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Applying Generative AI in Legal Practice

Presented by:

Alex Nisenbaum, Partner Blank Rome
Sharon Klein, Partner Blank Rome

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What is AI and How are Lawyers Using It?

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What is AI

- Algorithms – programs to solve a problem using series of math instructions
- Data Lakes – layer algorithms on top of enormous pools of data
- Machine learning – the algorithms learn dynamically what the answers should be using training data
- Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.”



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CHAT GPT and Generative AI

- What is ChatGPT? Well, we decided to ask it directly!
- *“I am ChatGPT, an AI language model developed by OpenAI. My main function is to generate human-like text in response to various inputs, making me a useful tool for a variety of applications, including customer service, chatbots, and virtual assistants. I have been trained on a massive amount of text data, allowing me to generate responses that are not only grammatically correct but also contextually appropriate. I am constantly learning and improving, and I am a cutting-edge example of the advancements being made in the field of artificial intelligence”.*

AI Outperforms Lawyers in Ethics Exam

- Generative AI Passes Legal Ethics Exam

Two generative AI models passed a legal ethics exam, and one model earned a higher score than the average law student.

| | 30.0% | 40.0% | 50.0% | 60.0% | 70.0% |
|----------------------------|-------|-------|-------|-------|-------|
| GPT-4 | | | | | 74.0% |
| Student Mean (est.) | | | | | 68.0% |
| Claude 2 | | | | 66.6% | |
| GPT-3.5 | | | 49.3% | | |
| PaLM 2 | | 42.1% | | | |
| Random Guessing | | | | 56.0% | |
| Passing score range (est.) | | | | | 64.0% |

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Generative AI Limitations – Probabilistic v. Deterministic



Generative AI is Probabilistic

- ChatGPT Query: What is 8568 times 7421?
- ChatGPT Answer: 63,584,728
- ChatGPT Query: What is 8568 times 7421?
- ChatGPT Answer: 63,613,128
- Trusty Calculator: 63,583,128

Deterministic Models Provide Predictable Outcome but...

- For both deterministic and probabilistic models, its garbage in, garbage out

AI Applications in the Legal Field

- Drafting
 - Legal Memoranda
 - Briefs
 - Contracts
 - Correspondence
- Legal Research
- Review and Analysis
 - Court orders, opinions, jury verdicts, depositions
 - Contracts
- E-discovery
- Legal Operations

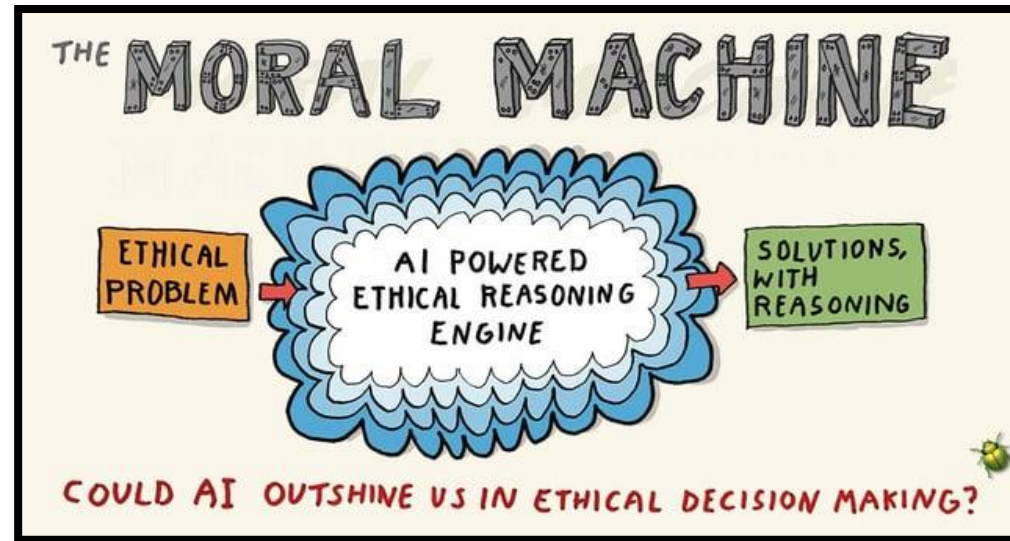


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Headlines of Attorneys in Trouble

- **Southern District of New York, 2023** – Attorney who used ChatGPT for legal research sanctioned for failure to check whether citations were real or accurate
- **Colorado State Court, 2023** - Attorney suspended for violating various ethical rules by failing to check cases cited by ChatGPT
- **2d. Circuit, 2024** – Attorney referred to grievance panel for not checking ChatGPT results and citing non-existent decision

AI Problem or Ethics Problem?



Guidance from Regulators

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AI Guidance from Bar Associations

- **States**

- **California** – *Practical Guidance for the use of Generative Artificial Intelligence in the Practice of Law* (November 16, 2023)
- **New Jersey** – *Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers* (January 24, 2024)
- **Florida** – *Ethics Opinion 24-1* (January 29, 2024)
- **New York** – *Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence* (April 6, 2024)
- **Pennsylvania** – *Joint Formal Opinion 2024-200* (June 2024)

- **American Bar Association**

- *Formal Opinion 512* (July 29, 2024)

California Rules of Professional Conduct

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Competence and Diligence

- A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence. (Rule 1.1)
 - Includes the duty to keep abreast of the changes in the law ***and its practice, including the benefits and risks associated with relevant technology.*** (Comment 1 to Rule 1.1)
- A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client. (Rule 1.3)



How to Become Competent/Remain Diligent

- Learn about using AI in legal practice by attending continuing legal education programs or other course about the proper use of AI technology (e.g., prompt training)
- Consult with other professionals who are knowledgeable about using AI tools. (See Rule 5.3 regarding supervision of nonlawyer assistance)
- Carefully scrutinize AI output
- Do not delegate professional judgment to AI



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Confidentiality

- It is the duty of an attorney to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (Cal. Bus. & Prof. Code § 6068(e))
- A lawyer won't reveal protected client information without the client's informed consent (Rule 1.6)
- A lawyer won't use protected client information to the disadvantage of the client without the client's informed consent (Rule 1.8.2)



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Confidentiality Continued

- Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes.
- Anonymization of input
- Vendor management
 - Contractual restrictions on sharing and secondary uses of data
 - Cybersecurity assurances

Communication

- A lawyer shall ... “reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation.” (Rule 1.4)
- State Bar of California Guidance:
 - Lawyer should consider disclosure of intention to use generative AI, including how technology will be used and the benefits and risks of such use
 - Lawyer should review any applicable client instructions or guidelines that may restrict or use the use of generative AI

Duty to Supervise



- A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm, shall make reasonable efforts to ensure that the other lawyer complies with these rules and the State Bar Act. (Rule 5.1)
- Reasonable efforts in the context of generative AI include:
 - Clear policies regarding the permissible uses of generative AI
 - Training on ethical issues and risks
 - Training on practical aspects of generative AI use

Practice Pointers – Do . . .

- Require approval/self-reporting on the use of AI tools to supervisors and implement additional **monitoring procedures**
- Be aware of the bias/limitations of AI tools and specify when **human verification** is required
- Strictly **prohibit** uploading or disclosing **non-public information**, and limit disclosure to what is reasonably necessary for the task, and
- Establish processes/training so outputs are **accurate and appropriate for the intended purpose(s), unbiased, ethical** and in compliance with any applicable rules, **laws**, regulations, or other policies

Nonlawyer Assistance- Vendor Management

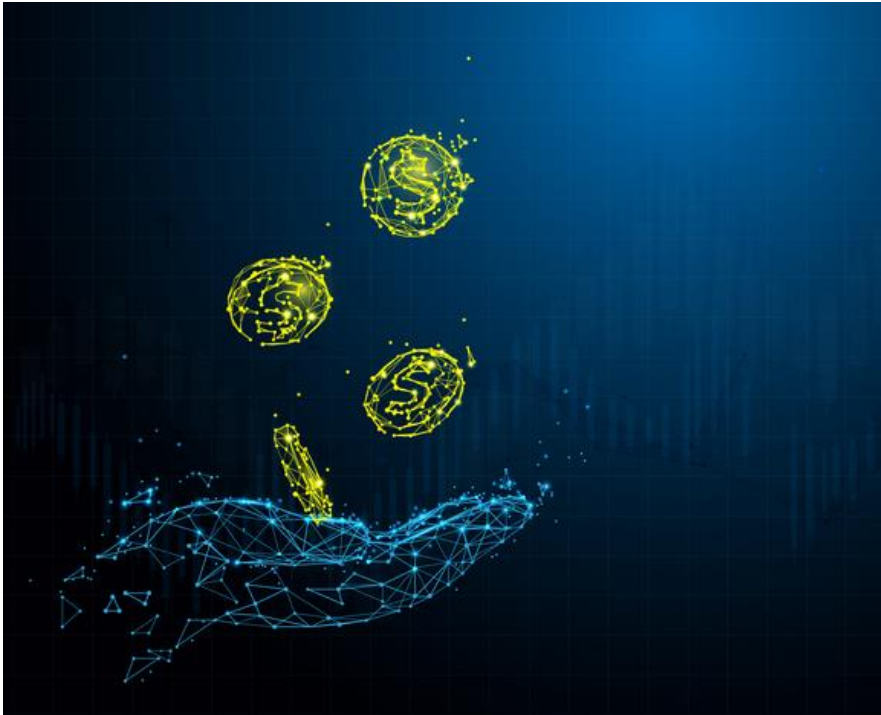
- A lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer (Rule 5.3)
- Rule 5.3 applies to the supervision of nonlawyer assistants and other legal support services (e.g., third party technology providers)

Duty to Comply with Law

- A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. (Rule 1.2.1)
- It is the duty of an attorney to support the Constitution and laws of the United States and of California. (Cal. Bus. & Prof. Code § 6068(a))
- Matters relating to use of generative AI often relate to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns.



Fees



- A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee. (Rule 1.5) Factors to determine unconscionability include:
 - The amount of the fee in proportion to the value of the services performed
 - The time and labor required
- How are efficiencies demonstrated with AI tools
- AI tools cost money? Does that get passed along?

Candor to the Tribunal

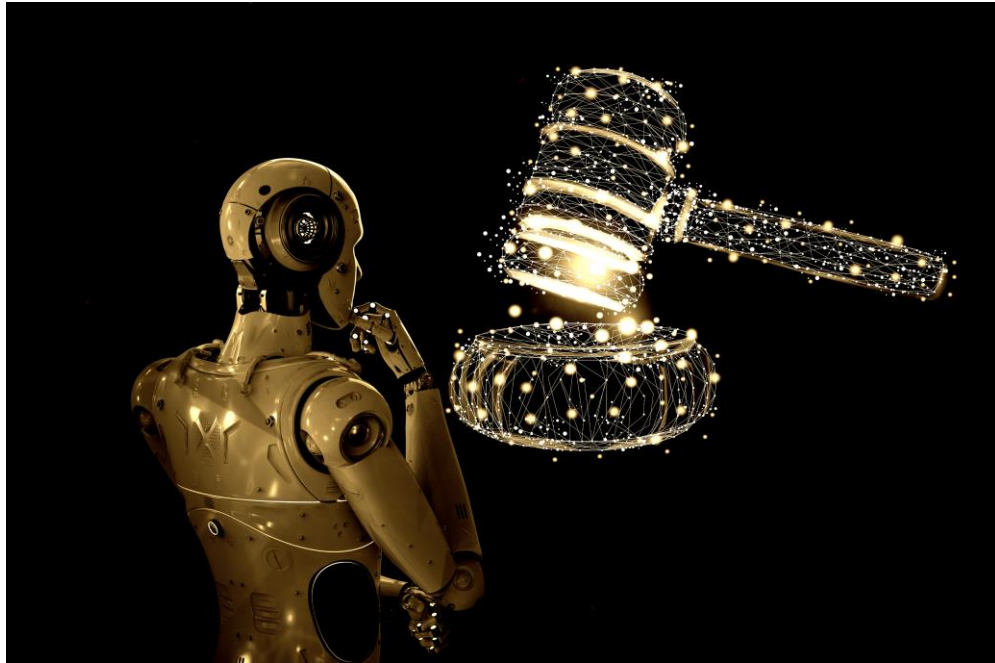
- A lawyer shall not:
 - knowingly make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer
 - fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal* the language of a book, statute, decision or other authority
 - offer evidence that the lawyer knows to be false (Rule 3.3)



What Courts are Doing

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What Courts are Doing



- Standing orders from judges in federal courts regarding generative AI
- 5th Circuit
 - Declined to adopt rule requiring attorneys to verify documents were not written using generative AI or that they were checked for accuracy
- California AB 2811 (died in committee)
 - Would have required attorneys to keep AI compliance affidavit for all state court filings

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What Lawyers Should be Doing

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Best Practices

- Apply professional judgment– use AI output as a starting point
- Scrutinize all citations and assertions in AI output
- Learn how to improve skills with AI tools
- Consult with other professionals who are knowledgeable about AI
- When advising on AI matters, remember many types of laws may affect compliant use of AI tools
- Set clear, reasonable and achievable policies aligned with ethical responsibilities

Best Practices



- Ensure appropriate AI tool vendor management
 - Review terms and conditions
 - Restrict secondary use of information
 - Require appropriate cybersecurity safeguards
- Pay attention to special court rules
- Discuss expectations regarding use of generative AI with outside counsel



Alex Nisenbaum
alex.nisenbaum@blankrome.com



Sharon Klein
sharon.klein@blankrome.com



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Other Ways to Stay Informed:

