THE ETHICS OF GENERATIVE ARTIFICIAL INTELLIGENCE

PLI
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FACULTY

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• The information in these slides and this presentation is not legal advice and should not be considered legal advice.

• This presentation represents the personal opinions of the presenters.

• This presentation is offered for informational and educational purposes only.
TOPICS FOR TODAY

• The nature of GAI and how it is being used
• The Model Rules of Professional Conduct and GAI
• The Federal Rules of Civil Procedure and GAI
• What the future might hold
THE NATURE OF GAI AND HOW IT IS BEING USED

• What do we mean by AI? If a computer simply matches patterns to pre-determined categories, is that AI?

• If a computer uses algorithms that continuously learn such that outcomes are refined as data volumes increase and do so without human intervention, is that AI?
THE NATURE OF GAI AND HOW IT IS BEING USED

From Wilson:

“Artificial Intelligence (AI) is a branch of computer science that focuses on creating intelligent machines that can think and act like humans. AI has been used to develop computer programs that can solve complex problems and make decisions and predictions with minimal human input.”
THE NATURE OF GAI AND HOW IT IS BEING USED

Generative AI (GAI) is a subset of artificial intelligence that uses algorithms to generate new data from existing massive data sources. The data sources primarily come from the Internet. GAI can be used to create text, images, music, and other forms of media. Examples include ChatGPT, Bard, and DALL-E-2.
THE NATURE OF GAI AND HOW IT IS BEING USED

Generative AI is a type of artificial intelligence (AI) that uses machine learning algorithms to create new and original content like images, videos, text, and audio.

1. Forming a Database
A neural network, consisting of various information or media files like images, text, data, sounds, etc., forms the basis of artificial intelligence.

2. Inputting a Prompt
The user provides the AI with a description or sample of the desired content.

3. Generating Content
...and the AI uses its neural network to generate new examples that are similar to the ones it has trained from.

Prompts can be any user-submitted material, like words, numbers, or photos.
THE NATURE OF GAI AND HOW IT IS BEING USED

• Draft documents
• Conduct legal research
• Contract review
• Predictive analytics
• Chatbots for legal advice
• Brainstorming
• Summarize legal narratives
• Convert “legalese” Into plain language
Andrew Perlman, Dean Suffolk University Law School:

“AI will not eliminate the need for lawyers, but it does portend the end of lawyering as we know it.”

“Adding generative AI to the mix of research tools — when deployed with the right protections — reduces the number of tries an attorney will need to get the right cases.

That’s going to make a significant improvement in the accuracy and efficiency of lawyering. But it’s not replacing the attorney.

Don’t blame AI for lawyering fails. Like a lot of things in tech, the source of the error here lies between the keyboard and the chair.”

THE MODEL RULES OF PROFESSIONAL CONDUCT AND GAI

• Duty of Competence (MRPC 1.1)
  • What does it mean when dealing with GAI?

• Duty of Confidentiality (MRPC 1.6)
  • Can disclosure to GAI waive attorney-client privilege?
  • What about protection of client confidences?

• Duty to Supervise (MRPC 5.1 and 5.3)
  • How might an attorney GAI?
THE FEDERAL RULES OF CIVIL PROCEDURE
AND GAI

What rules might be implicated by GAI use:

Rule 11(b):

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
Rule 26(g):
(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. ***. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.
WHAT THE FUTURE MIGHT HOLD

Federal action:

• United States Congress

• White House

• Regulatory agencies
  • EEOC
  • FTC
  • USDOJ
WHAT THE FUTURE MIGHT HOLD

• State and local action:
  • Maryland HB 1202, Chapter 446 (prohibiting employer use of facial recognition services during job interview absent consent), https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB1202?ys=2020RS
  • New York City Local Law Int. No. 1894-A (addressing bias in artificial intelligence hiring tools), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=ID%7CText%7C&Search=
WHAT THE FUTURE MIGHT HOLD

• “Measures for Generative Artificial Intelligence Services” (draft issued by Cyberspace Admin. of China), see https://www.china-briefing.com/news/understanding-chinas-new-regulations-on-generative-ai-draft-measures/

WHAT THE FUTURE MIGHT HOLD

• Litigation action:
  • *Tremblay v. OpenAI, Inc.*, Docket No. 3:23-cv-03223 (N.D. Cal. June 28, 2023) (copyright infringement action alleging that ChatGPT’s machine learning training dataset comes from books and other texts that are “copied by OpenAI without consent, without credit, and without compensation.”)
  • *P.M. v. OpenAI LP*, Docket No. 3:23-cv-03199 (N.D. Cal. June 28, 2023) (putative class action alleging that the defendants’ use of “scraped” data of non-consenting consumers to train ChatGPT and other artificial intelligence models constituted misappropriation)
WHAT THE FUTURE MIGHT HOLD

• Judicial action
  • *Mata v. Avianca, Inc. 22-cv-1461 (PKC) (SDNY June 22, 2023)*
  • Mandatory Certification Regarding Generative Artificial Intelligence, Judge Specific Requirement of Judge Brantley Starr, Northern District of Texas, https://www.txnd.uscourts.gov/judge/judge-brantley-starr
RESOURCES

• News, “EU AI Act: first regulation on artificial intelligence (European Parliament: updated June 14, 2023),

• B. Fung, “Schumer outlines plan for how Senate will regulate AI,” CNN Business (June 21. 2023),
https://www.cnn.com/2023/06/21/tech/schumer-ai-plan?fbclid=IwAR2HfK_r_5czjtn_bIWs7E0oqOEInRG55W9rjsFldBOupcdaq3r0AU1VQgc
RESOURCES


RESOURCES

• R.J. Hedges, “Artificial Intelligence Admissibility Caselaw” (last updated June 12, 2022) (in materials)

RESOURCES

• T. O’Connor, “Has Legal Artificial Intelligence (AI) Become a Fight Club?” *DigitalWarRoom* (Dec. 2, 2019),

• T. O’Connor, “AI ... Is It Safe?” *NOBA Blog* (New Orleans Bar Ass’n: Apr. 18, 2023),
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RESOURCES


• QUESTIONS?
• COMMENTS?
• THANK YOU!