

Ethical Considerations for the Use of AI in Litigation

John Kreienkamp, New Mexico Public Regulation Commission

Nadia Powell, El Paso Electric Company

Nicholas Rossi, New Mexico Public Regulation Commission





This Presentation

- Overview
 - Potential benefits and drawbacks of AI in adjudicatory process for utilities
 - Specific risks and benefits of AI for attorneys
 - Example of the risks of AI in litigation: *Mata v. Avianca, Inc.*
 - With an emphasis on which Rules of Professional Conduct are potentially implicated
 - Use of AI in discovery and related issues
- Focus of this presentation
 - Identifying potential risks and benefits of AI
 - Not necessarily providing all the answers, but identifying ethical issues
- Questions, please





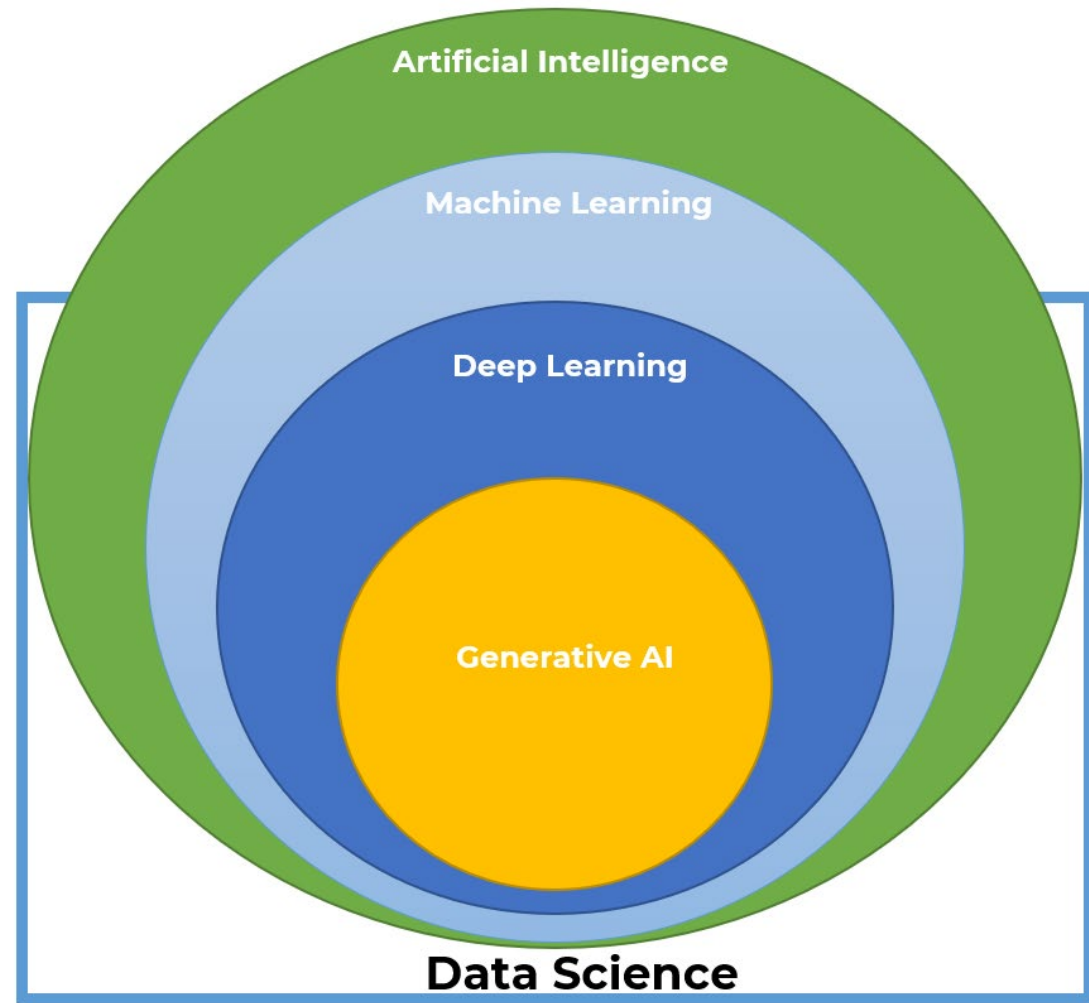
The Potential Benefits and Drawbacks of AI in the Adjudicatory Process for Utilities

Nadia Powell – Director Enterprise Advanced Analytics

El Paso Electric Co.

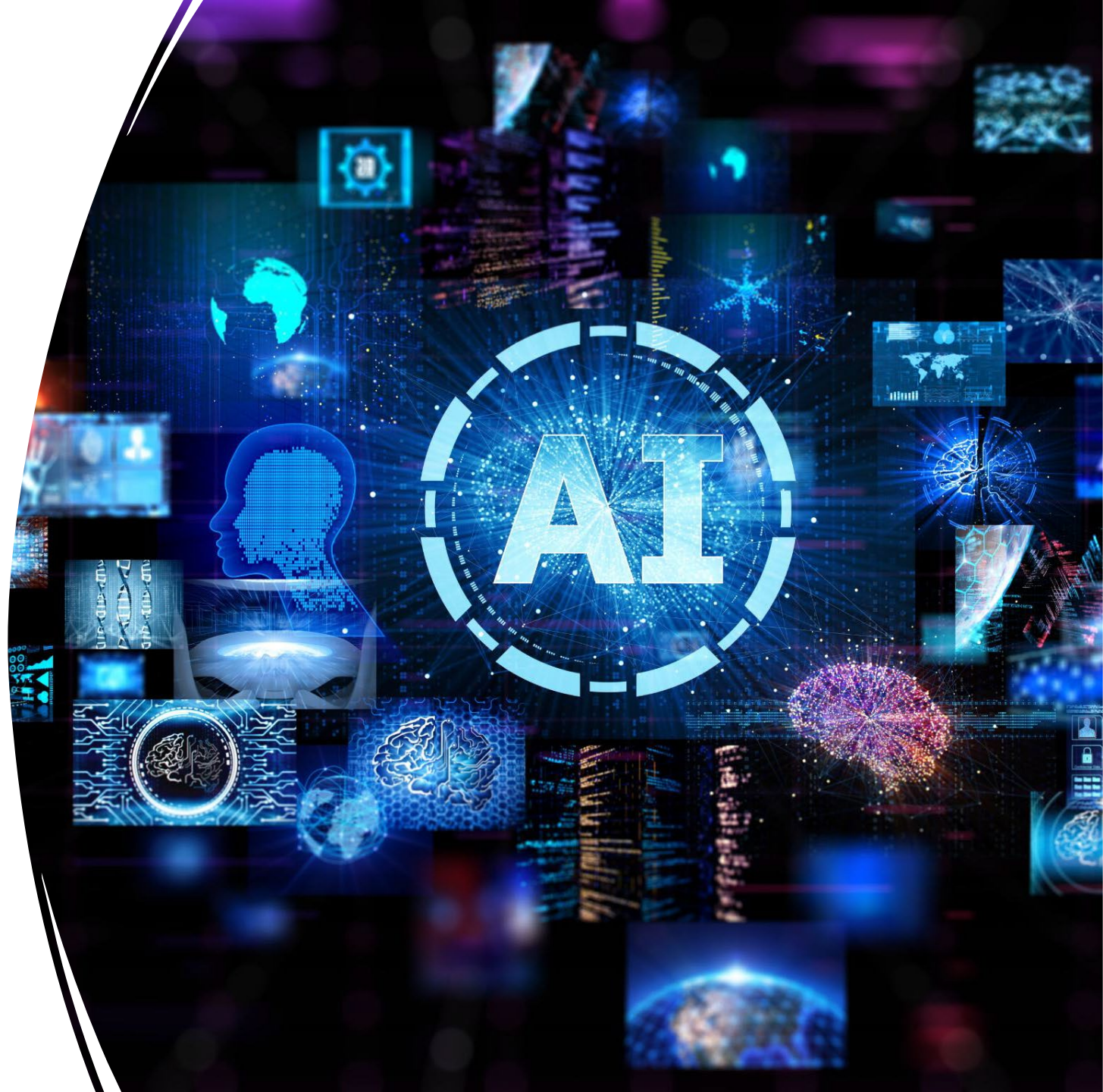
The evolution of Generative AI

- 1950's early exploration of AI
- 1989 neural networks are applied to real-world problems
- 2014 a new class of machine learning is established (Generative Adversarial Networks)
- 2021 Generative AI follows from this new class of machine learning



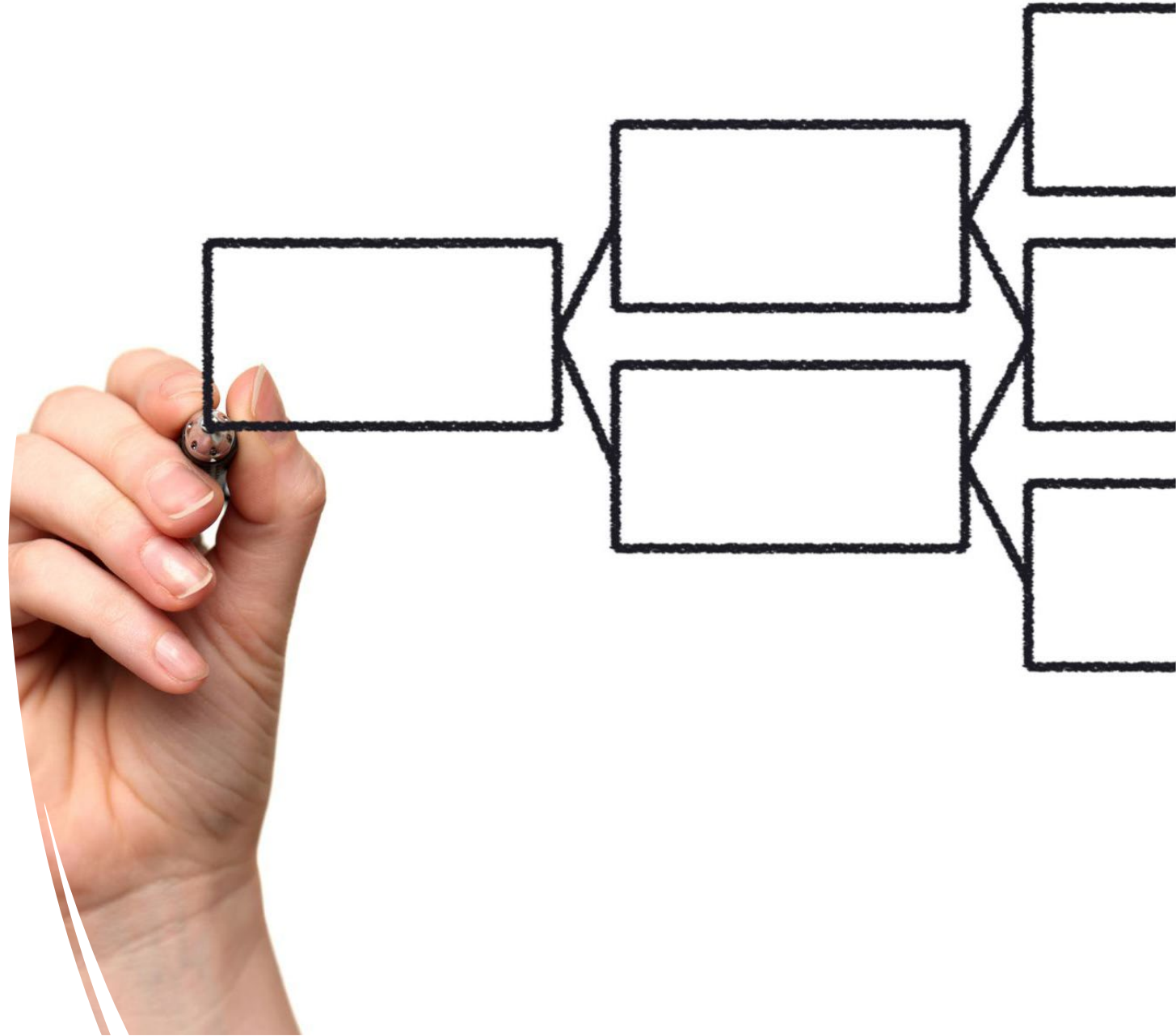
AI use cases in the Adjudicatory Process

- Growing interest in using AI to assist in legal research and developing testimony (Westlaw/ROSS intelligence/Lexis +AI)
- Potential for AI to streamline processes
- Improvement in efficiency



How Large Language Models (LLMs) Work

- LLMs are AI models trained on vast amounts of text data.
- They are used to understand and generate human-like text.
- LLMs are built through training on diverse datasets and fine-tuning for specific tasks.





Benefits and Drawbacks of AI

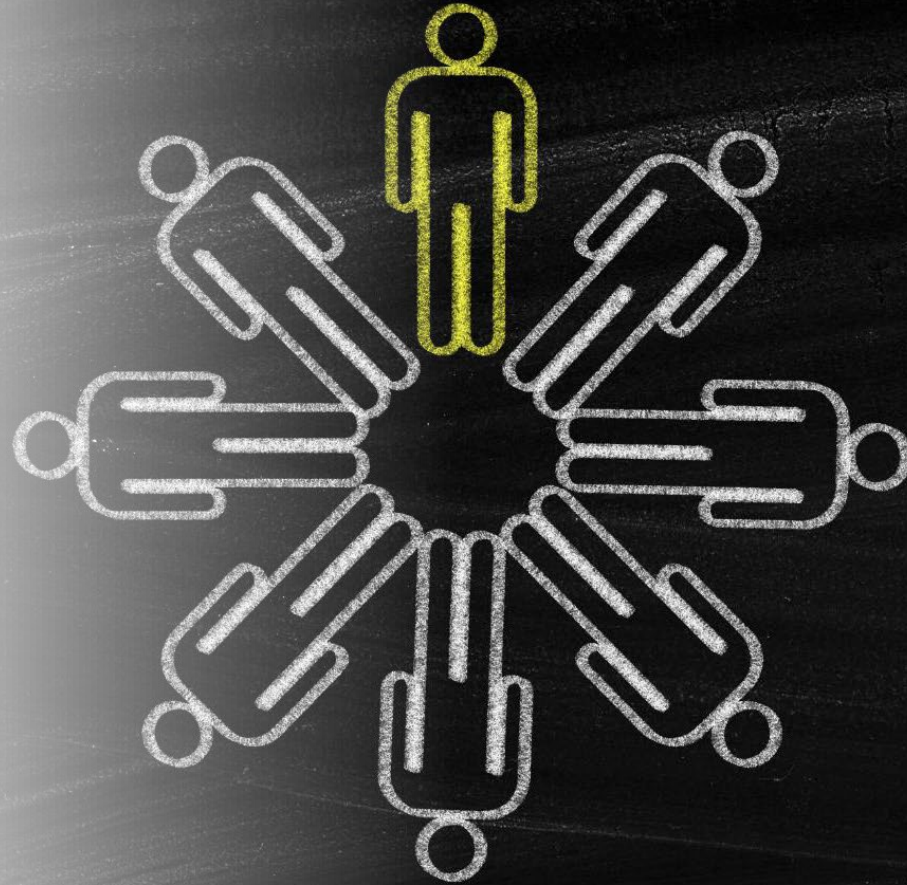
- AI can assist in legal research by quickly analyzing large volumes of documents
- AI can draft testimony and respond to requests for information, saving time and resources
- Generative AI tools can be used for research and information gathering, document drafting and review, and communication assistance
- Potential biases in AI models due to training data
- The need for human oversight to ensure accuracy and relevance of AI-generated content

Ethical Considerations of AI in Legal Research

- AI models can inherit biases from their training data, leading to unfair or discriminatory outcomes
- Ensuring the accuracy of AI-generated content is crucial, as errors can have significant legal implications
- AI systems must handle sensitive information responsibly to protect confidentiality
- Users must remain accountable for the AI tools they use and ensure compliance with professional ethics rules

The Role of the Witness in Reviewing AI Suggestions

- Witnesses should actively review and validate AI-generated suggestions.
- Ensure AI outputs align with legal standards and factual accuracy.





Ethical Considerations for Attorneys



Rule 16-101 NMRA

- “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”
- Committee commentary: “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*” (emphasis added)
- Requires attorneys, at least to a degree, to keep up with technological advances
 - What are the benefits and risks associated with AI?





Mata v. Avianca, Inc.

678 F.Supp.3d 443 (S.D.N.Y. 2023)

- Background
 - Case involving the use of AI in drafting pleadings in litigation
 - United States District Court for the Southern District of New York
 - Received media attention
- Facts: personal injury case regarding a metal serving cart on an airplane hitting the plaintiff's knee
 - Airline filed a motion to dismiss, arguing that the case was time barred
 - Plaintiff's counsel filed a response to the motion to dismiss





Mata v. Avianca, Inc. (cont'd)

678 F.Supp.3d 443 (S.D.N.Y. 2023)

- Plaintiff's counsel responded to the motion to dismiss
 - Used ChatGPT
 - Response cited to:
 - Varghese v. China Southern Airlines Co., Ltd., 925 F.3d 1339 (11th Cir. 2019)
 - Shaboon v. Egyptair, 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013)
 - Peterson v. Iran Air, 905 F. Supp. 2d 121 (D.D.C. 2012)
 - And other cases, many of which had their own internal citations
- These cases were fictional: they did not exist
 - Plaintiff's counsel (initially) denied this
- Opposing counsel and the court were unable to locate the decisions
 - Opposing counsel filed a reply and notes that these cases do not appear to exist
 - Court ordered Plaintiff's counsel to produce copies of the cases
- Plaintiff's counsel then turned to ChatGPT to produce excerpts



Mata v. Avianca, Inc. (cont'd)

678 F.Supp.3d 443 (S.D.N.Y. 2023)

- Receiving excerpts from Plaintiff's counsel, Court finds some oddities
 - Most importantly, Court still cannot locate the decisions
 - Goes so far as to contact the courts who are alleged to be the authors
 - As for the excerpts: "The 'Varghese' decision shows stylistic and reasoning flaws that do not generally appear in decisions issued by United States Courts of Appeals."
 - "Its legal analysis is gibberish."
 - "summary of the case's procedural history is difficult to follow and borders on nonsensical"
 - The decision "abruptly ends without a conclusion"
 - Notes that another case, "Miller v. United Airlines, Inc., 174 F.3d 366 (2d Cir. 1999)" lists "Alberto R. Gonzales" as counsel for the defendant
 - "Alberto R. Gonzales is the name of the former United States Attorney General, who served from 2005 to 2007."
 - (This case does not exist)
- When ChatGPT provided excerpts, also named **real judges** as authors of the fake opinions
- Court conducted a sanctions hearing, where Plaintiff's counsel testified about what happened
 - Counsel first prompted ChatGPT to argue his point for him, and it responded without citations to authority
 - Court found: "When directed to 'provide case law', 'show me specific holdings', 'show me more cases' and 'give me some cases', the chatbot complied by making them up."





Mata v. Avianca, Inc. (cont'd)

678 F.Supp.3d 443 (S.D.N.Y. 2023)

- Court found numerous ethical violations, and subjective bad faith, on the part of Plaintiff's counsel, including:
 - Did not read a single case cited in the response to the motion to dismiss or otherwise inquire as to whether the assertions of law were warranted
 - Swore to the truth of the affidavit submitting the excerpts of cases
- Sanctions:
 - \$5,000 fine (paid by counsel)
 - Required to provide written notification to client of the sanction
 - Required to provide written notification to all of the judges claimed to author the fake opinions
- Court also outlined what it saw as the harms of counsel's conduct:
 - Opposing counsel wastes time and resources
 - Wastes judicial resources
 - Deprives the client of real legal representation
 - Reputational harm to the real judges claimed to have authored the fake opinions
 - Fuels cynicism about the law and the judicial process
 - May tempt future litigants to defy a judicial ruling by disingenuously challenging its authenticity



Possible Risks: “Hallucinations” and Errors

- Risk of AI simply making things up
 - Case law and other authority
 - Statements of law
- Not limited to drafting legal pleadings
 - Reading an AI summary rather than the case itself
 - Trying to understand an area of law and explain it to a client
- How was the AI application trained or developed?
 - If bias went into training the AI, output may have bias
 - EX: Microsoft’s AI chatbox began to express discriminatory viewpoints based on conversations with the public over social media
 - Potential risk of bias and discrimination
 - Think about hiring, or criminal law (predictive AI and recidivism)



Possible Risks: Client Confidentiality

- Beyond “hallucinations,” arguably most well-known risk of AI in litigation
- Rule 16-106 NMRA requires an attorney to maintain the confidentiality of information regarding the representation of the client
- Inputting client information into an AI chatbox or database
 - Some AI applications retain queries and share them with third parties
 - Some law firms are prohibiting this, due to confidentiality concerns
 - At a minimum, attorneys will need to closely review the terms and conditions of the AI application
- AI (Siri, Alexa, etc.) listening in on conversations with clients
 - Potentially being recorded to improve AI performance



Possible Risks: Aspects of the Law that AI Might Not Easily Grasp

- There is a degree of art in the practice of law
 - Use of terminology
 - Assessing credibility
 - Even the development and use of facts in a case
- AI platforms might not readily grasp certain concepts or nuances in the law
- Chief Justice Roberts' 2023 Year-End Report on the Federal Judiciary
 - Emphasized the likely benefits of AI, but also emphasized its limitations in litigation
 - “Nuance matters: Much can turn on a shaking hand, a quivering voice, a change of inflection, a bead of sweat, a moment’s hesitation, a fleeting break in eye contact.”
 - Also noted that AI is less useful “on open questions about how the law should develop in new areas”
- Implicates several of the Rules of Professional Conduct:
 - Rule 16-101 (competence)
 - Rule 16-503 (duty to supervise)
 - Rule 16-103 (diligence)



Possible Risks: Loss of Skill or Knowledge

- Skills and knowledge, when not in use, may atrophy
 - Excessive use or reliance on AI may ultimately have negative consequences on attorney competence
- If a lawyer always uses AI platforms to write, will that attorney retain all of those writing skills?
- What about summarizing case law?
 - If ChatGPT summarizes the case for you, do you know the case as well?



Possible Risks: Pro Se Litigants

- Generative AI is also available to pro se litigants, who may not appreciate its risks
- *Morgan v. Community Against Violence*, No. 23-CV-353-WPJ/JMR, 2023 WL 6976510 (D.N.M. Oct. 23, 2023)
 - Memorandum opinion and order granting in part a motion to dismiss filed by the defendants
 - Pro se plaintiff filed a response citing to nonexistent cases
 - “Although courts ‘make some allowances for the pro se Plaintiff's failure to cite to proper legal authority,’ courts do not make allowances for a Plaintiff who cites to fake, nonexistent, misleading authorities.”
 - “Plaintiff cited to several fake or nonexistent opinions. ... Quite obviously, many harms flow from such deception—including wasting the opposing party's time and money, the Court's time and resources, and reputational harms to the legal system (to name a few).”
- U.S. District Court for the Eastern District of Texas recently amended its local rules to caution pro se litigants about use of AI
 - Comment (from Court): “Recent advancements in technology have provided pro se litigants access to tools that may be employed in preparing legal documents or pleadings. However, often the product of those tools may be factually or legally inaccurate.”



Other Considerations: Discussion of AI Use with Client

- Rule 16-104(A)(2) NMRA requires an attorney to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”
- Attorneys may have ethical duty to obtain informed consent before using (or not using) AI tools
 - Discussion would include the risks and benefits
 - Particularly important with respect to providing client information to AI



Possible Benefits

- Greater speed and efficiency
 - EX: faster legal research (supplementing Boolean searches)
 - EX: AI tools to assist with contract review (identifying critical provisions within contracts)
- Potentially more thorough research and writing
 - If opposing counsel is using AI-assisted legal research applications, and you don't, is your client at a disadvantage?
- Direct benefits to clients:
 - (Arguably) better representation
 - (Possibly) less expensive representation
- These benefits may increasingly implicate the Rules of Professional Conduct
 - Rule 16-101 (competence) and Rule 16-103 (diligence)
 - Rule 16-105 (reasonable fees)



ABA Formal Opinion 512 (July 29, 2024)

- Formal opinion issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility
 - First formal opinion addressing use of generative AI
 - Purpose was to identify ethical considerations
 - Described generative AI as “a *rapidly* moving target” because the features and abilities of AI are constantly improving
- Key takeaways:
 - Attorneys do not need to become experts on AI, but must have a reasonable understanding of the capabilities and limitations of the AI technology the attorney may use
 - Must be very careful about confidentiality issues whenever inputting information to AI
 - Client consultation regarding use of AI may be necessary, particularly if AI is used to evaluate possible litigation outcomes
 - Emphasized the attorney's supervisory responsibilities, both with respect to supervising AI work and the use of AI by subordinate attorneys
 - For fees, attorneys must only charge for actual time spent on the legal representation, even if AI makes that work faster and more efficient
 - Also, “before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge preferably in writing”



Judicial Responses to Developments in AI

- Courts are beginning to incorporate changes to court rules to address risks of AI
- U.S. Court of Appeals for the Fifth Circuit
 - Proposed, but ultimately rejected, a new rule regarding use of AI
 - Would have read: “counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human”
 - Court did not elaborate as to why it did not adopt this requirement, but did state: “Parties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require. ‘I used AI’ will not be an excuse for an otherwise sanctionable offense.”
- U.S. District Court for the Eastern District of Texas
 - Amended its rules to caution attorneys: “the lawyer is cautioned that certain technologies may produce factually or legally inaccurate content and should never replace the lawyer’s most important asset – the exercise of independent legal judgment,” E.D. Tex. Loc. R. AT-3(m)



State Bar of New Mexico Ethics Advisory Committee Formal Opinion

- Opinion: 2024-004
- Issued September 24, 2024
- Topic: Using Generative Artificial Intelligence in the Practice of Law
- Conclusion:

In summary, while a lawyer licensed in New Mexico may use Generative Artificial Intelligence in the practice of law, if they choose to do so they must do so responsibly and they must fully adhere the ethical standards of both the New Mexico Rules of Professional Conduct, and any tribunal or agency rules, policies, procedures or orders.

<https://www.sbnm.org/Leadership/Committees/Ethics-Advisory-Committee/Ethics-Advisory-Opinions>



Closer to Home

- New Mexico: does not appear there have been any attorneys disciplined for mishaps using AI
- Colorado: November 2023, Attorney suspended for filing a pleading (motion to set aside a decision) generated by AI with fictitious case citations. First case like this in Colorado.
 - 90 day suspension and 2 year probationary period
 - <https://www.cbsnews.com/colorado/news/colorado-lawyer-artificial-intelligence-suspension/>
 - People v. Zachariah C. Crabill. 23PDJ067. November 22, 2023.



Can AI assist in review of Discovery?

- AI can summarize a document for you. Is that helpful?
 - Do you own the document?
 - Is it a public document?
 - Are there restrictions that apply?





Discovery Restrictions:

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF)
THE UTILITY)
_____)

Case No. 24-00???-UT

CONFIDENTIALITY AGREEMENT

I hereby certify that I am familiar with the terms and conditions of the Protective Order entered by the Commission in the above-captioned case and agree to be bound by the terms and conditions thereof. I also consent to the jurisdiction of the New Mexico Public Regulation Commission and the courts of the State of New Mexico for the resolution of disputes regarding alleged violations of the Protective Order and this Confidentiality Agreement.



Knowledge Cutoff Date

“My knowledge cutoff date is October 2023. This means I can provide information on events and developments up until that date. For anything after October 2023, I’ll need to look up current information if possible.” – ChatGPT

Example: Texas v. New Mexico, SCOTUS No. 141 Original

“In the *Texas v. New Mexico* case over the Rio Grande Compact, the Supreme Court appointed Judge Michael Melloy as the Special Master.” – ChatGPT (Out of Date and Incorrect)

“Yes, the Special Master in *Texas v. New Mexico* has recently changed. As of July 2024, Judge Michael Melloy was discharged, and Judge D. Brooks Smith, a retired federal judge from Pennsylvania, was appointed to take his place.” - ChatGPT



Delivery to AI – What does it do with the information?

“I don’t continue to learn in the sense of training on new documents after my October 2023 cutoff. My responses are based on the knowledge I was trained on up until then. However, I can retain certain relevant information across our conversation, if it helps improve our ongoing interaction.”
- ChatGPT



How can AI be useful?

Example:

- Can you tell me about SMR nuclear reactors?
 - Small Modular Reactors (SMRs) are a type of nuclear reactor designed to be smaller, simpler, and often more flexible than traditional large nuclear reactors. SMRs generally produce less than 300 megawatts of electrical power (compared to traditional reactors that generate around 1,000 MW or more). Here's an overview of what makes SMRs distinctive:

Double check research you have finished.

A starting place, similar to Wikipedia.



Questions?

