

Use of AI in the Legal Profession

Womble Bond Dickinson

Ted Claypoole and Jill Rothstein

Artificial Intelligence

“A Poor Choice of Words in 1954”
-- Science Fiction Writer Ted Chiang





Relevant Functional Categories

- **Decisioning AI**
- **Personal Identifying AI**
- **Generative AI**
- **Physical Action AI**
- **Differentiating AI (Analytics)**
- **Strategizing AI**
- **Military AI**
- **Automating AI**

NIST Proposal: Trustworthy AI

Validity and Reliability

Safety

Security and Resiliency

Accountability and Transparency

Explainability and Interpretability

Privacy (Confidentiality)

**Fairness with Mitigation of
Harmful Bias**



What AI Can Lawyers Use?

Extractive AI

- Only produces content from its training database
- Excellent for choosing contracts and arguments from your own legal documents

Generative AI

- Summarizing documents and discovery data
- Writing entire documents

Decisioning AI

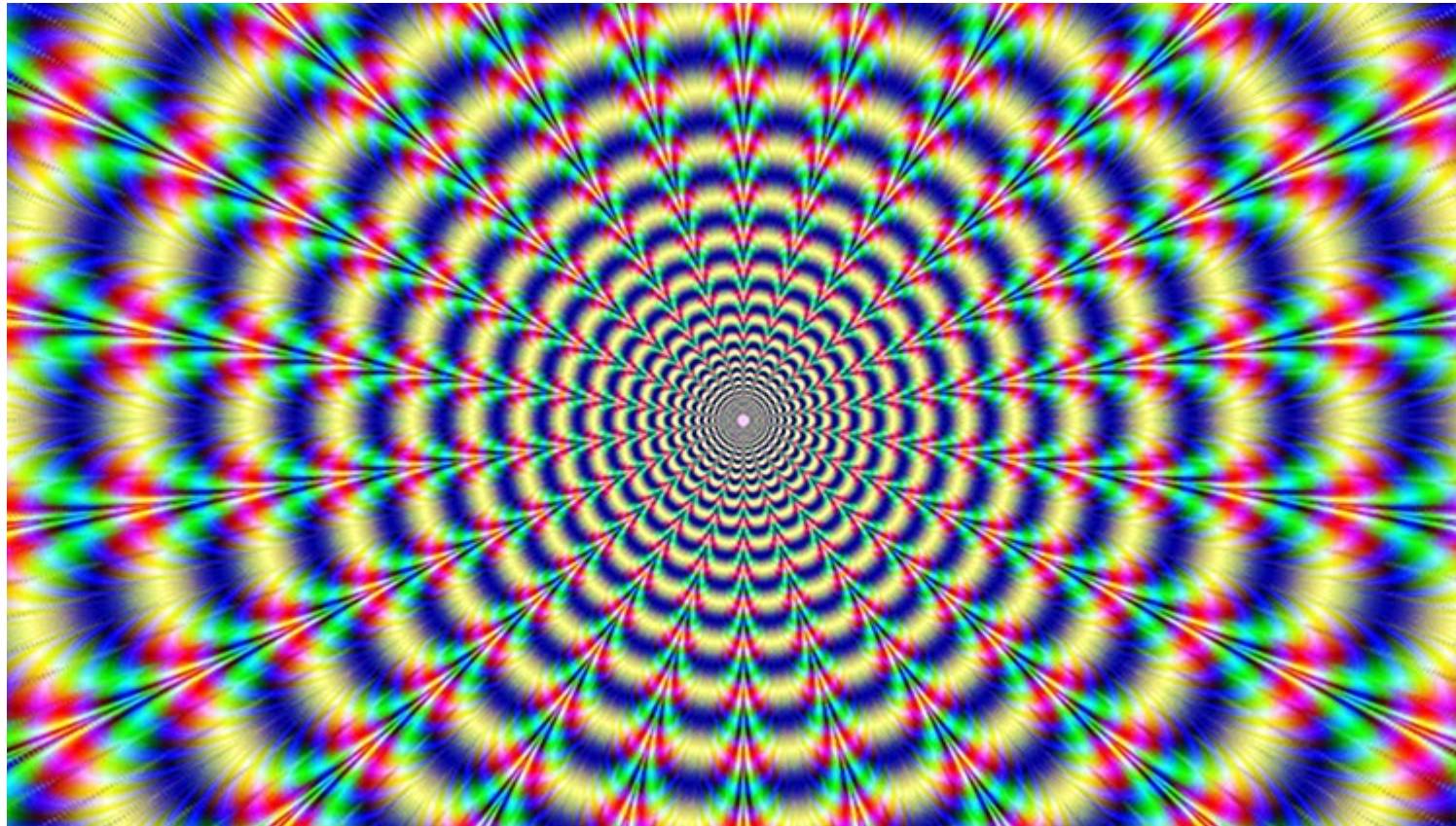
- Finding new lawyers or paralegals
- Analyzing interviews



Who Else Uses AI?

- Support staff
- Project management
- E-discovery and other discovery
- Production and Information Extraction
- Records Management
- Drafting
- Document Analysis

Hallucinations



It Started with a Serving Cart...



Mata V. Avianca Inc.

F. Supp. 3d, 22-cv-1461 (PKC), 2023 WL 4114965, (S.D.N.Y. June 22, 2023)).

Avianca's attorneys explained they had been "unable to locate" many authorities cited in the Affirmation of Opposition prepared by Schwartz and signed by LoDuca.

Note: Schwartz was not admitted in Federal Court, so his Partner, LoDuca, became the attorney of record. LoDuca told the judge he had no role in the research and also that he did read any of the cases cited, nor did he do anything to ensure the cases existed.

The Court also could not locate the cases, and ordered LoDuca to file an affidavit attaching copies of the cited cases. Mr. LoDuca submitted an affidavit purportedly containing all but one of the "decisions" (or at least the portions allegedly available on an unnamed "online database").

- Schwartz had prepared the affidavit. He attached copies of “decisions” created by ChatGPT when he asked the chatbot to identify favorable rulings. He asked ChatGPT if the cited cases were “real,” and received the response that the cases “indeed exist” and “can be found in reputable legal databases such as LexisNexis and Westlaw.”
- One cited case included “gibberish” and a “nonsensical” and inconsistent procedural history before it “abruptly” ended. The second decision ended in a sentence fragment. The third decision confused the District of Columbia with the state of Washington and cited itself.
- Court found both attorneys acted with “subjective bad faith” sufficient for sanctions under Federal Rule of Civil Procedure 11.
- <https://www.acc.com/resource-library/practical-lessons-attorney-ai-missteps-mata-v-avianca>

From the Opinion:

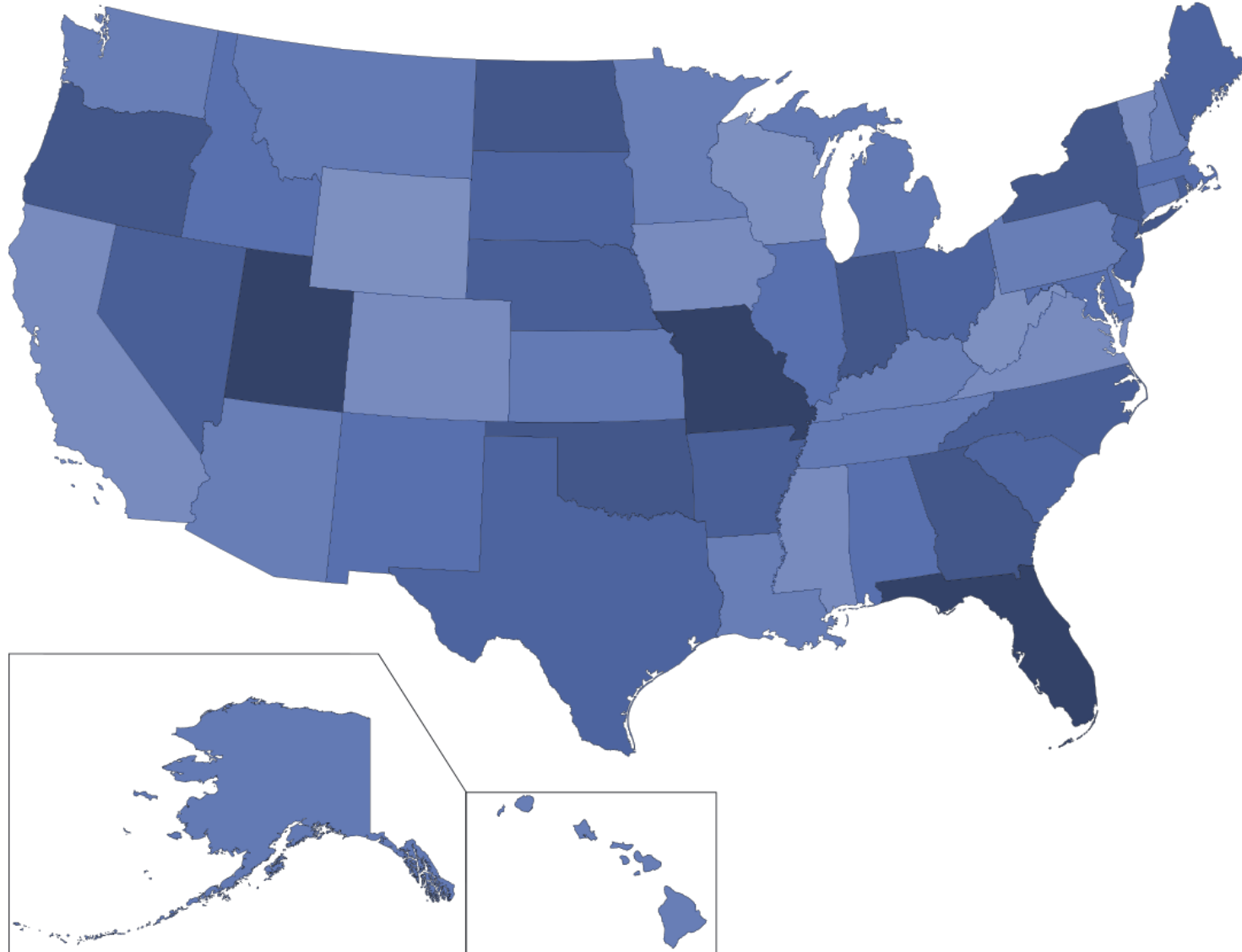
- “Technological Advances are commonplace, and there’s nothing inherently improper about using a reliable artificial intelligence tool for assistance”

Are There Rules?

- Rule of Civil Procedure 11
- Model Rules of Professional Conduct
 - Rules 1.1, 1.3 – Competence and diligence
 - Rule 1.4 – Consulting with client about new tech
 - Rule 1.6, 1.18 – Client (and prospective client) confidentiality



State's Rules can be Different



Accountabilities to Our Clients



Rule 1.1

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.1, Comment 8

- Maintaining Competence
- [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.

Is the AI Self-Learning?

- Self-Learning Generative AI

- Revises and updates its responses based on new inputs

- Adds the new inputs to the existing parameters

Higher likelihood that information may be stored within the program and could be revealed in future responses to inquiries by others

Rule 1.4: Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Rule 1.6: Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(c) 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.

Query:

- If the best practice is for a lawyer to get a client's informed consent prior to utilizing a third-party gen AI program, and the tech is new and rapidly evolving, how can the lawyer be sure that the client's consent is actually informed consent?
- In other words, How much do we have to understand to make sure that they understand?

What do the Fugees have to do with all this?



- Pras Michel convicted on several counts of conspiracy
- He is now alleging ineffective assistance: alleging that his lawyer Kenner “used an experimental artificial intelligence (AI) program to draft the closing argument, ignoring the best arguments and conflating the charged schemes, and he then publicly boasted that the AI program ‘turned hours or days of legal work into seconds,’”
- Lawyer appeared to mix up key elements of the case. He also misattributed the lyric “Every single day, every time I pray, I will be missing you,” to the Fugees, (actually a lyric from a song written by Sean “Diddy” Combs).
- Michel alleging that his lawyer not only used the AI, but also had a financial interest in the AI company that he did not disclose.
- <https://apnews.com/article/fugees-pras-appeal-conviction-trial-artificial-intelligence-d2c93aa5404eba63c3347a05fe8ba091>
- <https://www.politico.com/news/2023/10/16/pras-michel-fugees-trial-ai-closing-argument-00121900>

Rule 1.8: Current Clients: Specific Rules

- i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 - (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.

Switching
Gears...



Our Accountabilities to Each Other



Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly

(a) make a false statement of fact or law to a third person ; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

(b) 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.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer...

Rule 5.2: Responsibilities of a Subordinate Lawyer

A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

Advertising: Use of a Gen AI chatbot for advertising and intake purposes

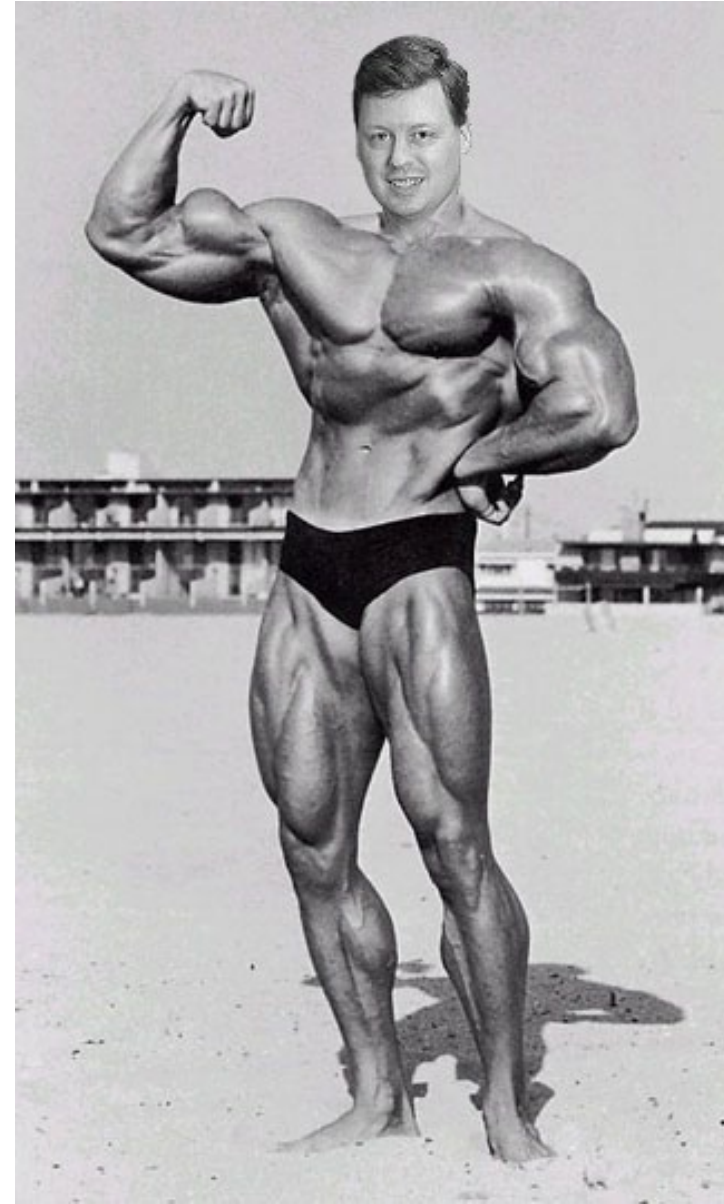
“Lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a matter that is inappropriately intrusive or coercive. To avoid confusion, a lawyer should inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee”

Machines Falsify Pictures/Video

Deep Fakes

Manufactured Evidence

Virtual Reality





Machines Create Their Own Art

Writing Copy

Painting

Photo and Video

Software

Industrial Design

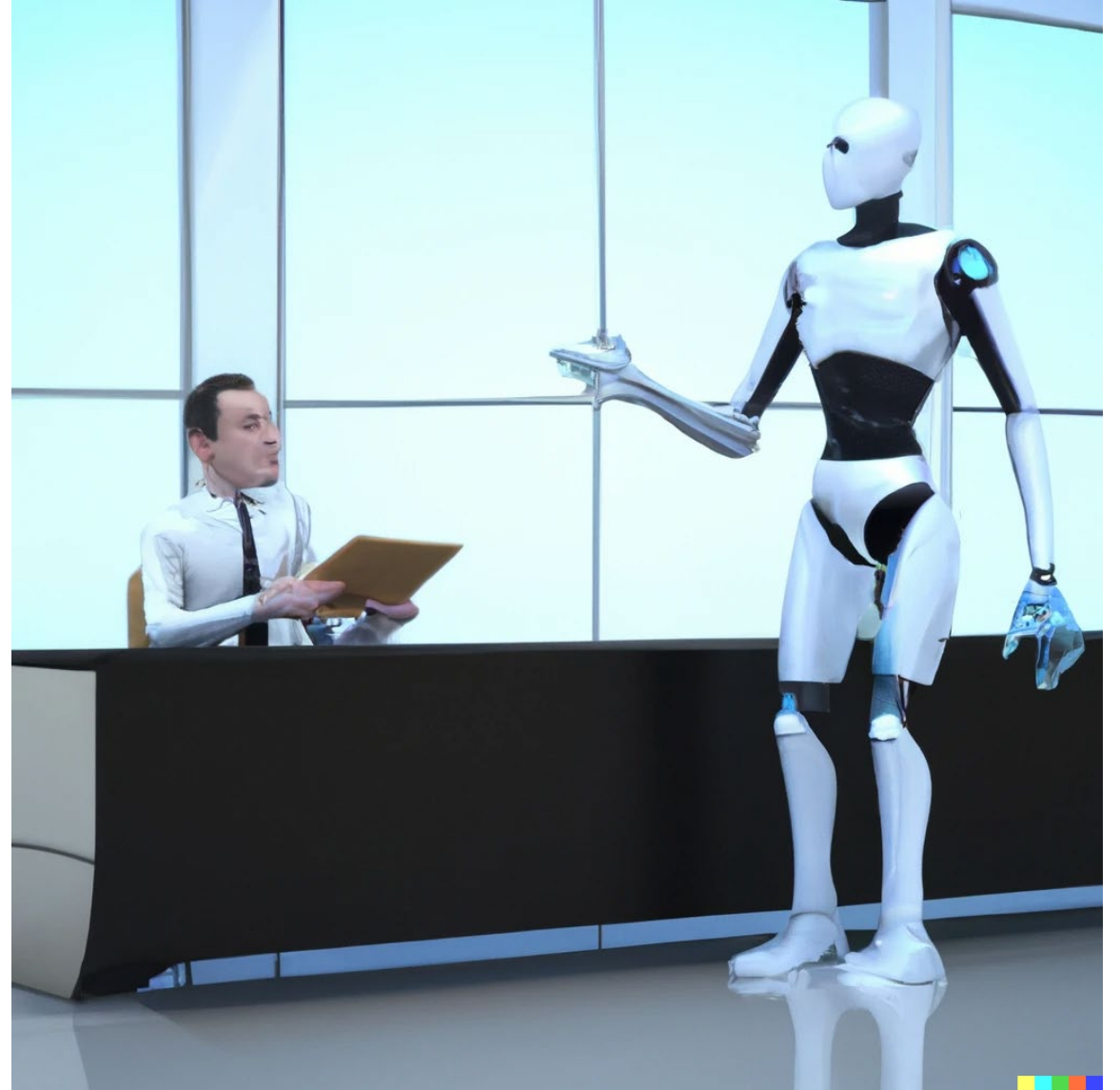


Your Clients are Using AI

- Developing Products
- Operating Equipment
- Hiring and Firing
- Preparing Documents

How do you Contract for AI?

How do you Advise Clients of the Risks?



Machines Making Decisions



Can They Contract For Me? With Each Other?

Can They Contract With Me?

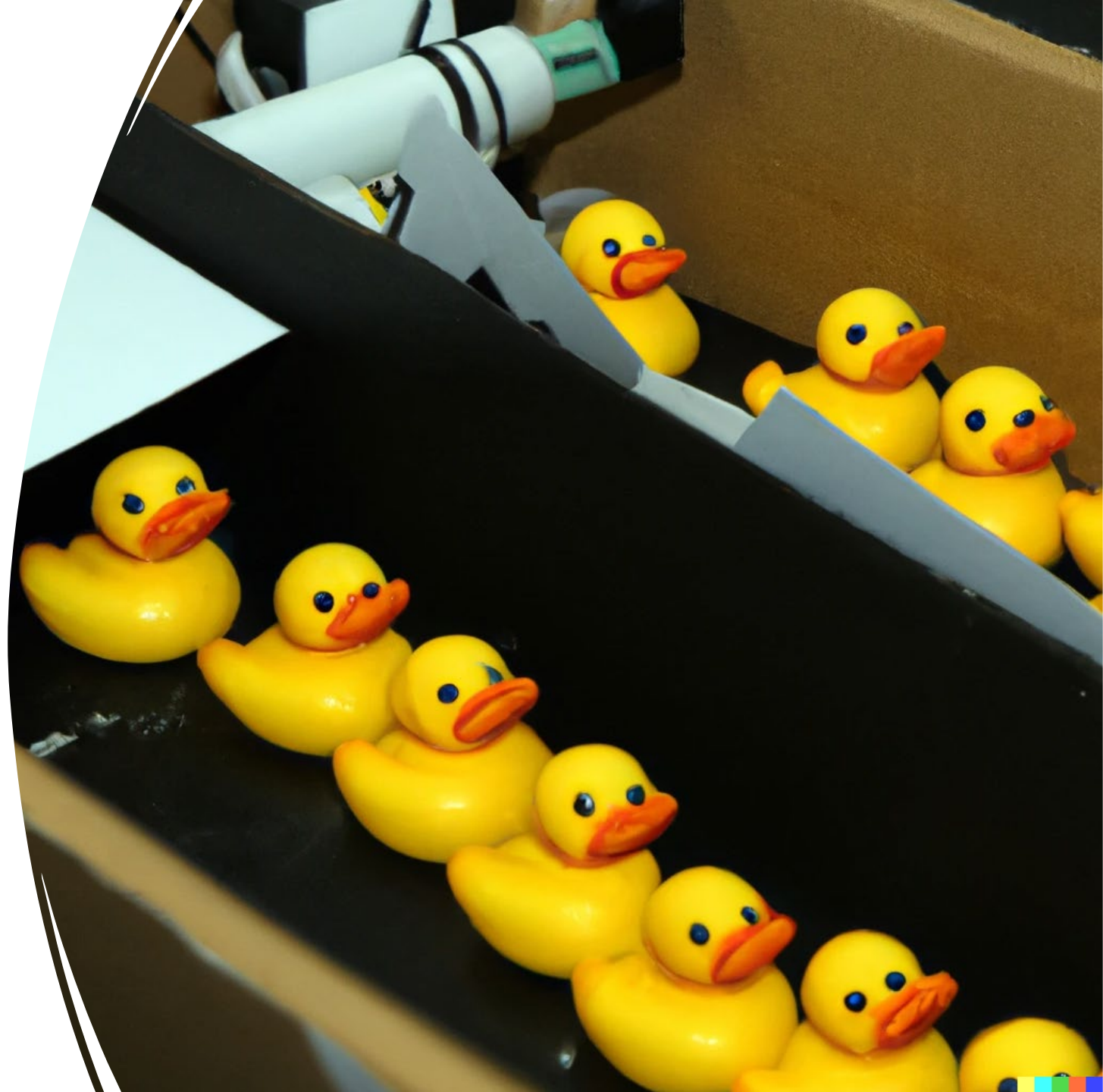
Who is Responsible?

Applying an AI Model

Business Inputs →

AI Production Model →

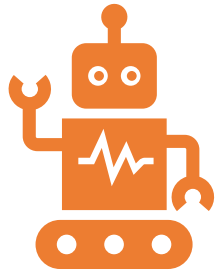
Desired Output



AI Vendor Negotiation

- Reps/Service Levels: Specify what you expect at the back end
 - AI Model
 - Eventual Output
 - Can't hold them to it if you don't specify up front
- Don't Give Up Your Data: Vendor will want it
- Legal Training Data
- Models are Subject to Change – need change control provisions
- Even if vendor owns the AI Models, customer must own outputs

Regulators Already Attacking Models



FTC – Everalbum and progeny

Improperly trained AI model on private data

Model must be destroyed – “any model or algorithm trained” on wrongfully obtained data must be deleted or destroyed and attested on penalty of perjury



Newest Executive Order

Requires registration of models sophisticated enough to be of interest to the US government

Otherwise pointillistic coverage of AI throughout the executive branch

Regulating AI

Who has Right and the Expertise to Regulate it?

How do you Test a Black Box Algorithm?

Should Regulators use AI to Audit Companies?

Can an AI Decision be Unfair and Deceptive?



MIT's TF on Responsible Use of Generative AI for Law

PRINCIPLES

- 1. Duty of Confidentiality to the client in all usage of AI applications;**
- 2. Duty of Fiduciary Care to the client in all usage of AI applications;**
- 3. Duty of Client Notice and Consent* to the client in all usage of AI applications;**
- 4. Duty of Competence in the usage and understanding of AI applications;**
- 5. Duty of Fiduciary Loyalty to the client in all usage of AI applications;**
- 6. Duty of Regulatory Compliance and respect for the rights of third parties, applicable to the usage of AI applications in your jurisdiction(s);**
- 7. Duty of Accountability and Supervision to maintain human oversight over all usage and outputs of AI applications;**

* Consent may not always be required - refer to existing best practices for guidance. We also seek feedback on whether or when consent may be advisable or required.

Your Takeaways

- This Technology is not static. Diligent attention to our high standards cannot be static either.
- Familiarize Yourself with the Gen AI Process and your company's AI policy, if there is one. Understand the strengths and risks of the tech, and how to best use it inside the framework of the policy.
- Determine the Best Use Cases for AI with your clients – individually
- Communicate
- Carve Out Tasks for AI, and Carve out Tasks for Human Attorneys
- Verify Everything

- <https://hbr.org/2023/05/8-questions-about-using-ai-responsibly-answered>
- <https://www.forbes.com/sites/bernardmarr/2023/07/24/the-difference-between-generative-ai-and-traditional-ai-an-easy-explanation-for-anyone/?sh=52c82305508a>
- <https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/artificial-intelligence-real-practice/#:~:text=For%20those%20who%20are%20anxiously,tools%20in%20a%20law%20practice.>
- <https://www.natlawreview.com/article/california-bar-set-guidelines-using-generative-ai-practice-law-more-states-follow>

Ted Claypoole

Ted.Claypoole@wbd-us.com

704 756-2432



Jill C. Rothstein

Jill.Rothstein@wbd-us.com

864 255-5406

