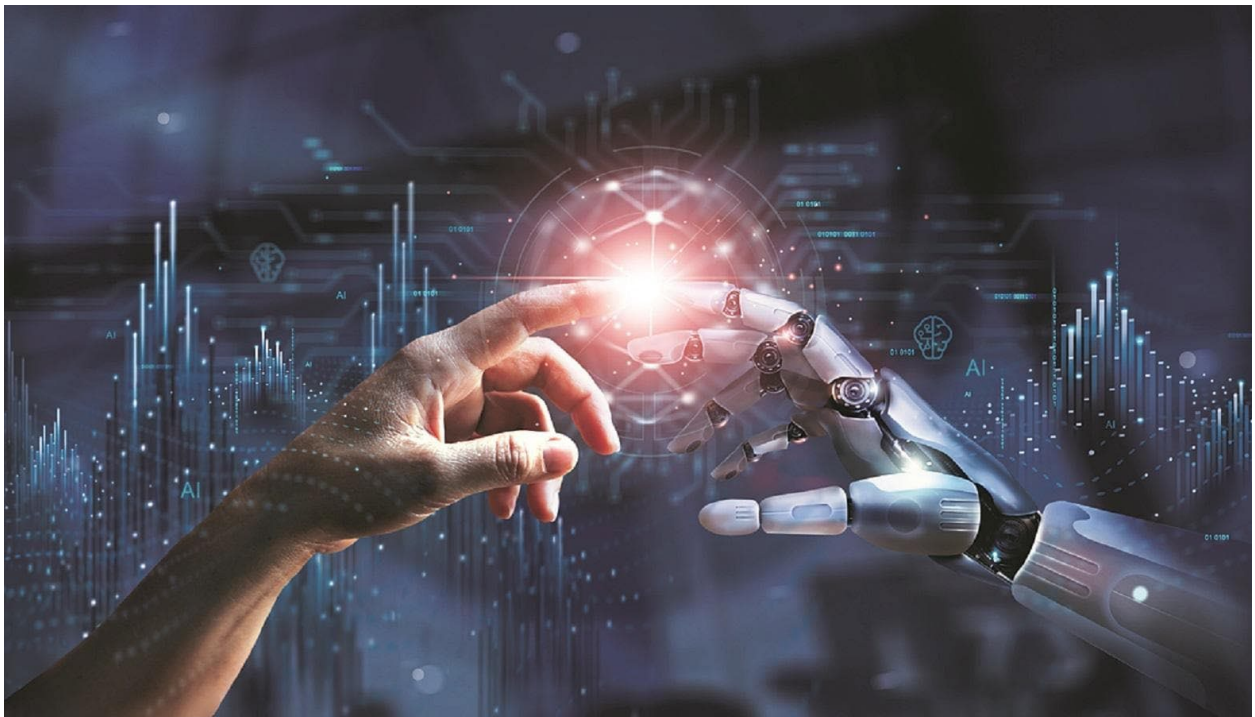**NYSBA TASK FORCE ON ARTIFICIAL INTELLIGENCE**

REPORT AND RECOMMENDATIONS TO
<u>**NYSBA HOUSE OF DELEGATES**</u>

APRIL 6, 2024

Members of the Task Force on Artificial Intelligence

Vivian D. Wesson, Esq., Chair
Jonathan P. Armstrong, Esq.
Catherine Casey
Dessislav Dobrev, Esq.
Hon. Timothy S. Driscoll
Sarah E. Gold, Esq.
Ignatius A. Grande, Esq.
Ronald J. Hedges, Esq.
Dean Elena B. Langan
Luca CM Melchionna, Esq.
Marissa Janel Moran, Esq.
Norman J. Resnicow, Esq.
Rebecca Roiphe, Esq.
Sudha Setty, Esq.
Prof. Roy D. Simon
Brooke Erdos Singer, Esq.

Richard C. Lewis, Esq.,
President, New York State Bar Association

Katherine Suchocki, NYSBA Staff Liaison

NYSBA Government Relations Team
Hilary F. Jochmans, Jochmans Consulting, LLC

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INTRODUCTION

The NYSBA Task Force on Artificial Intelligence, chaired by Vivian Wesson, respectfully presents this Report to the NYSBA House of Delegates. This Report, to be presented to the House of Delegates on April 6, 2024, examines the legal, social and ethical impact of artificial intelligence (AI) and generative AI on the legal profession. This Report also reviews AI-based software, generative AI technology and other machine learning tools that may enhance the profession but also poses risks for individual attorneys' understanding of new, unfamiliar technology, as well as courts concerned about the integrity of the judicial process. Further, this Report makes recommendations for NYSBA adoption, including proposed guidelines for responsible AI use. A copy of the Task Force's Mission Statement is attached as Exhibit A.

Why Now?

As NYSBA's President Richard Lewis has noted, AI's rapid growth and sophistication have, and will continue to have, a monumental impact on all professions – including lawyers, law firms and their clients. NYSBA seeks to proactively address how AI may best assist those who interact with the legal system while evaluating how tightly it needs to be regulated and what protections we should institute safeguard against misuse or abuse. From self-driving cars to ChatGPT to 3-D printed guns, AI has transformed our world. If this is our Promethean moment in AI evolution, now is the time to better understand, embrace, utilize and scrutinize this technology.

Who Is Involved?

For this Task Force, NYSBA has gathered legal professions across a range of subject matter expertise. We have deans of law schools seeking clarity on educating legal minds in this digital age. We have practitioners in the technology space advising clients on AI use. There are those who

enthusiastically deploy AI-based tools and those who are wary about the risks. The Task Force also has an international perspective, understanding that AI will have a global, not just a regional, effect.

What We Learned

We have organized this Report into five parts: (1) the evolution of AI and generative AI; (2) the benefits and risks of AI and generative AI use; (3) the impact of the technology to the legal profession; (4) legislative overview and recommendations; and (5) proposed guidelines.

Artificial intelligence, particularly generative AI, has had a profound impact across multiple sectors of our society, revolutionizing how we approach creativity, problem-solving and automation. From art and entertainment to healthcare and education, AI is reshaping industries, creativity and society in multifaceted ways. While AI and generative AI offer immense potential for innovation and efficiency, the technology also presents challenges that require careful management, including ethical considerations, privacy concerns and labor impact. The ongoing evolution of generative AI promises to continue influencing the world in unprecedented ways.

Considering the continued revolutionary impact of the technology, this Task Force undertook the challenge to assess its evolution, benefits and risks, and impact on the legal profession. Here, we summarize our four principal recommendations for adoption by NYSBA.

Task Force Recommendations

1. *Adopt Guidelines*: The Task Force recommends that NYSBA adopt the AI/GAI guidelines outlined in this report and commission a standing section or committee to oversee periodic updates to those guidelines.

2. *Focus on Education*: The Task Force recommends that NYSBA prioritize education over legislation, focusing on educating judges, lawyers and regulators to understand the technology so that they can apply existing law to regulate it.

3. *Identify Risks for New Regulation*: Legislatures should identify risks associated with the technology that are not addressed by existing laws, which will likely involve extensive hearings and studies involving experts in AI.

4. *Examine the Function of the Law in AI Governance*: The rapid advancement of AI prompts us to examine the function of the law as a governance tool. Some of the key functions of

the law in the AI context are: (i) expressing social values and signal fundamental principles; (ii) protecting against risks to such values and principles; and (iii) stabilizing society and increasing legal certainty.

"For more than 250 years the fundamental drivers of economic growth have been technological innovations. The most important of these are what economists call general-purpose technologies – a category that includes the steam engine, electricity, and the internal combustion engine. . . . The most important general-purpose technology of our era is artificial intelligence, particularly machine learning." ~ Erik Brynjolfsson and Andrew McAfee[1]

I.   Introduction

To begin a discussion of artificial intelligence, it may be helpful to first define "intelligence." Intelligence is "the capacity to acquire knowledge and apply it to achieve an outcome; the action taken is related to the particulars of the situation rather than done by rote. The ability to have a machine perform in this manner is what is generally meant by artificial intelligence."[2] Artificial intelligence means "computers doing intelligent things – performing cognitive tasks, such as thinking, reasoning, and predicting – that were once thought to be the sole province of humans. It's not a single technology or function."[3]

According to the Merriam Webster dictionary, artificial intelligence is "the capability of a machine to imitate intelligent human behavior."[4] At a basic level, artificial intelligence programming focuses on three cognitive skills: learning, reasoning and self-correction:[5]

- The learning aspect of artificial intelligence programming focuses on acquiring data and creating rules for how to turn data into actionable information. The rules, called algorithms, provide computing systems with step-by-step instructions on how to complete a specific task.

- The reasoning aspect involves artificial intelligence's ability to choose the most appropriate algorithm, among a set of algorithms, to use in a particular context.

- The self-correction aspect focuses on artificial intelligence's ability to progressively tune and improve a result until it achieves the desired goal.

II.   AI Defined and Explained

"*AI is a branch of computer science and often involves technical knowledge outside of most lawyers' expertise, understanding how AI programs operate may be difficult for lawyers.*"[6]

A.   <u>AI and Its Applications</u>[7]

- **AI** is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data and translating languages. AI mimics certain operations of the human mind.

- **Machine Learning** is an application of AI in which computers use algorithms (rules) embodied in software to learn from data and adapt with experience.

- A **Neural Network** is a computer that classifies information – putting things into "buckets" based on their characteristics.

B.   <u>What It Does</u>

In general, AI involves algorithms (a set of rules to solve a problem or perform a task), machine learning and natural language processing.

Why do similar but varied definitions of AI exist?

"*What qualifies as an intelligent machine is a moving target: A problem that is considered to require AI quickly becomes regarded as 'routine data processing' once it is solved.*"[8]

"*One result of AI's failure to produce a satisfactory criterion of intelligence is that, whenever researchers achieve one of AI's goals – for example, a program that can summarize newspaper articles or beat the world chess champion – critics are able to say, 'That's not intelligence!'*"[9]

"*Marvin Minsky's response to the problem of defining intelligence is to maintain – like Alan Turing before him – that intelligence is simply our name for any problem-solving mental process that we do not yet understand. Minsky likens intelligence to the concept of "unexplored regions of Africa": it disappears as soon as we discover it.*"[10]

III.   Types of AI

- **Narrow or Weak**: This kind of AI does some tasks at least as well as, if not better than, a human. For example, in law, there is TAR, or technology-assisted review – AI that can find legal evidence more quickly and accurately than a lawyer can; AI technology

that can read an MRI more accurately than a radiologist can. Other examples are programs that play chess or AlphaGo better than top players.

- **General or Strong AI**: This kind of AI would do most if not all things better than a human could. This kind of AI does not yet exist and there's debate about whether we'll ever have strong AI.

- **Super Intelligent AI** of the science fiction realm. This type of AI would far outperform anything humans could do across many areas. It's controversial, and some see it as an upcoming existential threat.[11]

IV.   The Founding Fathers/Mothers of AI

Credited as the "father of artificial intelligence," Alan Turing was the wartime codebreaker at Bletchley Park and founder of computer science. Turing was one of the first people to take seriously the idea that computers could think.[12] Credited as the "father of deep learning," Frank Rosenblatt was a psychologist whose brainchild was the Perceptron.[13] The rise of the modern computer is often traced to 1836 when Charles Babbage and Augusta Ada Byron, Countess of Lovelace, invented the first design for a programmable machine.[14]

V.   AI Through the Years: The AI Timeline

A.   Mythology

Efforts to understand and describe the human thought process "as symbols – the foundation for AI concepts such as general knowledge representation – include the Greek philosopher Aristotle, the Persian mathematician Muḥammad ibn Mūsā al-Khwārizmī, 13th-century Spanish theologian Ramon Llull, 17th-century French philosopher and mathematician René Descartes, and the 18th-century clergyman and mathematician Thomas Bayes."[15]

B.   Programmable Digital Computer (1940s)

In the 1940s, Princeton mathematician John von Neumann conceived the architecture for the stored program computer. This was the idea that a computer's program and the data it processes can be kept in the computer's memory.[16] The first mathematical model of a neural network, arguably the basis for today's biggest advances in AI, was published in 1943 by the computational neuroscientists Warren McCulloch and Walter Pitts in their landmark paper, "A Logical Calculus of Ideas Immanent in Nervous Activity."[17]

C.   Theseus: Remote-Controlled Mouse (1950)

"*It is customary to offer a grain of comfort, in the form of a statement that some peculiarly human characteristic could never be imitated by a machine. I cannot offer any such comfort, for I believe that no such bounds can be set.*" ~ Alan Turing, 1951

Developed by Alan Turing in 1950, the Turing Test focused on the computer's ability to fool interrogators into believing its responses to their questions were made by a human being.[18] The first step in the direction of machine learning was provided by the Turing Test (also known as the "imitation game") in which an interrogator had to discover whether they were interrogating a human or a machine and, therefore, whether a machine can show human-like intelligence.[19]

D.   Dartmouth College Workshop (Summer of 1956)

The term "artificial intelligence" was first used in 1955 when John McCarthy, a computer scientist at Dartmouth College, in New Hampshire, used the phrase in a proposal for a summer school.[20] The 1956 summer conference at Dartmouth, sponsored by the Defense Advanced Research Projects Agency, or DARPA, included AI pioneers Marvin Minsky, Oliver Selfridge and John McCarthy. In addition, Allen Newell, a computer scientist, and Herbert A. Simon, an economist, political scientist, and cognitive psychologist, "presented their groundbreaking Logic Theorist – a computer program capable of proving certain mathematical theorems and referred to as the first AI program."[21]

With the promise of great advancement in AI, the Dartmouth conference garnished both government and industry support. Some significant advances in AI at that time include the General Problem Solver (GPS) algorithm published in the late 1950s, which laid the foundations for developing more sophisticated cognitive architectures; Lisp, a language for AI programming that is still used today; and ELIZA, an early natural language processing (NLP) program that laid the foundation for today's chatbots.[22]

E.   Perceptron Mark I: Artificial Neural Network (1958)

The Perceptron was the first neural network, a rudimentary version of the more complex "deep" neural networks behind much of modern AI.[23]

F.   AI Winter (1970s)

Eventually, when the promise of developing AI systems equivalent to the human brain proved elusive, government and corporations diminished their support of AI research. This led to what has been termed the "AI winter," which lasted from 1974 to 1980.[24]

G.   AI Second Winter (1980s)

"*In the literal sense, the programmed computer understands what the car or the adding machine understand: namely, exactly nothing.*" ~ John Searle, 1980

In the 1980s, there was renewed AI interest due in part to research on deep learning techniques and industry adoption of Edward Feigenbaum's expert systems. Yet, lack of funding and support led to the "second AI winter," which lasted until the mid-1990s.[25]

H.   Machine Learning Development (1990s and 2000s)

During the 1990s and 2000s, many of the landmark goals of AI were achieved.[26] Groundbreaking work on neural networks and the advent of big data propelled the current renaissance of AI.[27] For example, in 1997, IBM's Deep Blue beat the chess grandmaster Garry Kasparov. The contest made global headlines, with Newsweek announcing, "The Brain's Last

Stand." Also, in 1997, speech recognition software, developed by Dragon Systems, was implemented on Microsoft® Windows®.[28] In 2007, AI was defined as the "science and engineering of making intelligent machines, especially intelligent computer programs."[29] In 2018, Microsoft defined AI as "a set of technologies that enable computers to perceive, learn, reason and assist in decision-making to solve problems in ways that are similar to what people do."[30]

I. AlexNet: Deep Learning System (2012)

Professor Mirella Lapata, an expert on natural language processing at the University of Edinburgh, stated that "AlexNet was the first lesson that scale really matters." "People used to think that if we could put the knowledge we know about a task into a computer, the computer would be able to do that task. But the thinking has shifted. Computation and scale are much more important than human knowledge."[31]

J. Introduction of Generative Adversarial Networks (2014)

OpenAI's GPT – an acronym meaning "generative pre-trained transformer" – and similar large language models (LLMs) can churn out lengthy and fluent, if not always wholly reliable, passages of text. Trained on enormous amounts of data, including most of the text on the internet, they learn features of language that eluded previous algorithms.[32] Once the transformer has learned the features of the data it is fed – music, video, images and speech – it can be prompted to create more. The transformer – not different neural networks – is relied upon to process different media.[33]

K. Language and Image Recognition Capabilities (2015)

An LLM is a machine-learning neuro network trained through data input/output sets; frequently, the text is unlabeled or uncategorized, and the model is using self-supervised or semi-supervised learning methodology. Information is ingested, or content entered, into the LLM, and the output is what that algorithm predicts the next word will be. The input can be proprietary corporate data or, as in the case of ChatGPT, whatever data it's fed and scraped directly from the

internet.[34] LLMs do not recreate the way human brains work. The basic structure of these models consists of nodes and connections.[35] Simply put, LLMs are "next word prediction engines."[36]

Examples of Open Model LLMs include:[37]

- OpenAI's GPT-3 and GPT-4 LLMs
- Google's LaMDA and PaLM LLMs
- HugginFace's BLOOM and XLM-RoBERTa
- Nvidia's NeMO LLM
- XLNet
- Co:here
- GLM-130B

According to Jonathan Siddharth, CEO of Turing, a Palo Alto company, "Hallucinations happen because LLMs, in their most vanilla form, don't have an internal state representation of the world. . . . There's no concept of fact. They're predicting the next word based on what they've seen so far – it's a statistical estimate."[38]

If the information an LLM has ingested is biased, incomplete or otherwise undesirable, then the response it gives could be equally unreliable, bizarre or even offensive. When a response goes off the rails, data analysts refer to it as "hallucinations" because they can be so far off track.[39] Further, since some LLMs also train themselves on internet-based data, they can move well beyond what their initial developers created them to do. For example, Microsoft's Bing uses GPT-3 as its basis, but it's also querying a search engine and analyzing the first 20 results or so. It uses both an LLM and the internet to offer responses.[40]

CEO Siddharth further explains, "We see things like a model being trained on one programming language and these models then automatically generate code in another programming language it has never seen. . . . Even natural language; it's not trained on French, but

it's able to generate sentences in French. It's almost like there's some emergent behavior. We don't know quite know how these neural network works. . . . It's both scary and exciting at the same time."[41]

L.   Chatbots

"*The foundation of the chatbot is the GPT LLM, a computer algorithm that processes natural language inputs and predicts the next word based on what it's already seen.[42] So, LLMs are the fundamental architecture behind chatbots like Open AI's ChatGPT or Google's Bard. A question typed in to ChatGPT [or Bard], for example, has to be processed by an LLM in order to produce an answer or response.*"[43]

Another way to think about ChatGPT is that it is a computer program that can understand and respond to human language. It accomplishes this by learning from a large amount of text (such as books, articles and websites) and uses that knowledge to predict what word or phrase might come next in a conversation or text.

Because it is "generative," each response to a question will be generated on the spot and will be unique. Because it can remember earlier parts of a conversation, it can change its original output in response to further feedback. Because it is pre-trained, it is limited – for better or worse – to what is in its training materials. And because it works by being predictive, it generates text that seems plausible, but not necessarily accurate.[44]

According to Assistant Professor Yoon Kim at MIT, prompt engineering is about deciding what we feed this algorithm so that it says what we want it to. The LLM is a system that just babbles without any text context. In some sense of the term, an LLM is already a chatbot.[45] Thus, "prompt engineering is the process of crafting and optimizing text prompts for an LLM to achieve desired outcomes. Prompt Engineering by a user trains the model for specific industry or organizational."[46] A potential new job is that of the Prompt Engineer. "Prompt Engineering is said to be a vital skill for IT and business professionals."[47]

BENEFITS AND RISKS OF AI AND GENERATIVE AI USE

Artificial intelligence continues to transform the globe in a manner not seen since the advent of the written word. Aspects of how each of the over 8 billion humans on planet earth live, work and play are increasingly impacted by AI. As with every transformative technology, there are an array of potential benefits and risks.

If the media and pop culture are to be believed, the world is facing an existential crisis that promises both utopia and global destruction. This section unpacks the reality of AI cost benefit analysis beyond the media hype.

I.   **Benefits**

AI has proliferated a wide array of human tasks and experiences over the last 70 years. Since the advent of the term in 1956 by John McCarthy, the concept of artificial intelligence has evolved from replicating and replacing human cognition to one of Augmented Intelligence which amplifies and optimizes human intellect. Done right, Machine Learning and AI help bring order to the chaotic wealth of information facing individuals today. In theory, this allows humans to spend more time on high-value and creative endeavors.

Today, nearly all aspects of human existence are touched in some manner by machine learning or AI. From the way we shop or interact as humans to medical treatment and supply chain logistics, the breadth of AI's impact on human existence is hard to overstate.

A large portion of the proliferation is being driven forward by the wealth of benefits in terms of accuracy, speed and capability offered by AI powered technology. Some key examples of benefits derived from the application of AI include:

A.   General Benefits

There are a substantial number of overall AI benefits, with the list growing daily. In general, AI: (i) efficiently performs repetitive tasks; (ii) reduces human error; (iii) increases efficiency; and (iv) augments human intelligence. Specific to the legal industry, AI has the potential to facilitate greater access to justice.

Legal representation in a civil matter is beyond the reach of 92% of the 50 million Americans below 125% of the poverty line. Globally, there are an estimated 5 billion people with unmet justice needs. The justice gap between access to legal services and unmet legal needs constitutes two-thirds of the global population, and these justice needs extend from minor legal matters to more grave injustices.

AI-powered technology has lowered the bar for many underserved communities to access legal guidance. Further, AI has been heralded as a solution for the closing the "justice gap." Increased efficiency, accuracy and the ability for underserved populations to leverage self-service legal resources all contribute to this benefit. Technologies powered by AI may allow the underserved population with internet access or individuals with limited funds to access guides at little or no cost to navigate the complexities of the judicial system.[48] GAI-powered chat bots now hover on the line of unauthorized practice of law,[49] offering high volume, low-cost legal services absent human input in areas such as traffic court[50] and immigration,[51] among others. But the early uses of generic AI chatbots (as opposed to specific legal applications) in this area have had mixed results. According to a January 2024 study by researchers from Stanford University,[52] popular AI chatbots, such as Open AI's ChatGPT3.5, Google's PaLM 2 and Meta's Llama 2, are inaccurate in the majority of cases when answering legal questions, posing special risks for people relying on the technology because they can't afford a human lawyer. The study found that LLMs get their results wrong at least 75% of the time when answering questions about a law court's core ruling.

In December 2023, the courts in England and Wales produced Judicial Guidance on AI, which highlighted why these errors may appear.

> Public AI chatbots do not provide answers from authoritative databases. They generate new text using an algorithm based on the prompts they receive and the data they have been trained upon. This means the output which AI chatbots generate is what the model predicts to be the most likely combination of words (based on the documents and data that it holds as source information). It is not necessarily the most accurate answer.[53]

There are also limits with the training data provided to these tools. Currently available LLMs appear to have been trained on limited material published on the internet. Their view of the law can be limited to the material included in the training data, which could include the opinions in chat rooms of individuals without any legal qualifications. Here, the Judicial Guidance in England and Wales looks at specific risks:

AI tools may:
- make up fictitious cases, citations or quotes, or refer to legislation, articles or legal texts that do not exist

- provide incorrect or misleading information regarding the law or how it might apply, and

- make factual errors.[54]

B.   Healthcare Advancement and Human Longevity

The healthcare industry has similarly witnessed significant advances owing to AI-powered tools. AI has aided in new drug discoveries,[55] improved image analysis, robotic surgery and gene editing. Further, AI algorithms can predict diseases based on medical imaging, genetic information, and patient data. AI-powered wearable technology allows physicians to continuously monitor patients remotely. AI has been deployed for personalized medicine, providing patients with tailored treatments and medication. Finally, AI has supported mental health by providing early diagnostics and therapeutic assistance.

C.   Ethical AI Development

In the ethics field, AI has helped to identify and correct human biases in data and decision-making. AI tools can also be designed with mechanisms to ensure ethical considerations are integrated into AI systems. Additionally, AI can be employed to create frameworks that ensure equitable outcomes.

D.   Health & Public Safety

In the health and public safety sector, AI advances have revolutionized a broad swath of areas from infrastructure to cybersecurity. AI has been used to manage traffic signals, thereby reducing congestion and optimizing traffic flow. The technology has utilized crime pattern analysis to predict and prevent future incidents. AI algorithms optimize rescue and relief operations during natural disasters. Engineers deploy AI-based sensors that predict when maintenance on bridges and buildings is required. Finally, AI systems are used to detect and respond to cyber threats in real time.

E.   Quality of Life

Where AI has had the most visible societal impact involves quality-of-life products. AI has transformed our living spaces into "smart homes" that can improve convenience and energy efficiency. AI has helped people with disabilities gain more independence. Technology companies capitalize on AI to enhance gaming and virtual reality experiences. In marketing, chatbots that handle customer inquiries without human intervention have become a staple.

People have become familiar with using AI to personalize recommendations on platforms, such as Netflix and Spotify. AI has been used to restore and preserve historical documents and artworks. It can also facilitate the sharing and understanding of diverse cultural expressions. Artists use AI-based tools to explore new forms of creative expression. Lastly, AI has enhanced the personalized shopping experience.

F.   Scientific Advancement, Space & Exploration

AI's reach extends beyond the boundaries of Earth. Scientists use AI to process data from space missions and to operate rovers on Mars. Aquatically, autonomous submarines are used to map the ocean floor and study marine life. Because AI can analyze vast datasets faster than the human mind, it has sped up scientific discoveries. For example, DeepMind's AlphaFold program predicts the 3D structure of proteins, which accelerates researchers' understanding of diseases and developing new treatments. AI has improved complex problem-solving in fields such as quantum physics and materials science. Lastly, AI enhances collaboration by connecting researchers across the globe and facilitating cross-disciplinary work.

G.   Global Environmental Impact

Environmentally, AI holds promises to combat climate change. Governments are deploying AI in the creation of "smart cities" that optimize energy consumption in homes and businesses. AI-powered drones and image recognition technology have been used to monitor endangered species. There are AI models that simulate and predict climate change impacts. Some municipalities deploy sensors and AI systems to monitor and predict air and water quality.

In the area of water conservation, AI has been used to predict water usage patterns and improve water conservation techniques. In the quest for clean energy, AI can streamline the development and management of renewable energy sources. Lastly, logistics managers find improved fuel efficiency through AI tools that optimize routes for freight and package delivery.

H.   Education Optimization

In the field of education, developers have created adaptive learning platforms that adjust in real time to the learning style and pace of students. Educators can use AI systems to automate grading and provide immediate student feedback. Voice-to-text and text-to-voice AI services have assisted learners with disabilities.

I.   Economic Development

The economy has seen material changes in how the world conducts business. Precision farming techniques use AI to increase yield, reduce resource consumption and waste, and optimize food distribution. AI has been utilized to analyze market trends, providing businesses with strategic insights. By automating routine tasks, employees turned their focus to more high-value work. Lastly, high paying new jobs relating to AI have been developed.

II.   Risks

A counterpoint to the transformative benefit of AI is an equally dramatic deluge from the press and media that AI poses substantial economic, ethical and existential risks. Some key examples of risks posed from the application of AI are described below.

A.   Widening Justice Gap

While many proclaim that AI is the solution to democratization of justice, an equally powerful contingent claim AI may create a "two-tiered legal system." Some anticipate that individuals in underserved communities or with limited financial means will be relegated to inferior AI-powered technology.

Additionally, development of such technology should acknowledge that many populations currently underserved by legal representation may have compounded obstacles in accessing the benefits that AI may bring to others, including:

- Lack of access to computers/internet

- Limited facility/literacy in how to use AI

- A high level of distrust in government institutions, law as a tool that operates to protect them, law enforcement as a positive influence and/or legal professionals as people who are available to help.

The specific layer of concern here goes beyond the "haves" with better access to counsel than the "have nots." For example, in a landlord-tenant dispute, AI would likely be used by landlords to increase enforcement actions against tenants. However, the tenants would not likely have access to AI in preparing their response. In that sense, AI could be viewed as broadening the availability of legal services to the "haves," leaving the "have nots" worse off than they are now. Compounding this is the fact that most legal services organizations have little to no resources to prepare for these changes in access to AI now.

B.   Data Privacy & Surveillance

Protectors of civil liberties and data privacy have raised alarms about the potential of AI to corrupt both. As most AI systems are capable of aggregating vast amounts of personal data, this could lead to privacy invasions. Currently, governments and corporations use AI for comprehensive surveillance and social control. Hackers have utilized AI tools to synthesize personal data for the purpose of impersonating individuals (think "deepfakes") and committing cyber theft. Concerns also circle around the lack of transparency in training data, biases built into models and ownership of intellectual property.

C.   Security

In addition to the cyber threats mentioned above, general security concerns accompany AI use. For instance, AI systems in military applications that lack adequate human control can lead to unintended engagements. Through social media, AI has been used to weaponize information, leading to an explosion in misinformation and potential erosion of democracy. Cyber criminals have deployed AI to target critical infrastructure, such as power grids and water systems.

D.   Social and Ethical Issues

AI algorithms have been utilized to perpetuate and amplify societal biases. Given concerns about privacy and surveillance, the impact of all types of societal biases – including a significant

number of instances of racial bias that have already been identified – is compounded. We have also witnessed a disquieting increase in adverse psychological issues related to AI (e.g., AI chatbot suicide[56]). We will also need to address the assignment-of-liability when decisions are made by AI systems. As noted above, the disparity in AI access has exacerbated inequality issues.

E.   Misinformation

As referenced earlier, bad actors have used "deepfakes" to disseminate misinformation. A deepfake is AI-generated content that is indistinguishable from real content. We are entering an age of information warfare in which AI systems can be used to create and spread misinformation at scale. We find this particularly troubling during any political election.

F.   Economic Impact and Disruption

The economic impact of AI is multilayered. There is the direct effect of job displacement where tasks are automated, leading to unemployment in various sectors and the indirect effect of devaluing services traditionally offered by a human (e.g., legal services). Further, AI advancements tend to benefit those with access to technology, thus widening the wealth gap.

Our financial markets face manipulation. AI systems could perform high-frequency trading to influence financial market activity. We face possible skill erosion; humans will no longer retain the knowledge to perform certain tasks. Lastly, the resources required to power certain AI systems rely on materials that are derived from exploitation.[57]

G.   Safety

Expanding on the general societal issues noted above, there are several safety concerns involving AI. How do we respond when AI systems that operate in critical roles fail and cause harm? We noted above AI's potential to manipulate emotions that could lead to psychological harm, but there is also the overdependence on AI that could lead to loss of human skills and

abilities. Lastly, AI has been shown to behave unpredictably, which may result in harmful or unintended consequences.

H.   Legal and Regulatory Challenges

The area in which the law struggles now involves assignment of liability when AI causes damage or harm. The courts are also grappling with issues involving intellectual property, including copyright (e.g., training data protections), ownership of output and invention patenting. Current laws and regulations have failed to keep pace with AI development. We will also encounter difficulty enforcing laws across borders as most technology companies offer global AI systems.

I.   Loss of Human Centricity and Control

We mentioned earlier the concern that AI develops autonomously without a human in the loop. The existential threat where AI systems operate beyond human understanding and control has been the subject of science fiction but has surfaced more as a probable fact.[58] We encounter the risk that AI may make critical decisions without human oversight or ethical considerations. Further, AI decisions may not value human life nor human generated output. We are imperiled by AI that makes moral decisions without human empathy or understanding.

I.   Ethical Impact

In the previous portion of this report, we explored the varying benefits and risks of AI and AI-based tools. When using any technology in legal practice, attorneys must remain compliant with the Rules of Professional Conduct. With generative AI tools, the number of rules implicated may be surprising.[59]

A.   Duty of Competency/Techno-solutionism

"*A refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent legal representation to clients*."[60]

Rule 1.1 of the Rules of Professional Conduct (RPC) requires that a lawyer provide competent representation to a client. Comment 8 to RPC Rule 1.1 asserts that keeping abreast of "the benefits and risks associated with technology the lawyer uses to provide services to clients" is an element of competency. However, a recent LexisNexis survey found that only 43% of U.S. attorneys use (or plan to use) these tools professionally.[61] The need for more education, training and proficiency with the technology is apparent.

In addition to competence, attorneys must resist viewing these tools through a techno-solutionism lens. "Techno-solutionism"[62] is the belief that every social, political and access problem has a solution based in development of new technology. In this case, some view generative AI as the solution to the access to justice problem. As infamously demonstrated in the *Avianca* case,[63] in which an attorney utilized ChatGPT (a generative AI tool) to write a brief that contained fictitious legal precedent, attorneys cannot rely on technology without verification. RPC Rule 5.3 imposes a supervisory obligation on attorneys with respect to nonlawyer work. In the *Avianca* case, the "nonlawyer" was the tool itself.

B.   Duty of Confidentiality & Privacy

RPC Rule 1.6 states, in part, that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." This duty of confidentiality also extends to what client information a lawyer may share when using certain generative AI tools. Because AI models depend on data to deliver salient results, privacy protection must become an integral part of their design.[64] Lawyers should cautiously use these tools, being mindful of a client's privacy.

In fact, the California bar association[65] recommends that lawyers inform their clients if generative AI tools will be used as part of their representation. The Florida bar association[66] takes its recommendation a step further, suggesting that lawyers obtain informed consent before utilizing such tools. Whether an attorney informs the client or obtains formal consent, the ethical obligation to protect client data remains unchanged from the introduction of generative AI tools.

C.   Duty of Supervision

As noted earlier, RPC Rule 5.3 imposes a duty to supervise non-lawyers involved in client representation. In 2012, the American Bar Association amended Model Rule 5.3 to clarify that the term "non-lawyers" includes non-human entities, such as artificial intelligence technologies.[67] Despite the cautionary tale set by the *Avianca* case, a prominent California law firm has submitted hallucinated cases in its legal briefs.[68] Dennis P. Block and Associates, which handles tenant evictions, was fined $999 for its ethical violation – a paltry sum considering the societal impact of wrongful evictions.

D.   Unauthorized Practice of Law

To begin a discussion about what constitutes the unauthorized practice of law (UPL) and specifically how use of generative AI, including LLMs, such as ChatGPT, Claude, Bard, and Mid-journey, may be considered UPL, we first examine what is the practice of law.

While there is no nationally agreed definition of what constitutes the practice of law, the ABA Model Rules provides one (discussed below). Some states have also fashioned their own definitions of the practice of law. Yet, without a uniform definition and precise meaning of the practice of law, we fall upon the adage: "You know it when you see it."

The ABA defines the practice of law as the application of legal principles and judgment regarding the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law. However, New York State does not offer a precise definition of the term. ABA Model Rule 5.5 forbids lawyers from engaging in the unauthorized practice of law. Section (b) of the rule states:

> A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Similarly, Rule 5.5 of the New York RPC defines the unauthorized practice of law in this manner:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. (b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Based on these rules, AI programs that do not involve a human-lawyer in the loop in providing legal advice arguably violate the rules and may be considered UPL. Thus, "AI programs cannot give legal advice unless a human lawyer is involved. In the age of AI, legal ethics preserves a human element in the practice of law."[69]

Case Law: Lawsuits Against AI Developers & UPL

Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 620 Fed. Appx. 37, 45 (2nd Cir. 2015) "According to the Lola decision, if a lawyer is performing a particular task [like document review] that can be done by a machine, then that work is not practicing law." The court also interpreted

North Carolina's law to imply, however, that the practice of law requires "at least a modicum of independent legal judgment."

Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011). The court held that filling out blank forms like the ones provided on LegalZoom's website "does not constitute the unauthorized practice of law." -Further, in a settlement between LegalZoom and the North Carolina Bar Association, LegalZoom agreed to have a licensed attorney review blank templates offered to customers in North Carolina and to clearly indicate to customers that the templates do not replace the advice of an attorney to ensure LegalZoom would not engage in the unauthorized practice of law.[70]

Based on current case law, AI programs can direct clients to the forms they need to fill out. However, these programs may not give any advice as to the substance of the client's answers because that would be replacing the work of a human lawyer.[71]

E.   Attorney-Client Privilege and Attorney-Work Product

"*There's not a lot of thought given to whether the information that's provided [to the chatbot] is covered by attorney client privilege.*" ~ Jay Edelson, CEO and founder of Edelson PC

One of the oldest recognized privileges regarding confidential information, the attorney-client privilege, "shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice during a professional relationship" so long as the communication is "primarily or predominantly of a legal character."[72]

The overarching purpose of this privilege is to allow for full and frank communications or discussions between attorneys and their clients. The attorney-client privilege has been defined as:

> a legal privilege that works to keep confidential communications between an attorney and their client private. Communications made to and by a lawyer in the presence of a third party may not be entitled to this privilege on grounds that they are not confidential. The

privilege can be affirmatively raised in the face of a legal demand for the communications, such as a discovery request or a demand that the lawyer testify under oath. A client, but not a lawyer, who wishes not to raise attorney-client privilege as a defense is free to do so, thereby waiving the privilege. This privilege exists only when there is an attorney-client relationship (Cornell University Law School, Legal Information Institute/LII, posting by the Wex Definitions Team).

The statutory attorney-client privilege in the State of New York is found in Civil Procedure Law and Rules 4503(A)(1), which states:

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government or by the legislature or any committee or body thereof.

While discovery requests for privileged information may reveal attorney-client privileged information, so too may the use of generative AI tools such as ChatGPT or GPT-4.

Model Rules of Professional Conduct 1.6(a) and (c):

(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.

New York RPC Rule 1.6:

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected.

Comment to New York Rules of Professional Conduct 1.6(c):

➢ An attorney must "make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision."

➢ "Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected . . . does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure."

Focusing on the language in the Cornell University Law School LII definition of attorney-client privilege – "communications made to and by a lawyer in the presence of a third party may not be entitled to this privilege on grounds that they are not confidential" – how then may attorney-client privileged information or attorney-work product be revealed when directly and indirectly using generative AI tools such as ChatGPT or GPT-4.[73]

For example, through:

➢ Direct Use of ChatGPT as an app (the user directly enters a prompt that contains your private or confidential information, which then goes into ChatGPT)

➢ Indirect Use of GPT-4 that is embedded in search engines such as Microsoft Bing (the user enters a prompt that contains private or confidential information, which then goes into the generative AI app)

➢ Use of Application Programming Interface/API (using some other application that connects to ChatGPT via the API, private or confidential information is inputted into ChatGPT)

➢ ChatGPT plugins (accessing other applications from within ChatGPT via plugins, which conveys your private or confidential information further into ChatGPT and other places too. With plugins, other users/persons can see/view your private or confidential information).

Key Points for attorneys to be aware of and consider when utilizing ChatGPT and other similar generative AI tools include:

- Licensing Information

- Terms of Use

- Privacy Policies

- Frequently Asked Questions/FAQs list

- Data that is supplied to or inputted into ChatGPT may be used for training purposes or to refine/improve the AI model (For example, ChatGPT developers may view the input and conversation history of its users and users' personal information, including log/usage data, to analyze/improve/and develop ChatGPT services).

- Data that is supplied to or inputted into ChatGPT may be viewed by and disclosed to third parties/vendors in the training of the AI model.

- Data output by ChatGPT may be viewed by third parties, including opponents and adversaries.

Pursuant to the Model Rules of Professional Conduct and New York RPC, lawyers must take reasonable efforts to prevent inadvertent and unauthorized disclosure of or access to client

information. When utilizing generative AI tools such as ChatGPT, attorneys need to be knowledgeable about the technology they are using and/or ask for assistance from those lawyers or trusted technology experts who do understand its use and limitations, including IT personnel. If none of these options is possible, then the attorney should not utilize such technologies until they are competent to do so per the duty of competency.

AI and Cybersecurity Risks

Open AI/ChatGPT may raise both ethical violations and cybersecurity issues. For example, "if there is a cyber intrusion [into OpenAI or ChatGPT], not only will that data potentially be lost to threat actors, but they could conceivably also obtain the firm's searches… [gaining] access into the mind of a lawyer and the arguments they might be raising."[74]

Preservation of Data

Data preservation and litigation hold obligations may present similar challenges for attorneys and the court. If the data that is inputted into the AI application is temporary/ephemeral, but also relevant and responsive to the litigation, parties have the duty to preserve this electronically stored information. Yet, how do you preserve what may no longer exist?

F.   Candor to the Court

When using ChatGPT or other similar AI tools, attorneys must verify the accuracy of the information and legal authority produced by such tools. Attorneys' signatures and attestations appear on legal documents submitted to the court, documents which make representations about case law and other authorities relied upon in support of the attorney's case. Regardless of the use of and reliance upon new and emerging technologies like generative AI tools, as officers of the court and in the interest of justice, attorneys must identify, acknowledge and correct mistakes made or represented to the court.

The following ABA Model Rules of Professional Conduct and New York RPC guide attorneys in their use and reliance on information obtained from AI tools:

M.R.P.C. 3.3 (Candor to the Tribunal):

"(a) A lawyer shall not knowingly:
(1) 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;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Comment [2] to *M.R.P.C.* 3.3:
"although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

Rule 3.3(a) (1) of the New York Rules of Professional Conduct prohibits lawyers from making false statements of fact or law to a court and requires correction of any false statements previously made during the case.

AI Hallucinations: What Are Hallucinations, and Why Do They Occur?

Hallucinations are incorrect/unreliable information generated by ChatGPT. In simplest terms, a hallucination is a euphemism for a lie. As an LLM, ChatGPT is trained on a vast amount of data to recognize patterns in language and then produce/generate a response it predicts is relevant and responsive to the user's input or prompt.[75]

> *AI hallucination is a phenomenon wherein a large language model, often a generative AI* chatbot *or* computer vision *tool, perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate." "Generally, if a user makes a request of a generative AI tool, they desire an output that appropriately addresses the prompt (i.e., a correct answer to a question). However, sometimes AI algorithms produce outputs that are not based on training data, are incorrectly decoded by the transformer or do not follow any identifiable pattern. It "hallucinates" the response.*[76]

Case Law and Hallucinations

U.S. v. Prakazrel Michel, No. 1:19-cr-00148-1 (CKK)(D.D.C.) (motion filed Oct. 16, 2023). Defendant, convicted of money laundering and corrupt political influencing, alleges that his attorney's reliance on AI for his closing argument constituted ineffective assistance of counsel. Defendant argues that his attorney's "closing argument made frivolous arguments, misapprehended the required elements, conflated the schemes and ignored critical weaknesses in the government's case."

Ex Parte Allen Michael Lee, 673 S.W.3d 755 (Tex. App. Jul. 19, 2023). In denying the petitioner's motion for a new bail hearing, the court found that petitioner's moving brief, prepared by counsel, contained citations that did not exist and arguments that appeared to be generated by GAI.

Mata v. Avianca, Inc., No. 22-cv-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023) (referenced in other portions of this report).

Donovan James Gates v. Christopher Omar, et al., No. 2022 cv 31345 (Col. Sup. Ct.). A lawyer used ChatGPT for research in connection with a motion to set aside summary judgment in a breach of contract matter, and the cases cited in the motion were nonexistent. The lawyer, who had been practicing in Colorado for 1.5 years and in civil litigation for 3 months, said he turned to ChatGPT because it was his first civil litigation and he wanted to save his client money by relying on the technology to do the research. As of June 2023, the Court was considering sanctions.

Attorneys cannot solely rely upon information provided by GAI. Attorneys may instead use GAI as a starting point and must independently review case citations, arguments and any other information/output produced by GAI.

Deepfakes – Synthetic Media as Evidence in Court

With the understanding that the fundamental purpose of a trial is its truth seeking function, for "the very nature of a trial [i]s a search for truth."[77] Evidentiary issues surrounding Deepfakes – a form of AI called deep learning that makes images of fake events[78] – may also for attorneys implicate the Duty of Candor to the Court. Deciding issues of relevance, reliability, admissibility and authenticity may still not prevent deepfake evidence from being presented in court and to a jury. "One of the fundamental tenets of the American legal system is that the trier of fact—either the judge or the jury—is best equipped to find the truth based on the evidence presented. But individuals cannot consistently determine truth from lies as they confront deepfakes."[79]

G.   Judges' Ethical Obligations

The Model Code of Judicial Conduct mandates: "*A judge shall uphold and promote the independence, integrity and impartiality of the judiciary.*" ABA Model Code of Judicial Conduct, Canon 1.[80] How does the Canon 1 of the Model Code of Judicial Conduct align with judicial use of generative AI such as ChatGPT?

"The human aspect of intelligence that cannot be artificially constructed is that of 'judgment.'" While AI can and does assist judges in a variety of ways, judges will always have the responsibility of exercising their own judgment: the human trait of independent judgment.[81]

According to New York Rules of Professional Conduct Rule 5.4: Professional Independence of a Lawyer:

> (c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

> Comment [2]
> This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also

Rule 1.8(f), providing that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's professional judgment and the client gives informed consent.

How does this rule and comments to the rule align with attorneys' use of generative AI such as ChatGPT? Attributed to the 16th U.S. President and attorney Abraham Lincoln: "A lawyer's time and advice are his stock in trade." It follows then that an attorney's time, advice and professional judgement are what clients expect and rely upon when retaining a lawyer/law firm for representation in a matter. While AI can and does assist lawyers in a variety of ways, attorneys do not shed their professional responsibility of exercising their own "independent judgment" in client matters.

II.   Access to Justice

A.   Introduction

The rapid development of AI has the potential to have a significant impact on access to justice in the American legal system. While AI and especially generative AI is generally causing disruption in the market for legal services, this impact is likely to be even greater when discussing access to justice.

For some time, there has been an enormous gap in access to legal services. A recent survey found that 66% of the U.S. population experienced at least one legal issue in the past four years, with just 49% of those problems having been completely resolved. In the United States, it is well documented that there are many geographical regions that do not have enough human lawyers. A recent survey found that low-income Americans did not receive any or enough legal help for 92% of their civil legal problems.

Generative AI tools such as ChatGPT have the potential to enhance the accessibility, efficiency and affordability of pro bono legal services. Generative AI could truly transform the way in which legal services are provided, and the tremendous opportunities and challenges of this

technology are magnified when addressing pro bono services to clients. But there are clearly risks too as highlighted above. As we have already discussed, early generative AI tools have been unable to consistently provide accurate legal advice to their users. While more accurate tools may be developed, given the reach of the corporations promoting existing generative AI tools, new market entrants may not come to the attention of those most in need. Where generative AI may make it easier for those without a lawyer to find an answer to a legal issue, it may make it harder for them to find the correct answer.

We cannot underestimate the additional cost in terms of court resources to research, verify and challenge incorrect AI-generated legal opinions and arguments. Coming at a time when many courts are already stretched thin with unacceptably long waiting times in some jurisdictions for a hearing, adding to this strain could lead to more injustice.

B.   Pro Bono Organizations Using Generative AI

Pro bono organizations often have faced challenges in meeting the needs of their clients and in hiring sufficient attorneys and staff to support the many matters that they take on. Staff and attorneys working for legal aid organizations are perpetually understaffed and overworked. AI has the potential to transform the way in which some pro bono organizations serve their clients.

Legal services organizations have limited resources and are unable to serve all the individuals who seek their assistance. Generative AI can help organizations put in place a triage process for pro bono clients that can help to analyze many potential matters and can enable these organizations to serve many more clients than they currently serve. Many organizations spend large amounts of time screening potential clients, but an AI chatbot could effortlessly screen potential clients and gather basic information about their legal issues. Several organizations have started building tools to access basic legal information and they have found that generative AI is a gamechanger when it comes to client intake.

Pro bono attorneys have found that generative AI tools are excellent at summarizing and extracting relevant information from documents, translating legalese into plain English and helping to quickly analyze thousands of existing court forms. In addition, ChatGPT and other similar generative AI tools can identify potential clients' legal needs and build out and maintain legal navigators.

Pro bono organizations are seeing how generative AI can even assist them in putting together navigator-type tools that can help guide clients seeking legal services. For example, a site powered by generative AI technology could provide a step-by-step guide to getting divorced, explain how to file a claim against an unlawful landlord or provide legal and other support options for domestic violence survivors. This is not a hypothetical scenario, as such systems have already been put into place by some legal services organizations, and these tools will only become more powerful, intelligent and accurate as Generative AI becomes more and more sophisticated.

In addition, language is often a barrier to justice. Members of some communities may struggle to understand English, and that struggle can be magnified when faced with the formal legal language that is often used in court documents and agreements. Generative AI tools can be utilized to simplify, summarize and translate documents.

Legal services organizations are often challenged by the research and writing that they must perform in order to properly support a matter. Generative AI can help with legal research and document preparation, which in turn can help to resolve cases more quickly. It could also help to draft legal documents, such as contracts or pleadings by providing template language and helping users to fill in necessary information. While drafting a complaint would have taken many hours in the past, with the help of generative AI, a complaint could be drafted in minutes.

If accurately and properly used, these tools may have the potential to bring legal services to those who cannot afford it and to make legal services organizations run more efficiently.

C.   Will Generative AI Tools Prove to Be Too Expensive?

While generative AI has the potential to greatly benefit access to justice, there are some who believe that this technology could potentially hinder, and not help, access to justice.

It has been noted that while this technology is developing at a fast pace, the industry is not currently structured to serve the interests of underserved populations and pro bono organizations. While there is potential for pro bono organizations and low-income individuals to take advantage of this technology, there is a risk that this technology could further exacerbate existing inequities.

While it might appear that the application of this technology will help to even the playing field, it remains to be seen how expensive it will be to properly utilize this technology in the practice of law. The development of AI technology is unregulated, and the companies developing and applying this technology to the legal profession have an interest in making a product that is attractive to those who are willing to pay for it. Many law firms are investing millions of dollars to implement AI solutions. Pro bono organizations run the risk of falling even further behind the big law firms.

Additionally, when one addresses assisting non-lawyers with justice problems it is possible that new generative AI tools may not make a significant difference in improving access to justice for low-income and minority communities. Those who need legal services from this constituency are less likely to be able to use AI tools due to fees to use these tools, limited internet access and literacy and language barriers.

Since this technology really does have the potential to improve access to justice, it is crucial that pro bono organizations and low-income individuals be given access to these tools. While this

may be difficult, it is imperative that this technology be available to all who are in need of legal services.

D.   Use of AI by Non-Attorneys

In its first year of widespread use by the public, Chat GPT and generative AI have been used by the general public for a wide range of uses. Non-lawyers will be able to readily interact with generative AI to ask a variety of legal questions. These uses of generative AI will present challenges for bar associations, courts and the legal community as a whole.

What one must realize when looking at this issue is that currently the majority of the parties in civil cases in state and local courts lack legal representation. Therefore, the question becomes: Are these people, who otherwise would not have legal counsel, better served by at least having a chatbot to assist them?

One of the challenges with non-attorneys using generative AI to assist with legal issues is the possibility of receiving misleading information. In its current iterations, generative AI is likely to provide an answer to a legal question, but it might do so without providing an indication that the confident answer is without a proper legal foundation. Some AI companies have included warnings in their user agreements about using their tools to provide legal advice. For example, OpenAI's online usage provisions state the following:

Prohibited use – "Engaging in the unauthorized practice of law, or offering tailored legal advice without a qualified person reviewing the information."

It is questionable whether individuals and new tools will abide by such prohibitions. Even if some tools include such warnings there is nothing to stop someone from asking a chatbot for legal advice or drafting papers for them. If a non-lawyer has a chatbot draft a brief or complaint, they are not in as good a position as an actual lawyer to know if the filing contains falsehoods, biases, incorrect cases or other AI hallucinations.

In addition, even though individuals who cannot afford an attorney will potentially benefit from generative AI tools, there will be some barriers to access, including more limited access to the internet and computers by the people experiencing homelessness or those living in poverty. Asking such tools the right questions also requires some skill. While a person may download advice on how to frame a question (i.e., developing a "prompt") correctly, some non-lawyers, particularly in those sections of society that have been traditionally underserved by the law, may struggle to design the correct prompt. In addition, much of the information that one would need to develop a system that provides accurate legal information would require access to databases that are generally behind a paywall (i.e., Westlaw, Lexis, Law360), which could potentially result in a cost to users.

Another potential issue stems from the fact that generative AI tools might not account for multiple, interrelated issues, which could include family, criminal, housing, employment, etc. It is possible that an answer from a chatbot could be correct for one issue but harmful in the context of the other issues. It is in this situation where a chatbot likely will never be able to fully replace a human. generative AI will never have the same level of empathy as a human, and when individuals are seeking legal services, they often need someone to "hold their hand" and that simply is not possible with a chatbot (at least for the time being).

It should be noted that non-lawyers are already able to gather the same kind of advice or information that a chatbot provides by searching online for legal materials and legal information. While some information found online may be correct, other information may be outdated, suspect or simply incorrect. Generative AI is basically a new interface to this online information that has the advantage of being an interactive conversational tool. If this can make information more

accessible and let people know if they even have a legal issue, this will prove to be a positive development.

In addition, generative AI solutions are available 24/7. It could take days, weeks or months for a low-income plaintiff to find an attorney to meet with them or represent them for a matter. Generative AI is generally efficient and is scalable, allowing it to provide information to many people at once. While it's true that generative AI may be challenged when dealing with multiple overlapping issues, it will surely be a positive development for individuals who are unable to afford an attorney.

The reality of the situation is that generative AI is here, and it is not going away but will rather become more advanced and more available to the general public as time goes on. It should be noted that the challenges facing the legal profession are not unique. The medical profession also is addressing the challenges presented by patients who have consulted with generative AI and arrive at an appointment with opinions on what is the correct medical advice. Lawyers will similarly be challenged by clients who have compiled information and learned about their legal options using generative AI.

We believe it is important not to dismiss innovation, and to allow vendors and companies to develop programs that will help guide the general public. It is just as important for attorneys to educate themselves on AI so they can utilize it and understand how their clients may be using it as well.

E.   Implications of AI Judges or Robo Courts

One other area where AI may have a great impact on access to justice relates to the utilization of AI by judges and courts. At the time of this Report, there are only a few examples of robo courts or AI judges being utilized to resolve disputes, and those trials have had mixed results. For example, in 2019, Estonia planned to use robo judges for small claims procedures. The

Estonian government said that those reports were misleading.[82] In Australia, a system designed to use technology to assess government payments has already failed.[83] But as generative AI becomes more sophisticated, it will become more feasible to have AI arbiters decide small claims courts matters or arbitration matters where both parties consent to an AI arbiter.

It is not clear at this time how widespread this practice will become and how it will impact access to justice. In some ways, it may make it more likely for those with little knowledge of the law and courts and those who have little financial means to have their day in court. An AI judge may also be less likely to be influenced by a prominent attorney or big-name firm. However, most people will generally not want their disputes to be decided by a computer or algorithm.

We are not quite yet to the point of AI judges replacing some portion of the judiciary, and that may never happen, but it is likely to be raised as a possibility in the future. We are already at a point where AI is being used to mediate matters, where both parties agree to the use of AI. While we have not quite arrived in a sci-fi world populated by robo judges, we do need to be wary of AI being used in lieu of judges, and we need to be well positioned to gauge the pros and cons of using AI judges in certain situations.

III.   Judicial Reaction/Responses to GAI

A.   Introduction

Artificial intelligence has been in use by the legal profession and its clients for a long time. In November 2022, GAI burst onto the scene through one program, launched by Open AI, known as ChatGPT. Since then, the use and varieties of GAI platforms has expanded on a seemingly daily basis, and attorneys and clients are evaluating GAI technology and how it could be used – and abused – in litigation. This section of the Task Force Report will introduce the reader to those uses and abuses.

B.   Uses of AI and GAI

Other sections of this Report have discussed the technologies. For now, we consider some uses of AI and GAI. Focusing on AI in general, it is in widespread use for:

- Identification (for example, airports and workplaces)

- Security (for example, to access cell phones and bank accounts)

- Law enforcement (for example, to identify suspects)

- Retail (for example, to identify shoppers)

- Human resources (for example, to interview and hire employees)

And, in addition to these uses, AI is used extensively for collection, review and production of ESI.

GAI takes AI to a new level. As we know, GAI ingests data and, in response to "prompts," generates an answer. GAI is being used by the legal profession and other entities to, among other things:

- Draft and edit documents

- Conduct legal research

- Contract review

- Predictive analytics

- Chatbots for legal advice

- Brainstorming

- Summarize legal narratives

- Convert "legalese" into plain language

C.   Causes of Action Arising out of AI and GAI

We are at the tip of the proverbial iceberg when thinking about causes of action (and we are only speaking of civil litigation here – there are uses of AI and GAI that could give rise to criminal proceedings, including, for example, "deepfakes" that might be prosecuting under federal or state criminal laws). Here are examples of causes of action:

- Breach of privacy

- Discrimination

- Copyright infringement

- Malicious uses such as defamation

- Cyber breach

- Employment-related

These causes of action might derive from common law. However, statutes or regulations might also give rise to litigation as well as regulatory proceedings. Examples include:

- Section 5 of the Federal Trade Commission Act

- Discrimination actionable under the Equal Employment Opportunity Act and state equivalents

- The Illinois Artificial Intelligence Video Interview Act

- New York City Local Law Int. 1894-A

Attorneys and clients should expect to see legislation at the state and federal levels to address AI and GAI.

It may also be useful to note that overseas laws attempting to govern AI may have extra-territorial effects. For example, the EU AI Act (summarized in Appendix A) was agreed in principle at an EU level in 2023. While there is still some way to go before this will become law, the EU AI

Act is designed to also regulate the use of AI by the U.S. and other entities outside the EU. Coupled with this, the EU has introduced an EU AI Pact, which could lead to some U.S. corporations agreeing to be bound by the EU AI Act's provisions as early as this year.

D.   Discovery

Prior sections of this Report have described the technology behind AI and GAI. Bearing in mind how technology might make mistakes and lead to injury, economic or personal, it is expected that regulatory requests for information and civil discovery demands that focus on, for example, alleged bias will be made. Discovery into bias might present questions about the nature of the data fed into the AI or GAI and how algorithms used by the AI or GAI "operated," as well as questions related to the prompt used to generate something. Such questions will raise other questions about the need for non-testifying or testifying experts. Moreover, as already outlined in this Report, the competence of attorneys to deal with this technology might present ethical questions.

E.   *Avianca* and Judicial Reactions to GAI

Not only is GAI now mainstream, but it has featured in judicial decisions and in "prophylactic" orders. The first of the decisions is *Avianca*, which is discussed below.

In *Mata v. Avianca, Inc.*,[84] the plaintiff's attorneys "submitted non-existent judicial opinions with fake quotes and citations created by *** ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question." The court held that:

- The attorneys acted with subjective bad faith and violated Federal Rule of Civil Procedure 11.

- The plaintiff's firm was jointly and severally liable for the attorneys' Rule 11 violation.

- Sanctions under U.S.C. 1927 could not be imposed because, "[r]eliance on fake cases has caused several harms but dilatory tactics and delay were not among them."

- "Alternatively," to Rule 11, sanctions were imposed under the inherent power of the court.

- $5,000.00 penalty imposed jointly and severally.

The court also required the attorneys "to inform their client and the judges whose names were wrongfully invoked of the sanctions imposed."

Since *Avianca* was decided, other courts have addressed GAI in decisions (discussed earlier in this Report). However, and of particular interest to the Task Force, individual judges (and one United States bankruptcy court) have directed attorneys who appear before them and who use GAI to take certain actions. Here is a "sampler:"

United States District Judge Brantly Starr of the Northern District of Texas has imposed a certification requirement:

> All attorneys and pro se litigants . . . must, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal data bases, by a human being.

United States District Court Judge Michael Baylson of the Eastern District of Pennsylvania has issued a Standing Order for all actions assigned to him:

> If any attorney for a party, or a pro se party, has used artificial intelligence ('AI') in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, MUST, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and CERTIFY, that each and every citation to the law or the record in the paper, has been verified as accurate.

These and other orders are problematic for several reasons, including:

- Might attorney work product be implicated?

- Might the use of the term "artificial intelligence" (rather than GAI) sweep into a disclosure obligation much more than GAI? (For example, if an attorney uses computer-assisted review to cull and make a production of ESI, would the order encompass that use?).

Judges issue local rules for court management and in reaction to or to get ahead of issues that may arise or have the potential to arise in their courtrooms (in real time), regardless of existing rules which address the same concerns!

In time, with better understanding of the new and emerging technologies, and with more precision in language when referencing these emerging technologies, the language in the local rules will more precisely match and address the concerns of the court and so, achieve what these judges' orders were designed to do.

LEGISLATIVE OVERVIEW AND RECOMMENDATIONS

I.   Legislative Overview

The Task Force does not recommend or endorse any specific legislation. Refer to Appendix A for a summary of proposed and passed legislation that the Task Force considered and reviewed.

II.   Recommendations

Rather than endorse existing or pending legislation, we make the following recommendations:

First, the Task Force recommends that NYSBA adopt the AI/GAI guidelines outlined in this report and commission a standing section or committee to oversee periodic updates to those guidelines. Daily, we learn more about the capability of the technology to transform society. As the impacts are continual, so should the updates to these guidelines be as well.

Second, we recommend a focus on educating judges, lawyers and regulators to understand the technology so that they may apply existing law to regulate it. Many of the risks posed by AI are more sophisticated versions of problems that already exist and are already addressed by court rules, professional conduct rules and other law and regulations. Rather than invent new laws or modify rules of professional conduct to address AI concerns, the Task Force suggests that we create a comprehensive education plan for judges, lawyers and regulators so they can address the risks associated with AI using existing laws and regulations. This approach has already been adopted effectively in other jurisdictions. For example, the Italian Data Protection Authority, the Guarante per la Protezione dei Dati Personali, has already effectively used GDPR in a number of AI-related cases, including to modify or restrict the operations of the ChatGPT and Replika AI chatbots.[85] This approach will allow the law to develop in a fact-based way along with the rapidly changing technology.

Comments to the rules of professional conduct, best practices, continuing education programs and bar opinions can also aid in this process. For instance, in the Preamble to the RPC, we may consider including a general statement about the importance of competence with technology by adding "including . . . artificial intelligence" therein. Further, we might expand Comment [8] to Rule 1.1 to add that the duty of competence obligates lawyers to: (a) keep abreast of and be able to identify technology (including AI and GAI) that is generally available to improve effective client representation and enhance the quality of legal services; (b) determine whether the use of AI will in fact augment the legal service to a specific client; and (c) attain a basic understanding of how AI-based tools operate to achieve the results and outputs sought.

Third, the Task Force recommends that legislatures seek to identify risks associated with the technology that are not addressed by existing law. This may involve extensive hearings and studies involving experts in AI. Once such risks are identified, new laws may be crafted with a focus on new categories of problems.

Fourth, the rapid advancement of AI prompts us to examine the function of the law as a governance tool. Some of the key functions of the law in the AI context are: (i) expressing social values and signal fundamental principles; (ii) protecting against risks to such values and principles; and (iii) stabilizing society and increasing legal certainty. Recommendations here involve:

a. <u>AI as a General-Purpose and Dual-Impact Technology</u>: The governance of AI should consider AI's nature as a classic dual-impact phenomenon. AI can improve many aspects of society but also has the potential to cause harm if left unchecked. Regulation should consider focusing on the effects of the technology on individuals and society, rather than the technical aspects of the technology itself (such as the algorithms or databases).

b.   <u>Regulatory Spectrum</u>: The governance of AI should be tailored to the risks posed by AI applications. It can adopt varying degrees of regulatory intrusiveness, with the spectrum potentially extending from detailed legal regulation at one end of the spectrum to self-regulation on the other end of the spectrum, with a principles-based approach in the middle of the spectrum. The approach chosen to address a particular risk or problem should consider:

- the sector involved (e.g., law enforcement or health care)

- the importance of the social activity at hand (e.g., hiring applicants or making loans)

- the rights affected (e.g., due process or privacy)

- the risks associated with the use and impact of AI (e.g., job loss or misinformation)

c.   <u>Comprehensive vs. Specific Regulation</u>: Foundationally, legislators should determine if regulations entail a comprehensive approach (i.e., an overarching framework governing diverse AI applications and their social implications) or a sector-by-sector or industry-by-industry approach (i.e., considering the particular and often unique issues posed by AI in each sector or industry). Regulators should determine which approach is best, or develop some mix or combination of these approaches, depending on the sectors and problems at hand.

d.   <u>Global Cooperation</u>: Another consideration in the regulatory approach involves jurisdictional reach. Can AI be effectively governed at the local, state or federal level, or does its governance necessarily require some degree of international or even global cooperation? We believe in local, state and federal regulation where appropriate, but also propose that local, state and federal regulation is likely to prove inadequate without international and sometimes global cooperation, because AI is a cross-border phenomenon rather than a local one. The following four elements of AI may elude regulations if they are confined to a specific geographic area:

i. Data, which is the input for AI, can move across borders (although data location is likely to enhance a jurisdiction's power to regulate AI);

ii. Algorithms programmable anywhere in the world;

iii. Algorithms exportable for use anywhere else in the world; and

iv. Outputs from algorithms transmitted to and applied in different jurisdictions.

AI & GENERATIVE AI GUIDELINES

The chart below reflects the Task Force's recommended guidelines when utilizing AI or generative AI tools (collectively, the "Tools") in legal practice. We will update these guidelines periodically as the technology evolves.

TOPIC	GUIDANCE
ATTORNEY COMPETENCE (RULE 1.1)	*A lawyer should provide competent representation to a client.* You have a duty to understand the benefits, risks and ethical implications associated with the Tools, including their use for communication, advertising, research, legal writing and investigation. Refer to <u>Appendix B</u> for resources to better under the Tools.
SCOPE OF REPRESENTATION (RULE 1.2)	*A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.* Consider including in your client engagement letter a statement that the Tools may be utilized in your representation of the client and seek the client's acknowledgement. Refer to <u>Appendix C</u> for a sample language to include.
DILIGENCE (RULE 1.3)	*A lawyer should act with reasonable diligence and promptness in representing a client.* Consider whether use of the Tools will aid your effectiveness in representing your client.
COMMUNICATION (RULE 1.4)	*A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.* While the Tools can aid in generating documents or responses, you must ensure that you maintain direct and effective communication with your client and not rely solely on content generated from the Tools.

TOPIC	GUIDANCE
FEES (RULE 1.5)	*A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense.* If the Tools would make your work on behalf of a client substantially more efficient, then your use of (or failure to use) such Tools may be considered as a factor in determining whether the fees you charged for a given task or matter were reasonable. If you will add a "surcharge" (i.e., an amount above actual cost) when using specific Tools, then you should clearly state such charges in your engagement letter, <u>provided</u> that the total charge remains reasonable.
CONFIDENTIALITY (RULE 1.6)	*A lawyer shall not knowingly reveal confidential information.* When using the Tools, you must take precautions to protect sensitive client data and ensure that no Tool compromises confidentiality. Even if your client gives informed consent for you to input confidential information into a Tool, you should obtain assurance that the Tool provider will protect your client's confidential information and will keep each of your client's confidential information segregated. Further, you should periodically monitor the Tool provider to learn about any changes that might compromise confidential information.
CONFLICTS OF INTEREST (RULE 1.7)	*A lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests.* Your use of the Tools in a particular case may potentially compromise your duty of loyalty under Rule 1.7, by creating a conflict of interest with another client. Rule 1.7 imposes a duty on you to identify, address and, if necessary, seek informed client consent for conflicts of interest that may result from your use of the Tools.

TOPIC	GUIDANCE
SUPERVISORY RESPONSIBILITIES (RULE 5.1)	*A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to the ethical rules.* As a supervising lawyer, you have a duty to ensure that the lawyers for whom you have oversight observe the ethical rules when utilizing the Tools.
SUBORDINATE LAWYERS (RULE 5.2)	*A lawyer is bound by the ethical rules notwithstanding that the lawyer acted at the direction of another person.* If you as the subordinate lawyer utilize the Tools as directed by your supervising attorney, you are independently required to observe the ethical rules. All rules described in these guidelines apply equally to your conduct.
RESPONSIBILITY FOR NON-LAWYERS (RULE 5.3)	*A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate.* If the Tools are used by non-lawyers or paralegals (or the Tools themselves are considered "non-lawyers"), you must supervise their use to ensure compliance with the ethical rules. Further, you must ensure that the work produced by the Tools is accurate and complete and does not disclose or create a risk of disclosing client confidential information without your client's informed consent.
PROFESSIONAL INDEPENDENCE (RULE 5.4)	*A lawyer shall not permit a person to direct or regulate the lawyer's professional judgment in rendering legal services.* While the Tools are technically not a "person," you should refrain from relying exclusively on them when providing legal advice and maintain your independent judgment on a matter.
UNAUTHORIZED PRACTICE OF LAW (UPL) (RULE 5.5)	*A lawyer shall not aid a nonlawyer in the unauthorized practice of law.* Understand that human oversight is necessary to avoid UPL issues when using the Tools, which should augment but not replace your legal work.

TOPIC	GUIDANCE
VOLUNTARY PRO BONO SERVICE (RULE 6.1)	*Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.* The Tools may enable you to substantially increase the amount and scope of the pro bono legal services that you can offer. Considering Rule 6.1, you are encouraged to use the Tools to enhance your pro bono work.
ADVERTISING (RULE 7.1)	*A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates an ethical rule.* You are responsible for all content that you post publicly, including content generated by the Tools. Further, you must be cautious when using the Tools for advertising or solicitation purposes to ensure that you comply with ethical guidelines regarding truthful and non-deceptive communication.
SOLICITATION AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT (RULE 7.3)	*A lawyer shall not engage in solicitation by in-person or telephone contact, or by real-time or interactive computer-accessed communication . . .* You may not use the Tools to automatically generate phone calls, chat board posts or other forms of solicitation, nor may you contract with another person to use the Tools for such purposes, as Rule 8.4 (Misconduct) prohibits you from using others to engage in conduct in which you personally could not engage.

CONCLUSION

This report offers no "conclusions." As AI continues to evolve, so will the work of NYSBA and the groups tasked with ongoing monitoring. As a profession, we must continue to refine the initial guidelines suggested in this report and audit the efficacy of proposed rules and regulations. We liken this journey to the mindset of ancient explorers: be cautious, be curious, be vigilant and be brave.

<u>Exhibit A</u>
Task Force Mission Statement

The Task Force on AI will examine the legal, social and ethical impact of artificial intelligence (AI) on the legal profession. The Task Force will review AI-based software, generative AI technology and other machine-learning tools that may enhance the profession and that pose risks for individual attorneys dealing with new, unfamiliar technology and courts concerned about the integrity of the judicial process. Also, the Task Force will explore the positive and negative implications of AI use by the legal community and the general public, including effects on access to justice, legal regulations and privacy preservation. As it engages in its work, the Task Force will consult and ensure alignment of approaches, where appropriate, with other entities within the Association, including but not limited to the Committee on Technology and the Legal Profession, the Task Force on Emerging Digital Finance and Currency, the Working Group on Facial Recognition Technology and Access to Legal Representation and relevant sections. Lastly, the Task Force will develop policies for bar association adoption and suggest legislation to govern effective and responsible AI use.

APPENDIX A: LEGISLATION REVIEWED

I.   **Assemblyman Clyde Vanel's proposed statutes on AI:**

- *Evidence created or processed by artificial intelligence.* An Act to amend New York's Criminal Procedure Law (CPL) and Civil Practice Law and Rules (CPLR) to address "the admissibility of evidence created or processed by artificial intelligence"

The essence of the evidence bill, which would amend the CPL and CPLR, is as follows:

§ 60.80 Rules of evidence; admissibility of evidence created or processed by artificial intelligence.

1. Evidence *created, in whole or in part, by artificial intelligence* shall not be received into evidence in a criminal proceeding unless the evidence is substantially supported by independent and admissible evidence and the proponent of the evidence establishes the reliability and accuracy of the specific use of the artificial intelligence in creating the evidence.

2. Evidence *processed, in whole or in part, by artificial intelligence* shall not be received into evidence in a criminal proceeding unless the proponent of the evidence establishes the reliability and accuracy of the specific use of the artificial intelligence in processing the evidence (emphasis added).

- *Political communications using artificial intelligence.* An Act to amend New York Election Law by requiring disclosure of "the use of artificial intelligence in political communications."

This bill would amend New York Election Law by requiring disclosure of "the use of artificial intelligence in political communications." The bill has separate sections to cover visual and non-visual communications. The heart of the bill provides as follows:

5. (a) Any political communication, regardless of whether such communication is considered a substantial or nominal expenditure, that uses *an image or video footage that was generated in whole or in part with the use of artificial intelligence*, as defined by the state board of elections, *shall be required to disclose that artificial intelligence was used* in such communication in accordance with paragraphs (b), (c), and (d) of this subdivision (emphasis added).

Paragraphs (b), (c), and (d) require specific disclaimers for "printed or digital political communications," "non-printed and non-digital political communications," and political communications that are "not visual, such as radio or automated telephone calls."

- *Political communications created by synthetic media.* An Act to amend New York Election Law, by "prohibiting the creation of synthetic media with intent to influence the outcome of an election."

This bill would amend New York Election Law, by "prohibiting the creation of synthetic media with intent to influence the outcome of an election." Specifically, the bill would add a new § 17-172 that would provide as follows:

§ 17-172. Creating synthetic media with intent to unduly influence the 4 outcome of an election.

1. A person who, with intent to injure a candidate or unduly influence the outcome of an election, creates or causes to be created a *fabricated photographic, videographic, or audio record* and causes such fabricated photographic, videographic, or audio record to be disseminated or published within sixty days of an election shall be guilty of a class E felony (emphasis added).

- *Artificial intelligence bill of rights.* An Act to amend New York's Technology Law by "enacting the New York artificial intelligence bill of rights."

This bill would amend New York's Technology Law by "enacting the New York artificial intelligence bill of rights." The section on legislative intent says, in part:

[T]he legislature declares that any New York resident affected by any *system making decisions without human intervention* be entitled to certain rights and protections to ensure that the system impacting their lives do so lawfully, properly, and with meaningful oversight.

Among these rights and protections are (i) the right to safe and effective systems; (ii) protections against algorithmic discrimination; (iii) protections against abusive data practices; (iv) the right to have agency over one's data; (v) the right to know when an automated system is being used; (vi) the right to understand how and why an automated system contributed to outcomes that impact one; (vii) the right to opt out of an automated system; and (viii) the right to work with a human in the place of an automated system.

The next part of the bill defines various terms. For example:

4. "Algorithmic discrimination" means circumstances where an automated system contributes to an unjustified different treatment or impact which disfavors people based on their age, color, creed, disability, domestic violence victim status, gender identity or expression, familial status, marital status, military status, national origin, predisposing genetic characteristics, pregnancy-related condition, prior arrest or conviction record, race, sex, sexual orientation, or veteran status or any other classification protected by law.

The next part of the bill imposes various requirements. For example:

§ 404. Safe and effective systems.

2. *Automated systems shall undergo pre-deployment testing, risk identification and mitigation*, and shall also be subjected to ongoing monitoring that demonstrates they are safe and effective based on their intended use, mitigation of unsafe outcomes including those beyond the intended use, and adherence to domain-specific standards.

3. If an automated system fails to meet the requirements of this section, it shall not be deployed or, if already in use, shall be removed. *No automated system shall be designed with the intent or a reasonably foreseeable possibility of endangering the safety of any New York resident or New York communities* (emphasis added).

- *New York Penal Law – Fabricated photos, video, or audio*. An Act to amend the penal law by addressing "unlawful dissemination or publication of a fabricated photographic, videographic, or audio record."

This bill would amend New York's Penal Law by addressing "unlawful dissemination or publication of a fabricated photographic, videographic, or audio record." The essence of the bill is as follows:

1. A person is guilty of unlawful dissemination or publication of a fabricated photographic, videographic, or audio record when, with intent to cause harm to the liberty or emotional, social, financial or physical welfare of an identifiable person or persons, he or she intentionally creates or causes to be created a fabricated record of such person or persons and disseminates or publishes such record of such person or persons without such person or persons' consent.

The bill contains many exceptions. For example, the bill says:

This section shall not apply to the following:
(a) Dissemination or publication of a fabricated record by *a person who did not create the fabricated record*, whether or not such person is aware of the authenticity of the record;
(b) Dissemination or publication of a fabricated record that was created during the lawful and *common practices of law enforcement, legal proceedings or medical treatment* where the record is not disseminated or published with the intent to misrepresent its authenticity;
(c) Dissemination or publication of a fabricated record that was created for the purpose of *political or social commentary, parody, satire, or artistic expression* that is not disseminated or published with the intent to misrepresent its authenticity . . . (emphasis added)

- *Advanced Artificial Intelligence Licensing Act*. An Act to amend the state Technology Law to require registration and licensing of "high-risk advanced artificial intelligence systems."

An Act to amend the state Technology Law to address "advanced artificial intelligence systems" and to require registration and licensing of "high-risk advanced artificial intelligence systems." The bill defines these as follows:

1. "Advanced artificial intelligence system" shall mean any digital application or software, whether or not integrated with physical hardware, that *autonomously performs functions traditionally requiring human intelligence*. This includes, but is not limited to the system:

(a) Having the ability to learn from and adapt to new data or situations autonomously; or

(b) Having the ability to perform functions that require cognitive processes such as understanding, learning or decision-making for each specific task.

2. "High-risk advanced artificial intelligence system" shall mean any advanced artificial intelligence system that possesses *capabilities that can cause significant harm to the liberty, emotional, psychological, financial, physical, or privacy interests of an individual or groups of individuals, or which have significant implications on governance, infrastructure, or the environment*. The director shall assess any such public or private system in determining whether such system requires registration (emphasis added).

After a long series of definitions, the bill provides that the New York Department of State shall have "discretion to issue or refuse to issue any license provided for in this article" and to "revoke, cancel or suspend" any such license.

- *General Business Law – Oaths of responsible use of advanced AI*. An Act to amend New York's General Business Law by "requiring the collection of oaths of responsible use from users of certain high-impact advanced artificial intelligence systems."

This bill would amend New York's General Business Law by "requiring the collection of oaths of responsible use from users of certain high-impact advanced artificial intelligence systems." Here is a sample of the operative language of the oath:

I, _____ residing at _____, do affirm under penalty of perjury that I have not used, am not using, do not intend to use, and will not use the services provided by this advanced artificial intelligence system in a manner that violated or violates any of the following affirmations:

1. I will not use the platform to create or disseminate content that can foreseeably cause injury to another in violation of applicable laws;

2. I will not use the platform to aid, encourage, or in any way promote any form of illegal activity in violation of applicable laws;

3. I will not use the platform to disseminate content that is defamatory, offensive, harassing, violent, discriminatory, or otherwise harmful in violation of applicable laws;

4. I will not use the platform to create and disseminate content related to an individual, group of individuals, organization, or current, past, or future events that are of the public interest which I know to be false and which I intend to use for the purpose of misleading the public or causing panic."

II.   Federal and New York State proposals regarding use of AI-generated or compiled information in judicial proceedings

Judges face challenges in evaluating the admissibility of AI-generated or compiled evidence. Concerns include the reliability, transparency, interpretability and bias in such evidence. These challenges become even more pronounced with the use of generative AI systems. A discussion follows regarding two recent proposals to address these challenges.

Federal Law – A proposal to amend Fed. R. Evid. 901(b)(9)

As a general matter, Rule 901 of the Federal Rules of Evidence requires the proponent of a given item of evidence to authenticate that evidence. That is, the proponent "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Subsection (b) of that rule provides a non-exhaustive list of examples of how the proponent may satisfy the authentication requirement. As currently written, Fed. R. Evid. 901(b)(9), which applies to "evidence about a process or system" states that such evidence is "accurate" if the proponent shows that the process or system "produces an accurate result."

The Advisory Committee for the Federal Rules of Evidence is considering a proposal by former U.S. District Judge Paul Grimm and Dr. Maura R. Grossman of the University of Waterloo to amend Fed. R. Evid. 901(b)(9). That proposal initially changes the "accurate" standard as currently exists for any evidence about a process or system and replaces it with a requirement that

the proponent provide evidence that shows that the process or system produces a "reliable" result. For evidence generated by AI, the proponent must also (a) describe the software or program that was used and (b) show that it has produced reliable results in the proposed evidence.

New York: Proposed amendments to the Criminal Procedure Law and CPLR

New York State Assemblyman Clyde Vanel has introduced a bill, A 8110, which amends both the Criminal Procedure Law and the Civil Practice Law and Rules regarding the admissibility of evidence created or processed by artificial intelligence. As stated in the bill, evidence is "created" by AI when AI produces new information from existing information. Evidence is "processed" by AI when AI produces a conclusion based on existing information.

Simplified greatly, the bill requires that evidence "created" by AI would not be received at trial unless independent admissible evidence establishes the reliability and accuracy of the AI used to create the evidence. Evidence "processed" by AI similarly requires the proponent of the evidence to establish the reliability and accuracy of the AI used. This bill does not yet have a co-sponsor in the Assembly and does not have a sponsor in the Senate.

The goals of both the proposal to amend Fed. R. Evid. 901 and the Vanel bill are laudable. The "black box" problem of AI is of great concern to lawyers and judges and has significant due process concerns in the criminal justice area. These proposals thus attempt to address AI-generated "deepfakes" that could be passed off as authentic evidence. Nevertheless, given the intricacies and time involved in the legislative and rule-amending processes, it may well be that the common law at the trial court level provides at least an interim roadmap for how judges should consider these issues. Indeed, this approach was largely employed to develop the law regarding discovery and admissibility of social media evidence when those issues first took hold.

III.   New York City's local law regarding use of AI in hiring and promotion

As of this writing, there are no statewide laws or regulations in New York regarding commercial use of AI. Notably, Governor Hochul vetoed a bill in November 2023 (A.4969), initially proposed by Assemblyman Vanel, that would have created a statewide commission to study AI. But it appears that Assemblyman Vanel, and perhaps many of his colleagues, are undeterred in their attempts to keep the conversation moving. One such attempt is a bill actually drafted by an AI program, and introduced by Vanel, that permits tenants in New York state to have the right to be able to request a copy of their lease. That bill, A.6896, is awaiting sponsorship in the New York State Senate.

New York City has, however, entered the regulatory space regarding AI-based hiring decisions. As of July 5, 2023, New York City's Automated Employment Decision Tool (AEDT) law, Local Law 144 of 2021, or "NYC 144," requires New York City employers who use AI and other machine-learning technology as part of their hiring process to annually audit their recruitment technology. NYC 144 defines AEDT as (1) any computational process, derived from machine learning, statistical modeling, data analytics or artificial intelligence, (2) that issues a simplified output, including a score, classification or recommendation, which is used to substantially assist or replace discretionary decision making for employment decisions that impact natural persons. A third party must perform these audits, and the audit results must be available on the company's website. The audit itself must check for biases, whether intentional or unintentional, that are built into these systems. Failure to comply could result in fines starting at $500, with a maximum penalty of $1,500 per instance.

At the outset, NYC 144's focus on "employment decisions" appears to cover only hiring and promotion. Conversely, it appears that decisions regarding compensation, termination, benefits, workforce monitoring and perhaps even performance evaluations are beyond the reach

of the law. Moreover, NYC 144 applies only to those who actually apply for a job. Thus, the statute does not apply to any AI-based tools that might identify potential candidates who ultimately do not apply for a position.

Due to the recency of the NYC 144's implementation, there is no data as of this writing to determine its effectiveness, including whether and when any third-party audits have actually taken place. Even to the extent such audits have taken place, questions may remain as to the standards used for such audits and the company's data that was used for the audits.

IV.   The White House's October 30, 2023 Executive Order regarding AI

On October 30, 2023, President Biden issued an Executive Order setting forth various standards for AI safety and security. It is one of the lengthier Executive Orders in recent history on any topic. The Order charges various executive agencies to develop guidelines, propose regulations or compile reports that will shape the AI landscape. The highlights of the Order include:

a.   Establishment of the AI Safety and Security Board, under the auspices of the Department of Homeland Security, to address any threats posed by AI systems to infrastructure and cybersecurity.

b.   Requiring the Department of Commerce to provide guidance for content authentication and watermarking to clearly label AI-generated content on government communications. In turn, federal agencies using AI-generated content are to highlight these authentication tools to assist recipients of government communications to know that these communications are authentic.

c.   Federal agencies are to develop rules and guidelines to address algorithmic discrimination, both through training and technical assistance in areas including criminal justice, federal benefits and contracting programs, civil rights, and workplace equity, health and safety.

The question remains how these directives will be enforced. There is no requirement that any non-governmental entities involved in the creation or marketing of AI tools adhere to the directives that the various agencies will issue. Additionally, the Order does not provide, or even suggest, any recourse for individuals harmed by discriminatory AI systems. On these points (and perhaps many others), Congress may well have to provide guidance to federal agencies. Nevertheless, the Executive Order does provide a framework for both the government and the private sector to think about AI issues. It also invests the federal government, at least under the current administration, in AI security.

V.   Summary of the EU AI Act

On December 9, 2023, the EU Parliament and Council negotiators reached a provisional agreement on the EU Artificial Intelligence Act (the "EU AI Act"). The agreed text will now proceed towards formal adoption by both the EU Parliament and Council to become EU law. While it is expected that the EU Parliament will adopt the EU AI Act, the law itself will not come into force for at least another two years after that vote.

As an overarching objective, the EU AI Act aims to ensure that fundamental rights, democracy, the rule of law and environmental sustainability are protected from high-risk AI, while boosting innovation and making the EU a leader in the field. The rules establish obligations for AI based on its potential risks and level of impact.

The following is a summary of the key aspects of the EU AI Act:

- General Regulatory Approach: The EU AI Act generally opts for a risk-based approach. Some applications are specifically prohibited (e.g., social scoring), some high-risk areas are strictly regulated (e.g., employment and worker management), and some areas of low risk are based on self-regulation. The EU AI Act strives to

mitigate harm in areas where using AI poses "unacceptable" risk to fundamental rights, such as health care, education, border surveillance and public services.

- Territorial Scope: The EU AI Act has extraterritorial scope. It applies to: (a) providers placing on the EU market AI systems, whether those providers are established within the EU or in a third country; (b) users of AI systems located within the EU; (c) providers and users of AI systems that are located in a third country, where the output produced by the system is used in the EU. In practice this is likely to mean significant regulatory impact for U.S.-based organizations. The majority of the GDPR fines levied to date have been on U.S.-owned organizations. This extraterritorial reach is likely to be a feature of the EU AI Act as well.

- Prohibited AI applications: Recognizing the potential threat to individuals' rights and democracy posed by certain applications of AI, the EU AI Act specifically prohibits the following applications:

  - biometric categorization systems that use sensitive characteristics (e.g., political, religious, philosophical beliefs, sexual orientation, race);

  - untargeted scraping of facial images from the internet or CCTV footage to create facial recognition databases;

  - emotion recognition in the workplace and educational institutions;

  - social scoring based on social behavior or personal characteristics;

  - AI systems that manipulate human behavior to circumvent their free will;

  - AI used to exploit the vulnerabilities of people due to their age, disability, social or economic situation.

- High-Risk AI Applications: The EU AI Act delineates the applications and activities designated as "high risk" and adopts certain requirements for their development, deployment and use. These uses are not prohibited but strictly regulated.

  o Categories of High-Risk AI Applications: Certain specific-use cases are designated as "high risk" irrespective of which industry or product the use case is deployed in, for instance, the use of AI in biometric identification systems, critical infrastructure, credit-worthiness evaluation, human resources contexts and law enforcement. In addition, this category includes the use of AI in relation to certain products, for example, machinery, radio equipment, medical devices and in vitro diagnostic medical devices, as well as AI used in certain products in civil aviation (security) and automotive industries. AI systems used to influence the outcome of elections and voter behavior are also classified as high risk.

  o Requirements for High-Risk AI Applications: Pursuant to the EU AI Act, high-risk AI must comply with various requirements such as conformity assessments, post-market surveillance, data governance and quality measures, mandatory registration, incident reporting and fundamental rights impact assessments. For example, in respect of AI systems classified as high risk (due to their significant potential harm to health, safety, fundamental rights, environment, democracy and the rule of law), the EU AI Act provides for a mandatory fundamental rights impact assessment applicable to, among other areas, the insurance and banking sectors. In addition, individuals will have a right to launch complaints about AI systems and receive explanations about decisions based on high-risk AI systems

that impact their rights. AI providers must build in human oversight, incorporating human-machine interface tools to ensure systems can be effectively overseen by natural persons.

- Law Enforcement: Predictive policing may only be employed under strict rules, such as clear human assessment and objective facts, not deferring the decision of investigating an individual to an algorithm. The EU AI Act stipulates a range of safeguards and narrow exceptions for the use of biometric identification systems (RBI) in publicly accessible spaces for law enforcement purposes, subject to prior judicial authorization and for strictly defined lists of crime. "Post-remote" RBI would be used strictly in the targeted search of a person convicted or suspected of having committed a serious crime. "Real-time" RBI would have to comply with strict conditions and its use would be limited in time and location, for the purposes of:

  o targeted searches of victims (abduction, trafficking, sexual exploitation),

  o prevention of a specific and present terrorist threat, or

  o the localization or identification of a person suspected of having committed one of the specific crimes mentioned in the EU AI Act (e.g., terrorism, trafficking, sexual exploitation, murder, kidnapping, rape, armed robbery, participation in a criminal organization, environmental crime).

- General-Purpose AI: In order to reflect the broad range of tasks that AI systems can accomplish and the rapid expansion of their capabilities, under the EU AI Act general-purpose AI (GPAI) systems, and the GPAI models they are based on, will need to adhere to certain transparency requirements. These include presenting

technical documentation, complying with EU copyright law and disseminating detailed summaries about the content used for training. GPAI is defined in the EU AI Act as "an AI system that can be used in and adapted to a wide range of applications for which it was not intentionally and specifically designed." In this regard, the legislative text does not seem to distinguish between foundation AI, generative AI or GPAI regulation based on use cases. However, with respect to high-impact GPAI models with systemic risk, the EU AI Act stipulates more stringent obligations. High-impact GPAI models (in essence, those that were trained using a total computing power above a certain threshold) will be subject to more onerous requirements due to the presumption that they carry systemic risk. If these models meet certain criteria, they will need to conduct model evaluations, assess and mitigate systemic risks, conduct adversarial testing, report to the European Commission on serious incidents, ensure cybersecurity and report on their energy efficiency.

Blogs & Podcasts

- ➢ **OpenAI Blog**: Direct insights from one of the leading organizations in AI research. It covers breakthroughs, applications and considerations around their technologies, including generative models like GPT and DALL-E.

- ➢ **Distill**: Though not exclusively focused on generative AI, Distill publishes detailed, interactive research articles on machine learning that often touch on generative models. Its visual and intuitive approach makes complex topics accessible.

- ➢ **The Gradient**: A place for deep technical and theoretical discussions on AI, including generative models. The Gradient offers perspectives on the latest research trends, ethical considerations and practical applications.

- ➢ **AI Weirdness**: Authored by Janelle Shane, this blog explores the quirky and humorous side of AI, including many experiments with generative models. It's an entertaining way to see the creative potential and limitations of AI.

- ➢ **DeepMind Blog**: While DeepMind's research encompasses a wide range of AI technologies, their work on generative models and their applications is frequently featured, providing insights into cutting-edge developments.

- ➢ **The AI Alignment Podcast**: Hosted by the Future of Life Institute, this podcast covers broader topics in AI, including the development and implications of generative AI technologies. Discussions often revolve around safety, ethics and future prospects.

- ➢ **TWIML AI Podcast** (This Week in Machine Learning & AI): Offers a wide range of interviews with AI researchers, practitioners and industry leaders, including episodes focused on generative AI technologies and their applications.

- ➢ **The Gradient Podcast**: An extension of The Gradient blog, this podcast dives into discussions with AI researchers and industry professionals, shedding light on their work, the future of AI and occasionally focusing on generative models.

- ➢ **AI in Business**: While more focused on the application of AI in industry, this podcast sometimes explores generative AI applications in business, offering insights into how companies are leveraging this technology.

Newsletters

- ❖ **The Batch by DeepLearning.ai**: Curated by Andrew Ng and his team, the Batch brings the most important AI news and perspectives, including topics on generative AI, to your inbox. It's great for professionals, researchers and anyone interested in AI.

- ❖ **Import AI by Jack Clark**: Jack Clark, co-founder of Anthropic and former policy director at OpenAI, shares weekly insights on AI developments, policy implications and research breakthroughs. While not exclusively focused on generative AI, the newsletter often covers significant advancements and considerations in the field.

- ❖ **Data Elixir**: While broader than just generative AI, Data Elixir covers data science and machine learning trends, tools and resources, including topics on generative models and AI-generated content.

- ❖ **The Algorithm by MIT Technology Review**: Offers insightful commentary on the latest AI developments, including ethical considerations, policy and groundbreaking research in generative AI.

- ❖ **The Sequence**: A deep-tech AI newsletter that offers cutting-edge perspectives on AI technologies, including generative AI. It's structured in a unique format that includes a brief overview, a deep dive and a summary of the latest AI research.

Subscriptions

- ▪ **AI Weekly**: A roundup of the best content in AI, including research papers, articles and news. It frequently features content related to generative AI technologies and their applications.

- ▪ **Last Week in AI**: This newsletter gives a concise overview of the latest AI news, research and applications with occasional deep dives into generative AI technologies and their societal impacts.

- ▪ **Orbit**: Focused on machine learning and AI, Orbit provides updates on the latest research, applications and trends, including insightful discussions on generative AI.

- ▪ **MIT Technology Review**: Their subscription gives access to in-depth reporting on emerging technologies, including detailed articles on developments in AI and machine learning. Their coverage on generative AI technologies, implications and ethical considerations is among the best.

- ▪ **AI Business**: Provides insights, analysis and news on the application of AI in the business world, including generative AI. The subscription is aimed at professionals looking to understand how AI can be leveraged in various industries.

- ▪ **Inside AI**: Offers premium content on the latest AI news, research and trends, with some focus on generative AI. The paid subscription includes additional insights and analysis not available in the free version.

- ▪ **Benedict Evans' Newsletter**: While not exclusively about AI, Benedict Evans provides high-level analysis and insights on the tech industry, including AI's impact on different sectors. His annual presentation includes significant trends in AI and machine learning.

- ▪ **Stratechery by Ben Thompson**: Offers in-depth analysis on the strategy and business side of technology, including AI. While the focus is broader, Thompson occasionally dives into topics related to generative AI and its impact on industries.

- ▪ **Datanami**: Focused on data science and big data news, Datanami covers the technological advancements and applications in AI and machine learning. Their subscription service provides in-depth analysis and exclusive content.

APPENDIX C: SAMPLE ENGAGEMENT LETTER PROVISION

Use of Generative AI: While representing you, we may use generative AI tools and technology to assist in legal research, document drafting and other legal tasks. This technology enables us to provide more efficient and cost-effective legal services. However, it is important to note that while generative AI can enhance our work, it is not a substitute for the expertise and judgment of our attorneys. We will exercise professional judgment in using AI-generated content and ensure its accuracy and appropriateness in your specific case.

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