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AI: The Future of Humanity or The End of Civilization?

IMLA

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Roadmap

- What is Generative AI?
- AI vs. Machine Learning
- Risks – Confidentiality
- Is the Output Reliable?
- Risk of Unauthorized Practice
- Using AI to Predict the Future
- How Can Lawyers Benefit from AI?
- Are We Being Replaced?
- Questions

What is Generative AI?

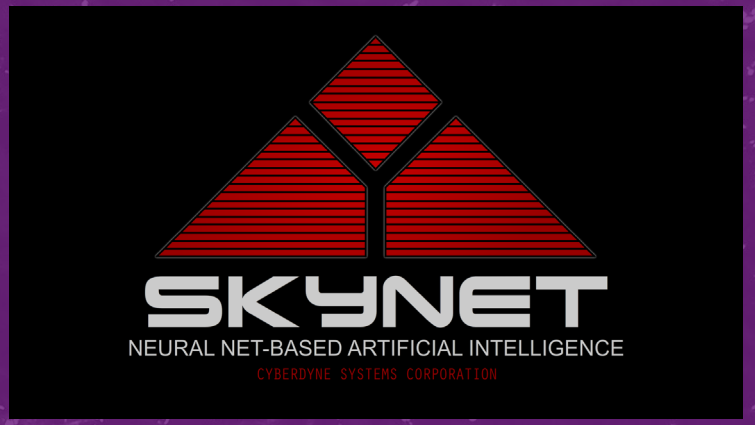
Definition

No uniform definition of AI. Generally refers to computer technology with the ability to simulate human intelligence to:

1. Analyze data to reach conclusions about it, find patters, and predict future behavior
2. Learn and adapt to perform certain tasks better over time

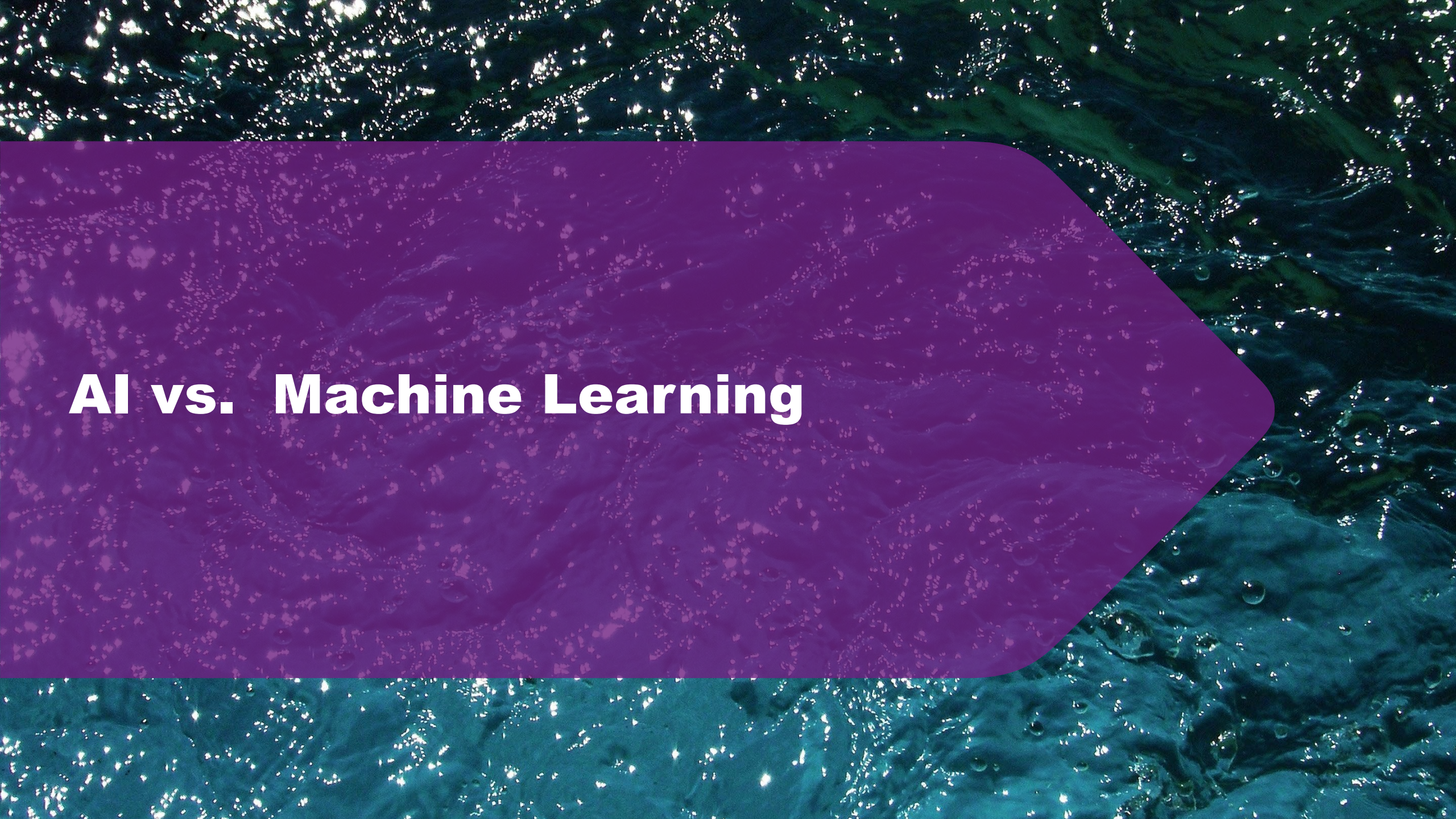
AI executes algorithms to:

- Recognize patterns
- Reach conclusions
- Automate repetitive functions



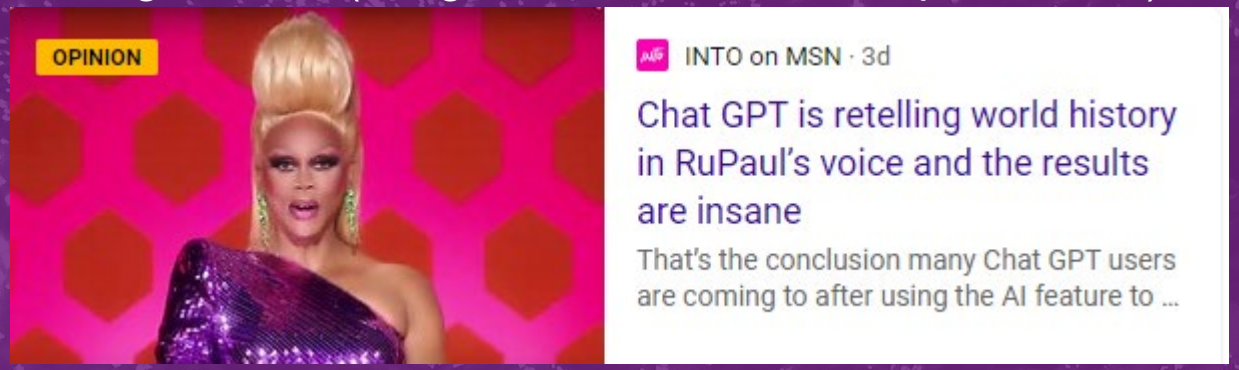





AI vs. Machine Learning

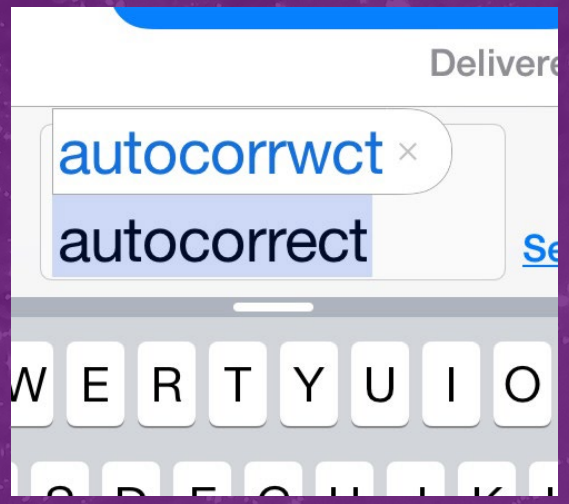
Generative AI v. Machine Learning

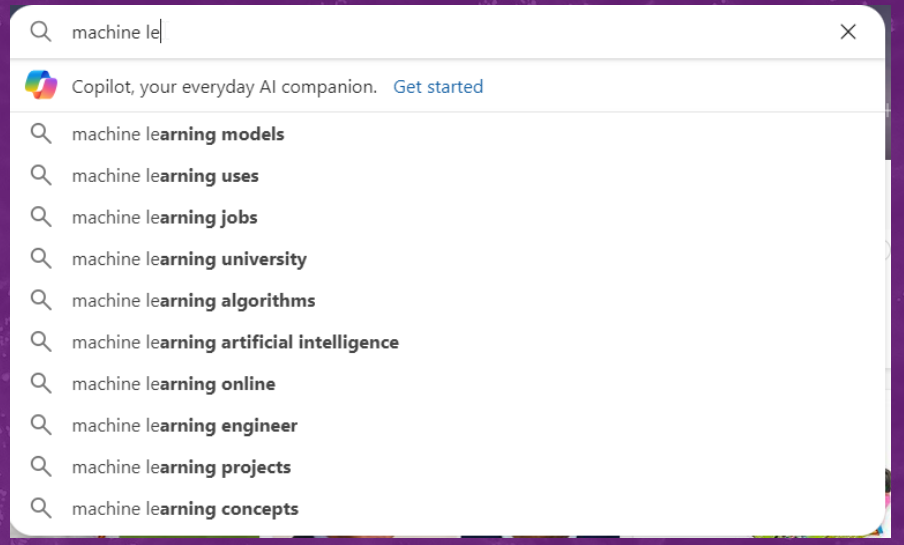
Generative AI: Type of AI that uses unsupervised learning algorithms to create new digital content based on existing content (images, video, audio, computer code)





Machine learning: AI that learns from its past performance, such as predictive text.





Algorithm = sets of code with instructions to perform specific tasks.

When will AI impact legal profession?
AI is Already Here

- Lawyers and firms have been using AI for years: document review, contract updates, legal research
- COMPAS: Correctional Offender Management Profiling for Alternative Sanctions
  - Recidivism risk
  - Concerns about bias (Pro Publica)

- ABA has formed a group to assess how AI will impact the practice of law and to review associated ethical questions: ABA Task Force on Law and Artificial Intelligence

Is it More Reliable?

- A 2019 experiment compared experienced corporate lawyers and AI programs for document review project:
  - The AI program “achieved a 94% accuracy level of spotting risks in the contracts” in 26 seconds
  - The Lawyers, on average, “spent 92 minutes to achieve an 85% accuracy level.”

- Audrey Herrington, How AI Can Make Legal Services More Affordable, SMARTLAWYER (Jul. 23, 2019), http://www.nationaljurist.com/smartlawyer/how-ai-can-make-legal-services-more-affordable



What Are the Risks: Confidentiality

Lawyers Must Protect Confidentiality

- A user would likely have to share matter-specific details with ChatGPT to help it draft the work product. By disclosing the facts of the matter at issue, a lawyer could be breaching the duty of confidentiality.
- Inadvertent waiver
- Risk of AI “learning” from information given to it
  - Example: teaching AI its own name
  - Example: asking AI to draft a contract for development deal

Lawyers Must Protect Confidentiality

- Rule 1.6
- Duty to maintain confidences is broader than the duty to maintain privilege
- ABA's Standing Committee on Ethics and Professional Responsibility Opinion 480: "Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules."


What are the Risks?
Is the Output Reliable?

Is The Output Reliable?

- Concerns about ChatGPT as a shortcut. ChatBots are designed to make conversation with plausible sounding answers to questions. It knows it needs to include citations in briefs, but it hasn't read the caselaw to be accurate.
- May need legal experience to recognize the shortcuts
- AI needs human oversight
- Risk of AI "learning" discriminatory behavior and human biases
- Risks of manufacturing evidence
- What is the source? Open internet vs. limited dataset
- Some AI tools are specifically designed to be used in legal practice (e-discovery, document production, performance review)

Courts are Concerned

- New York federal judge sanctioned lawyers who submitted a legal brief using ChatGPT – that included fake quotes and citations from non-existent court cases
- The attorneys here may have made it worse by not copping to the use of AI
- Ordered to pay fines and to notify each judge falsely quoted
- “In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis…. Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance,” Castel wrote. “But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.”

Courts are Concerned

- *People v. Crabill*, 2023 WL 8111898: Attorney filed a motion written by ChatGPT in a Colorado court, but many of the case citations were fake. The attorney did not read the cases or verify their accuracy.
  - The fabricated cases were “Zerbi v. Colorado Division of Employment & Training, 940 P.2d 697 (Colo. App. 1997),” “In re Marriage of McQueen, 970 P.2d 1245 (Colo. App. 1998)” and “People v. Hall, 276 P.3d 456 (Colo. App. 2011).”
- Another attorney was fired from her firm after she used AI to write a legal brief in an eviction case. An opposing attorney realized the brief cited nonexistent caselaw, leading to the judge issuing a $999 penalty.

Courts are Concerned

Pegnatori v. Pure Sports Technologies, 2023 WL 6626159

- Patent dispute over softball bat technology, specifically the definition of foam
- One party used a technical expert to provide a definition, the other "consulted ChatGPT" to come up with a different definition
- "…the court would be taking its eye off the ball if it applied the ChatGPT definition in its review of extrinsic evidence."

Courts are Concerned

- N.D. Texas standing order on generative AI (Judge Starr)
  - With a notice of appearance, lawyers must “file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.”
  - Although generative AI may have uses for lawyers, “legal briefing is not one of them”
  - Concerns about bias, reliability, and the fact that these platforms hold “no allegiance to any client, the rule of law, or the laws and Constitution of the United States”
  - Risk of Rule 11 Sanctions
- Critics say this restricts free speech or increases the burden on small practices

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PARTY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NUMBER
	§	
PARTY,	§	
	§	
Defendant.	§	

CERTIFICATE REGARDING JUDGE-SPECIFIC REQUIREMENTS

I, the undersigned attorney, hereby certify that I have read and will comply with all judge-specific requirements for Judge Brantley Starr, United States District Judge for the Northern District of Texas.

I further certify that no portion of any filing in this case will be drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence—including quotations, citations, paraphrased assertions, and legal analysis—will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court. I understand that any attorney who signs any filing in this case will be held responsible for the contents thereof according to applicable rules of attorney discipline, regardless of whether generative artificial intelligence drafted any portion of that filing.

_____

ATTORNEY NAME(S)

Duty of Competence for Technology

- Example: Attorney who relied on AI to write a brief that invented citations
- Did the attorney breach the duty of competence by delegating legal research to ChatGPT?

ABA Model Rule 1.1, Comment 8

- ABA Model Rule 1.1 states that:
- *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

- Comment 8, added in 2012:
- *[8] 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.*
- Georgia has not adopted this comment

The Rules

- Georgia has not adopted this comment on technological competence

- Comment [5]: “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

Duty of Competence in Technology

- Largely driven by ESI and e-discovery
- Administrative errors account for approximately 23% of all legal malpractice claims (technological competence)
- “Professed technological incompetence is not an excuse for discovery misconduct.” (Del. Ch. Dec. 5, 2014)
- Is there an obligation to know what you’re doing when using AI?

Is There a Duty to Supervise a Non-Lawyer?

- Rule 5.3: Is AI a “nonlawyer” for whom the lawyer has a duty to supervise?
- What is appropriate delegation?
- ABA Formal Op. 498 comments on a lawyer’s duty to supervise others when working remotely

Risks of Plagiarism or Infringement

- AI output is publicly-sourced, but the source is not explicitly provided to users
- Need for fact-checking
- Risks of plagiarism or copyright infringement
- Check the disclaimer

AI Program Disclaimers

- ChatGPT and similar AI programs use disclaimers on their sites, warning users of the risks of relying on the results provided by AI.
- For example, ChatGPT's homepage warns users that it "may occasionally generate incorrect information." Similarly, OpenAI's terms of use includes a disclaimer stating that OpenAI does "not warrant that the services will be uninterrupted, accurate or error free."
- Providers of AI are putting users on notice that relying on their products, without doing independent verification, could lead to errors or misstatements

What Does the Disclaimer Mean for Lawyers?

- Users of ChatGPT are now on notice that the information provided may not be complete or accurate and that ChatGPT is not taking responsibility for verifying the truthfulness of the information.
- OpenAI's terms of use include an indemnity provision.
- Regardless of whether such terms are enforceable, they suggest that there can be substantial risk for lawyers in relying on ChatGPT to perform legal services.
- Mitigate the risks.

What are the Risks?
Risk of Unauthorized Practice

Are Lawyer-Bots Committing Unauthorized Practice?

- TIKD – enjoined by the Florida Supreme Court from running an app that provided assistance to drivers with traffic tickets
- Balancing this risk of UPL with the ability to provide access to justice
  - "We cannot address the access to justice problem by allowing non-lawyer corporations to engage in conduct that, under this Court's sound precedent, constitutes the practice of law."
- Citizens to be guided by AI via smart glasses in making traffic court arguments ("DoNotPay") – test program was canceled in light of objections from bars (UPL can be a misdemeanor)

Are Lawyer-Bots Committing Unauthorized Practice?

- Is AI able to conduct complex legal analysis?
- *Lola v. Skadden* (2d Cir.) – plaintiff engaged in document review was not "practicing law" because he "provided services that a machine could have provided"
- *Janson v. LegalZoom.com, Inc.* (Missouri) – providing forms "is not in and of itself the unauthorized practice of law"
- Are self-help services equivalent to AI?

Access to Justice

- State Bars tend to be protective of lawyers' ability to earn a living
- But does AI give a voice to the voiceless?
- Is this a reasonable expansion of legal "self-help" companies?
- Advocates say that lawyers who use AI will have more free time to serve communities

Using AI to Predict the Future

AI as a Valuation Tool

- Attorneys are often asked by their clients to assess a claim, provide a likelihood of success and assign a risk to the matter. Can AI be part of this predictive technology?
- Intersection with the professional judgment rule. Is relying on AI still part of the honest exercise of professional judgment?
- Is it competent representation to use AI to predict outcomes? What about as a jury selection tool?
- What constitutes “competent” practice can vary by jurisdiction or practice area

How Can Lawyers Benefit from AI?

Benefits of AI

- Client Intake
- Marketing
- Development of associates
- Training
- Summarize Changes to Documents
- Client Service
- Speech to text conversion
- Legal research through legal platforms (Westlaw or Practical Law or “ROSS”)

Firms are Taking Note and Enacting Policies

- When can generative AI be used? By whom?
- Can AI output be passed on to clients?
- Is it accessible at the firm?
- Are lawyers complying with their ethical obligations?
- Are certain types of generative AI permissible?
- Training on how to use generative AI
- Notify clients when AI is used?

Learn from AI Disclaimers

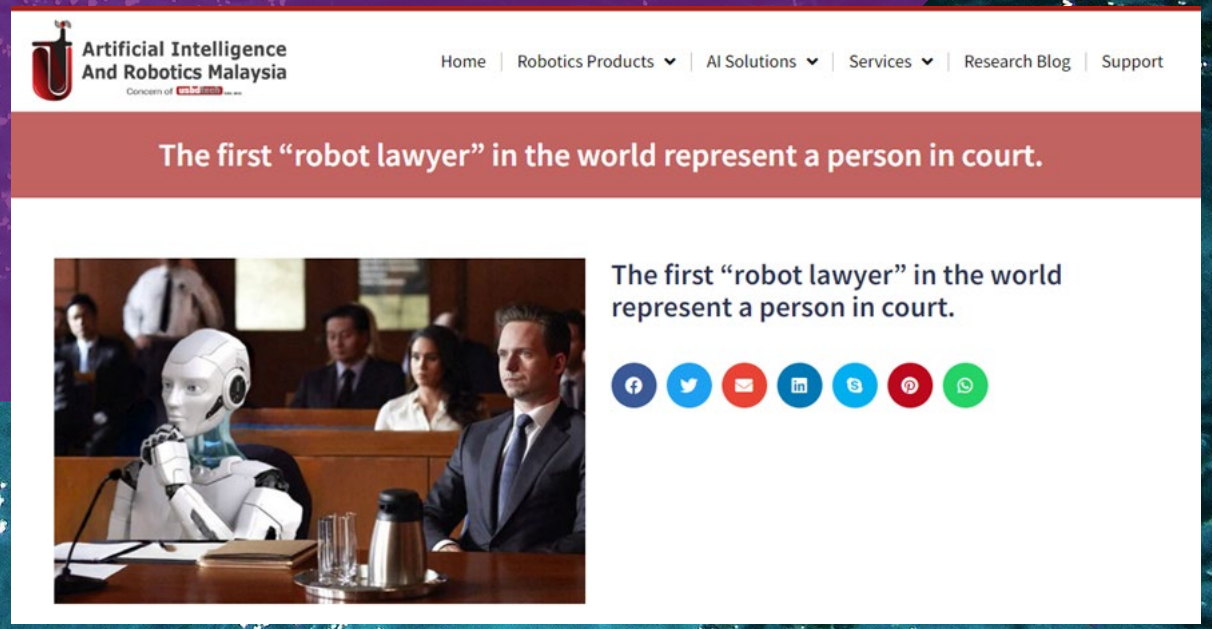
- Disclaimers can be a particularly effective tool for providers of services to describe what services they are intending—and not intending—to provide. Lawyers can also adopt disclaimers in their own practices to help define the scope of work and limit potential exposure.
- Lawyers have used disclaimers for years in many different ways—for example, to help shape the scope of an attorney-client relationship, to limit the reliance of third-parties on potential advice or to limit their exposure from content posted online or in email communications.
- Overly broad or vague disclaimers tend to be less effective than specific, targeted ones
  - Example: lawyer running a blog
- Courts look at whether an attorney-client relationship was formed from the perspective of the client

Learn from AI Disclaimers

- Lawyers are required to present specific and conspicuous disclaimers in communications advertising contingency fee arrangements under the Georgia Rules of Professional Conduct 7.1(a)(5) and (6).
  - Comment [3] to Model Rule of Professional Conduct 7.1 also advises that lawyers can use disclaimers to avoid a finding that a statement is otherwise "likely to create unjustified expectations or otherwise mislead the public."

- Beyond these well-established disclaimers, lawyers can also look to the ChatGPT disclaimer to determine whether there are areas of their own practice that could benefit from the use of similar disclaimers, such as in a legal blog or email signature.

Are We Being Replaced?



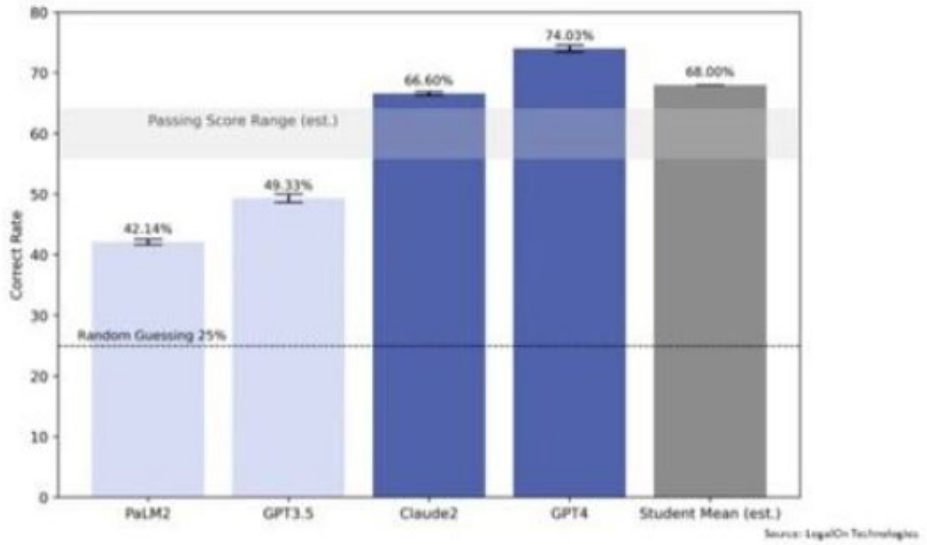
Maybe?

LawSites

Tracking Technology and Innovation for the Legal Profession

Home 〉 Generative AI, Having Already Passed the Bar Exam, Now Passes the Legal Ethics Exam

Generative AI, Having Already Passed the Bar Exam, Now Passes the Legal Ethics Exam



By Bob Ambrogi on November 16, 2023

Well, it's happened again: Generative AI has passed a critical test used to measure candidate's fitness to be licensed as a lawyer.

Back in March, OpenAI's GPT-4 took the bar exam and **passed with flying colors**, scoring around the top 10% of test takers.

Robo-Lawyers

- AI may be able to draft reports or summaries, but there is a risk of errors
- Can AI develop strategy? Does it understand the human experience?
- AI sources are often not transparent
- Not a replacement for local counsel and analysis



Maybe she's on to something...

Smith v. U.S. Department of Defense

- Pro se complaint alleging the United States government used "modern technology 'to manipulate and lower [her] intelligence' by employing 'utters that startled [her] via AI [artificial intelligence].'"
- As relief, plaintiff requested "all artificial intelligence from her being be detached and permanently cease, her medical records after May 18, 2018, be corrected so there is "no bogus diagnosis," that defendants be "confined" for deliberately interfering with her life for entertainment, and that she be awarded compensation for pain and suffering."
- Dismissed by court.

Do we have an ethical duty to use AI?

- Under Rule 1.5 of the ABA Model Rules of Professional Conduct, a lawyer shall not collect an unreasonable fee or an unreasonable amount for expenses.
- Reasonableness is determined by the time and labor *required* and the skill requisite to perform the legal service
- If using AI tools can significantly reduce the amount of time to complete a task is it reasonable to perform those tasks ‘the old fashioned way?”

Questions

Thank you