of Illinois

Magistrate Judge Gabriel Fuentes' standing order requires any party using generative AI in a filing to disclose the use, exact tool and manner in which the tool was used.

U.S. Court of International Trade

Judge Stephen Vaden orders attorneys to disclose the AI tool used and which portion of text was drafted by AI. Judge Vaden further requires attorneys to certify that no confidential information was disclosed "to any unauthorized party" while using AI tools.

AI HALLUCINATIONS:

Can they be illegal?

Who is responsible?

In April 2023, Australian Mayor, Brian Hood, threatened to sue OpenAI if they did not correct ChatGPT's output which falsely claims that he served prison time for bribery. In fact, Mayor Hood was the person to notify authorities of about a bribery scandal within a subsidiary of the Reserve Bank of Australia.

In July 2023, Mark Walters filed a defamation lawsuit against OpenAI LLC claiming the tool generated false content about him that was harmful to his reputation.

Walters v. OpenAI, L.L.C., 1:23-cv-03122, (N.D. Ga.)

Policy Questions



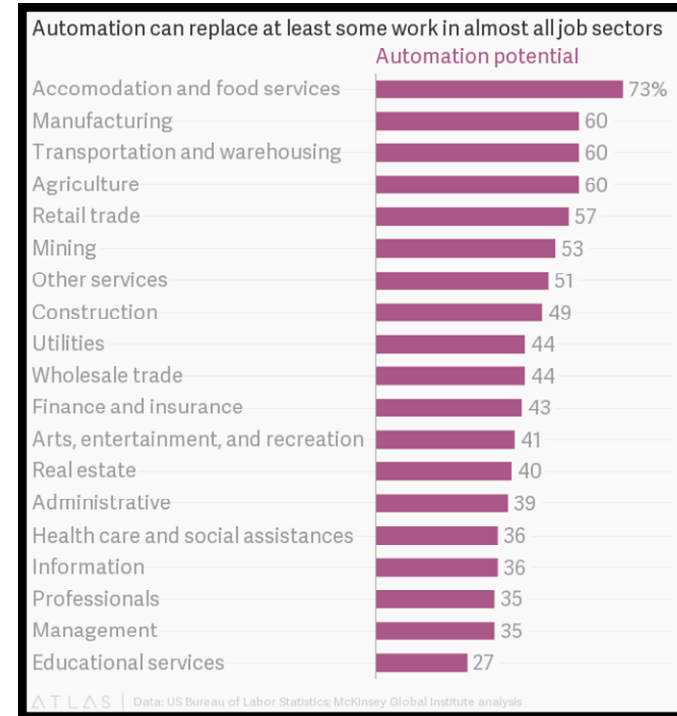
Policy Questions

- UBI
- The Singularity
- Extinction

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Future of Work: Will AI Result in Mass Human Displacement in the Workforce?

- 2023 Goldman Sachs report says that generative AI could impact up to 300 million jobs worldwide, noting that AI could substitute up to 25% of current work leading to “significant disruption” of the labor market.
- 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.



<https://qz.com/904285/the-optimists-guide-to-the-robot-apocalypse/>

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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THANK YOU

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