



NCR A 24

National Conference of Regulatory Attorneys

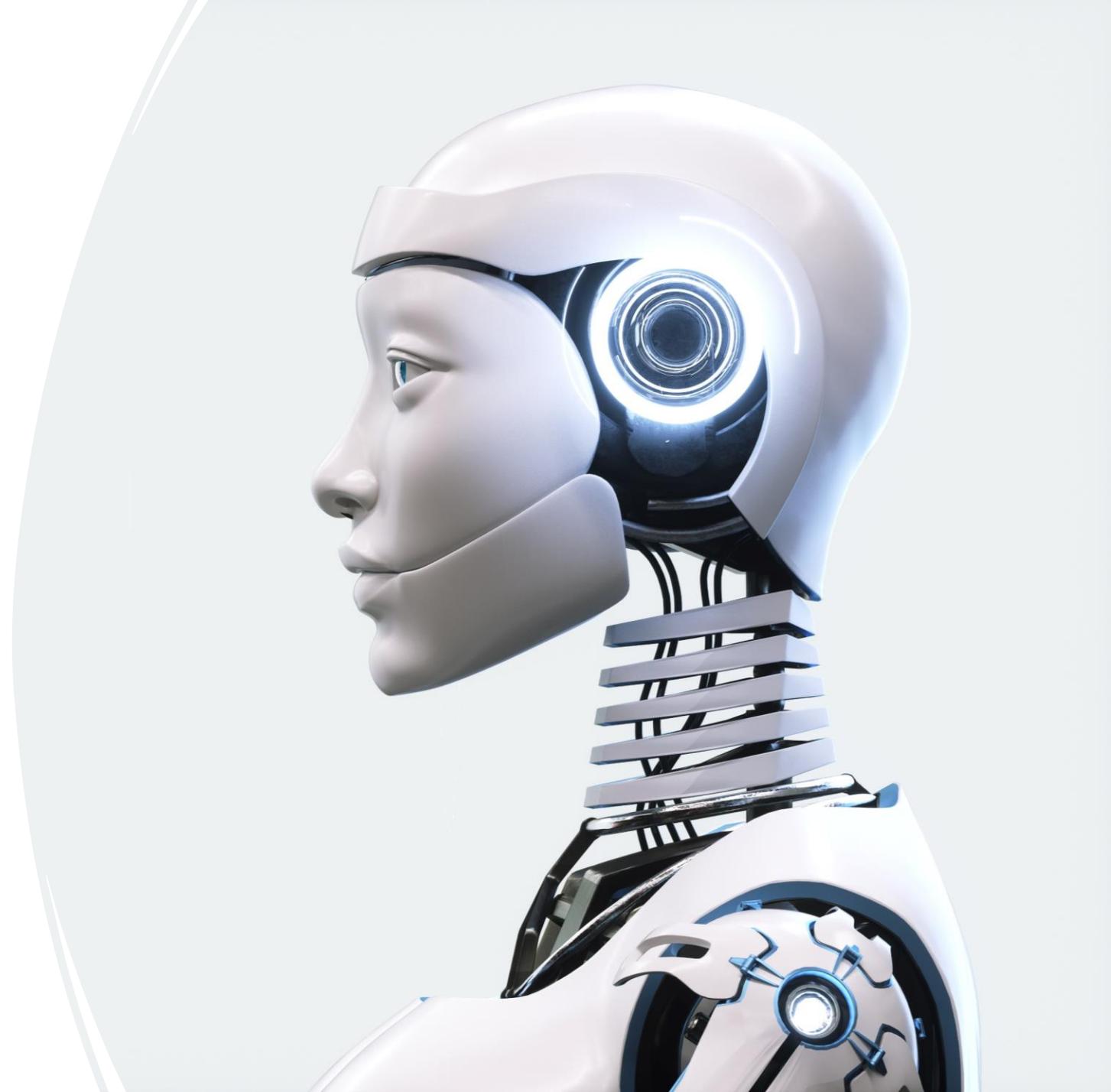
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2024 National Conference of Regulatory Attorneys

Ethical Issues in the Use of Artificial Intelligence

- Presented By:

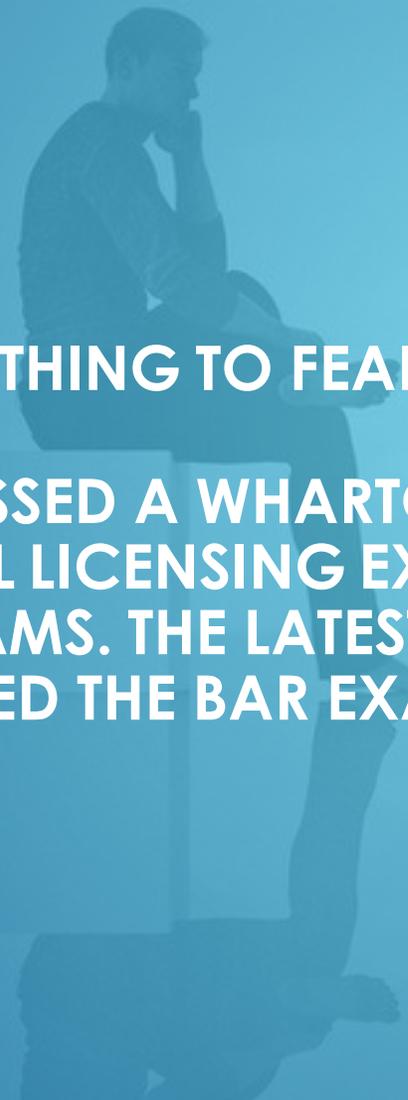
Thomas G. Wilkinson
Deborah A. Winokur





The Problem

- “If we leave it to professionals themselves to reinvent their workplace, are we asking the rabbits to guard the lettuce?”
— Richard Susskind,
**The Future of the Professions:
How Technology Will
Transform the Work of Human
Experts**



DO WE HAVE ANYTHING TO FEAR?

CHATGPT HAS PASSED A WHARTON MBA EXAM, A MEDICAL LICENSING EXAM, SEVERAL LAW SCHOOL EXAMS. THE LATEST VERSION, CHATGPT-4, PASSED THE BAR EXAM.

Artificial Intelligence is Here to Stay

According to International Legal Technology Association 2023 Tech Survey:

Many legal professionals are already using generative AI

Two-thirds of legal professionals expect generative to be a major factor in their practices in the future.

Nearly 75% intend to incorporate generative AI into their work produce within the next twelve months.



GLOBAL LAW FIRM AVERY & OVERY

- ▶ Rolled out its Harvey chatbot in February 2023. Harvey is used to create legal documents, conduct research, leverage work across practice areas and more.

- ▶ Jurypicks fees survey info. into a data model looking for patterns whether, for example, a higher level education or experience as a business owner will more likely support a plaintiff or defendant.
- ▶ The Focus Group allows clients to conduct personalized studies to determine effective voire dire questions and jurors' perception of them.
- ▶ Voire Dire Simulator allows attorneys to practice voire dire on a library of cases.
- ▶ Jury Analytics uses AI to develop compelling questions for jurors.

AI'S GROWING USE IN JURY SELECTION

- ▶ AI can, for example, list reasons why an x-ray technician could fail to detect lung cancer on a chest x-ray or 10 reasons why an auto's air bag would fail to deploy.
- ▶ AI can quickly produce a series of questions for a potential deponent. Those questions may be obvious to an experienced practitioner, but they can be generated in seconds at virtually no cost.
- ▶ See Harvard Law School Center on the Legal Profession's *The Practice* magazine article "The Implications of ChatGPT for Legal Services and Society".

WILL CHATGPT BECOME ESSENTIAL FOR DISCOVERY DEPOSITIONS?

ETHICAL CONSIDERATIONS AND RISKS



- ▶ Privacy and cybersecurity risks may arise from use of AI if trade secrets or proprietary information is submitted to ChatGPT and similar platforms.
- ▶ Challenge for lawyers is to provide enough matter-specific details to develop key arguments or identify precedent without giving confidential information that AI will “learn” from and incorporate for later use by others.
- ▶ Consider whether informed consent was properly given for any use of client or third party information.

PRIVACY CONSIDERATIONS

- ▶ “Hallucinations,” also known as confabulations or delusions, are the result of predictive sequencing used by AI rather than analysis.
- ▶ Hallucinations can result in fabrications and definitive statements on uncertain historical events.
- ▶ ChatGPT fabricated an entire article titled “Machines Will Be Capable of Learning, Solving Problems, Scientists Predict” dated July 10, 1956, which was “published” after a real conference which is considered the birthplace of AI as a field of study.
- ▶ Avianca case
- ▶ Lawyers must understand the technology available to improve the legal services they provide to clients.

DUTIES OF COMPETENCE

- ▶ AI takes available information and perpetuates it within responses.
- ▶ AI technology has shown bias in recruitment. For example, Amazon suspended use of a job applicant review tool because it favored men over women.
- ▶ Research by UVA Law Professor Megan Stevenson and Texas A&M Econ Professor Jennifer Doleac demonstrated that some algorithms used by judges for sentencing discriminate against minority defendants.
- ▶ Disparities in salaries between genders can be inserted in wage predictors.

AI & BIAS

- ▶ Under Rules 5.1 and 5.3 lawyers are obligated to supervise the work of the AI utilized in the provision of legal services and understand the technology well enough to ensure compliance with the lawyer's ethical duties.
- ▶ Lawyer must know where to draw the line with tasks that should or should not be handled by AI.

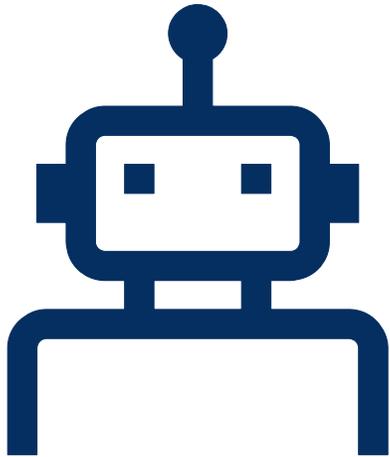
DUTY TO SUPERVISE LAWYERS AND OTHERS

- ▶ Should a client be charged the same amount for a task completed by AI as they would if that same task had been completed by a lawyer?
- ▶ Is it unethical for a lawyer not to use AI for work that could be performed by AI?
- ▶ Can lawyers charge a premium or adjusted hourly billing rate for work that AI completed using a firm's enterprise system?

FEES AND USE OF AI

TERMS OF USE – INDEMNIFICATION CLAUSE MINEFIELD

- ▶ OpenAI licensing agreement provides an indemnification and hold harmless from any claim, loss, and expenses (including attorneys' fees) arising from or relating to your use of the Services, including your Content, products or services you develop or offer”
- ▶ If the provision is enforceable and OpenAI is sued, the user who is also sued may end up paying OpenAI's fees and costs defending against any claim.
- ▶ Open model caps damages at \$100.
- ▶ See L. Eliot, Forbes (April 10, 2023)



JUDICIAL ORDERS ON AI

Responsible AI in Legal Services (RAILS) has an Initial AI in Courts Tracker researched by a Duke law student and published in 2024 which provides a table of Court Orders on AI.

<https://airtable.com/appKUCriCQDI1BxIV/shrflAPpNKaNMnacR/tblNmp6mff8CzLuQD>



BAR ASSOCIATION RESPONSES

Bar associations in eight states have issued ethics guidance on the use of AI.

The ABA has set up a Task Force on Law and Artificial Intelligence.



PLEASE FEEL FREE TO CONTACT
US WITH QUESTIONS