

A large, crowded stadium at night, illuminated by bright lights. The crowd is cheering, and the stadium's architecture is visible in the background.

2024

SPORTS LAW CLE SERIES

Proskauer»

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Generative AI 2.0

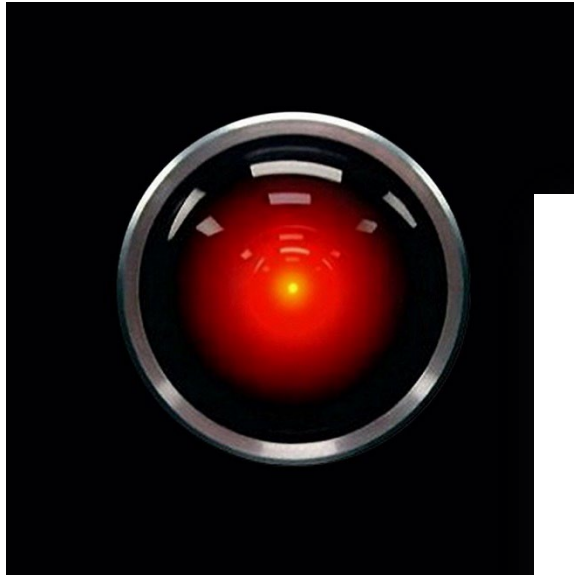
Jeffrey D. Neuburger
Co-Head, TMT Group

Wai L. Choy
Partner, TMT Group

October 30, 2024

Proskauer»

GenAI 1.0



The General Release of ChatGPT on November 30, 2022



Introducing ChatGPT
Nov 30, 2022

5

Everything Changed on January 3, 2023



6

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GenAI 1.0

Training an AI Engine

An AI system is designed to generate content by learning from vast amounts of pre-existing materials.

It may be trained in two ways:

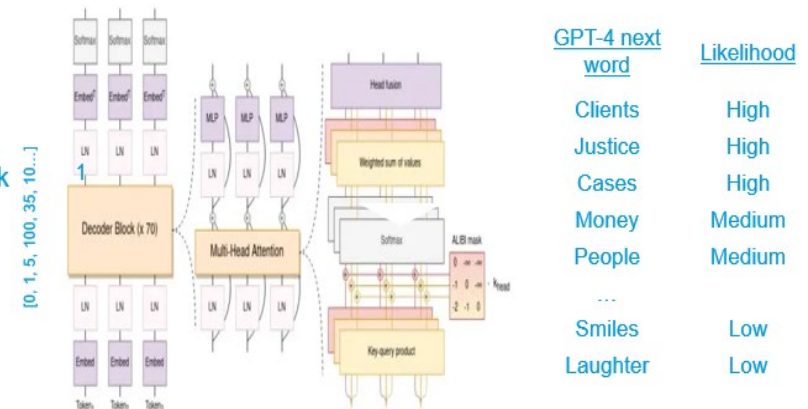
pre-training on vast datasets to “learn” to predict the next word in a sentence by analyzing massive datasets containing diverse text sources.

fine-tuning on specific datasets for targeted applications, improving contextual understanding and accuracy.

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Generating a Response

Lawyers work very hard for...



GenAI 1.0



GenAI 2.0 – What has changed in a year?

Some Risks Are Being Addressed...By Litigation

Authors Guild v. OpenAI Inc., No. 23-08292 (S.D.N.Y. Filed Sept. 19, 2023) (“Defendants copied Plaintiffs’ works wholesale, without permission or consideration. Defendants then fed Plaintiffs’ copyrighted works into their “large language models” or “LLMs,” algorithms designed to output human-seeming text responses to users’ prompts and queries”)

A.T. v. OpenAI LP, No. 23-04557 (N.D. Cal. Filed Sept. 5, 2023) (privacy-related claims against OpenAI and Microsoft for using “stolen private information” from millions of internet users without consent to train its AI)

Huckabee v. Meta Platforms, Inc., No. 23-09152 (S.D.N.Y. Filed Oct. 17, 2023) (putative class action over alleged AI training on ebooks)

Concord Music Group, Inc. v. Anthropic PBC, No. 23-01092 (M.D. Tenn. Filed Oct. 18, 2023) (music publishers claims AI model copies and disseminates copyrighted music lyrics)

New York Times Co. v. Microsoft Corp., No. 23-11195 (S.D.N.Y. Filed Dec. 27, 2023) (“Defendants’ unlawful use of The Times’s work to create artificial intelligence products that compete with it threatens The Times’s ability to provide that service”)

Main Sequence, Ltd. v. Dudesy, LLC, No. 24-00711 (C.D. Cal. Filed Jan. 25, 2024) (settled dispute against podcast creators who alleged used genAI to write and perform jokes based on George Carlin’s voice and style)

Lehrman v. Lovo, Inc., No. 24-03770 (S.D.N.Y. Filed May 16, 2024) (voice actors’ action against text-to-speech AI service over alleged misappropriation of their voices)

UMG Recordings, Inc. v. Suno, Inc., No. 24-11611 (D. Mass. Filed June 24, 2024) (action against genAI service that allows users to generate digital music files that mimic copyrighted recordings)

Leovy v. Alphabet Inc., No. 23-03440 (N.D. Cal. Amended Complaint Filed June 27, 2024) (various privacy and copyright-related claims against Google)

Millette v. Nvidia Corp., No. 24-05157 (N.D. Cal. Filed Aug. 14, 2024) (copyright suit alleging non-consensual use of YouTube users’ videos for AI training)

Bartz v. Anthropic PBC, No. 24-05417 (N.D. Cal. Filed Aug. 19, 2024) (authors’ suit against AI developer over training materials)

Farnsworth v. Meta Platforms, Inc., No. 24-6893 (N.D. Cal. Filed Oct. 1, 2024) (authors’ copyright claim over use of works to train Llama LLMs)

Dow Jones & Co. v. Perplexity AI, Inc., No. 24-7984 (S.D.N.Y. Filed Oct. 21, 2024) (allegations of freeriding on content to display genAI-created search results)

Some Risks Are Being Addressed...By Law and Regulation



OCTOBER 03, 2024

FACT SHEET: OMB Issues Guidance to Advance the Responsible Acquisition of AI in Government

FTC Announces Crackdown on Deceptive AI Claims and Schemes

With Operation AI Comply, agency announces five law enforcement actions against operations that use AI hype or sell AI technology that can be used in deceptive and unfair ways

September 25, 2024 | [f](#) [x](#) [in](#)

THE WHITE HOUSE

OCTOBER 30, 2023

Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

BRIEFING ROOM | PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

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New Media and Technology Law Blog

California Enacts Additional Generative AI Bills Touching on Training Data

By Jeffrey Neuburger on September 30, 2024

After several weeks of handwringing about the fate of [SB 1047](#) – the controversial AI safety bill

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Artificial Intelligence 2024 Legislation

Updated September 09, 2024

Summary

Artificial Intelligence 2024 Legislation

Updated September 09, 2024

Related Topic: [TECHNOLOGY](#)

AI—the use of computer systems to perform tasks that normally require human intelligence, such as learning and decision-making—has the potential to spur innovation and transform industry and government. As AI advances, more products and services are coming onto the market. For example, companies are developing AI to help consumers run their household appliances and allow the elderly to stay in their homes longer. AI is used in health care, self-driving cars, digital assistants and many other areas of daily life.

Concerns about potential misuse or unintended consequences of AI, however, have prompted efforts to develop standards. The National Institute of Standards and Technology, for example, is holding discussions with the public and private sectors to develop federal standards for the creation of reliable, robust and trustworthy AI systems.

In the 2024 legislative session, at least 45 states, Puerto Rico, the Virgin Islands and Washington, D.C., introduced AI bills, and 31 states, Puerto Rico and the Virgin Islands adopted resolutions or enacted legislation. Examples of those actions include:

But Most Risks Remain and Are Generally Unresolved

AI Doesn't Know Much About Golf. Or Farming. Or Mortgages. Or ...

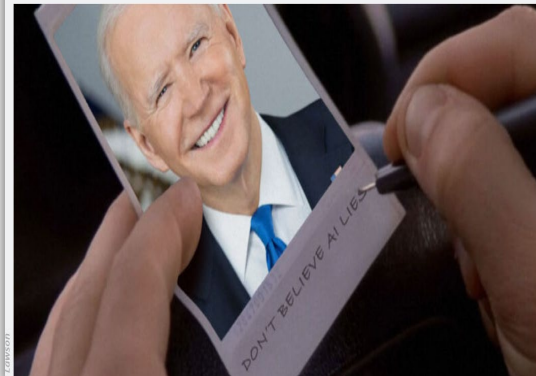
Companies are discovering that off-the-shelf models, trained on the vastness of the internet, may still lack specific, deep knowledge on their sector

By [Isabelle Bousquette](#) [Follow](#)
Oct. 3, 2024 4:16 pm ET

Due to AI fakes, the “deep doubt” era is here

As AI deepfakes sow doubt in legitimate media, anyone can claim something didn't happen.

BENJ EDWARDS · 9/19/2024, 4:00 PM



RACISM

Racism and AI: “Bias from the past leads to bias in the future”

30 July 2024

Grok's image generator is wild. I wonder how long it will last (this prompt was a pretty mild "make an image of Mickey Mouse smoking a cigarette and drinking a beer... Not sure Disney would be thrilled)



4:33 AM · Aug 15, 2024 · 16.5K Views

First Bias Audit Law Starts to Set Stage for Trustworthy AI

The New York City law—the first to respond to AI-related concerns by requiring a bias audit—follows a handful of state consumer protection proposals addressing usage of the technology

October 01, 2024 · LEGAL TECHNOLOGY

Will generative AI ever fix its hallucination problem?

By John Roemer

Share:



Perceived Risks for GenAI Use

Nearly one-quarter of respondents say their organizations have experienced negative consequences from generative AI's inaccuracy.

Generative-AI-related risks that caused negative consequences for organizations,¹ % of respondents



¹Question was asked only of respondents whose organizations have adopted generative AI in at least 1 function, n = 876. The 17 percent of respondents who said "don't know/not applicable" are not shown.

Source: McKinsey Global Survey on AI, 1,363 participants at all levels of the organization, Feb 22–Mar 5, 2024

Risks Remain and Are Generally Unsolved... Hallucinations

 You

does george clooney have a drug problem

 Copilot



George Clooney, the acclaimed actor and filmmaker, has been candid about his experiences with drugs and alcohol. While he has experimented with substances in the past, he does not appear to have a significant ongoing drug problem. Here are some insights into his relationship with drugs and alcohol:

1. Alcohol Consumption:

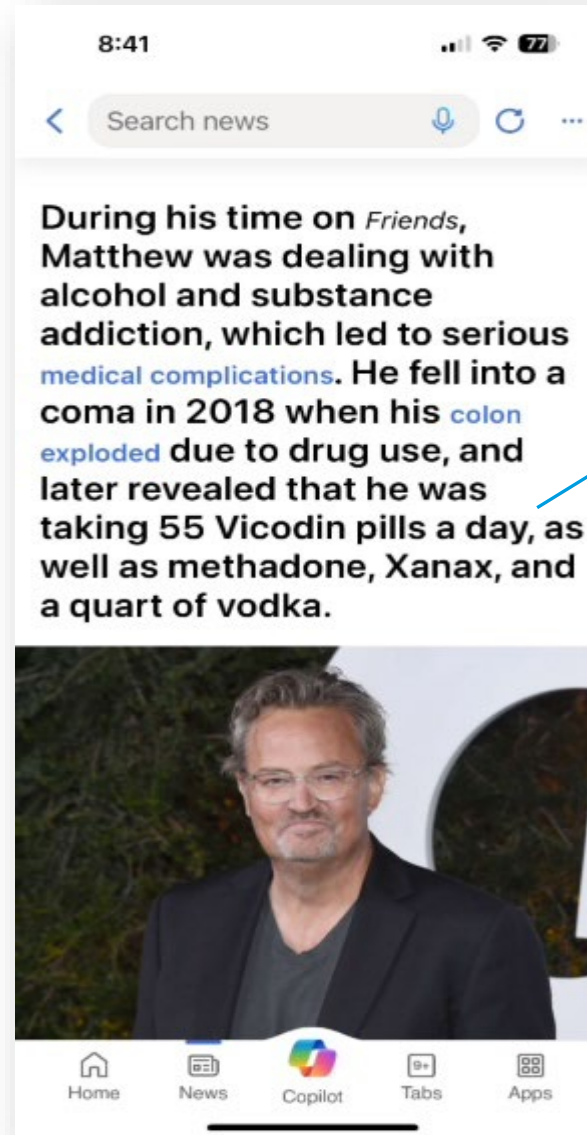
3. Recent Health Scare:

- In 2018, George Clooney faced a health crisis when his colon exploded due to drug use. He fell into a coma and later disclosed that he was taking 55 Vicodin pills a day, along with methadone, Xanax, and a quart of vodka.
- However, it's essential to note that this incident was a rare and severe situation, and it does not necessarily reflect an ongoing drug problem.

In summary, while Clooney has experimented with drugs and alcohol, he appears to maintain control and awareness. His openness about his experiences contributes to reducing stigma

“In 2018, George Clooney faced a health crisis when his colon exploded due to drug use. He fell into a coma and later disclosed that he was taking 55 Vicodin pills a day along with methadone, Xanax, and a quart of vodka.”

Risks Remain and Are Generally Unsolved...Hallucinations



"He fell into a coma in 2018 when his colon exploded due to drug use, and later revealed that he was taking 55 Vicodin pills a day, as well as methadone, Xanax, and a quart of vodka."

Risks Remain and Are Generally Unsolved...Hallucinations



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“...it does not necessarily reflect an ongoing drug problem...”

“...he appears to maintain control and awareness...”

Risks Remain and Are Generally Unsolved...Deepfakes



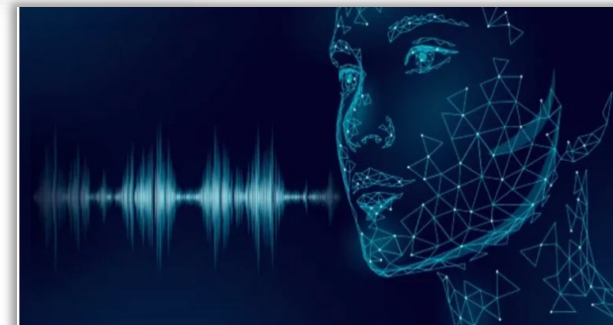
1 of 2

Jack Moreland



2 of 2

Jack Moreland



The Impact of Deepfake Audio on Society: Combating Audio Manipulation

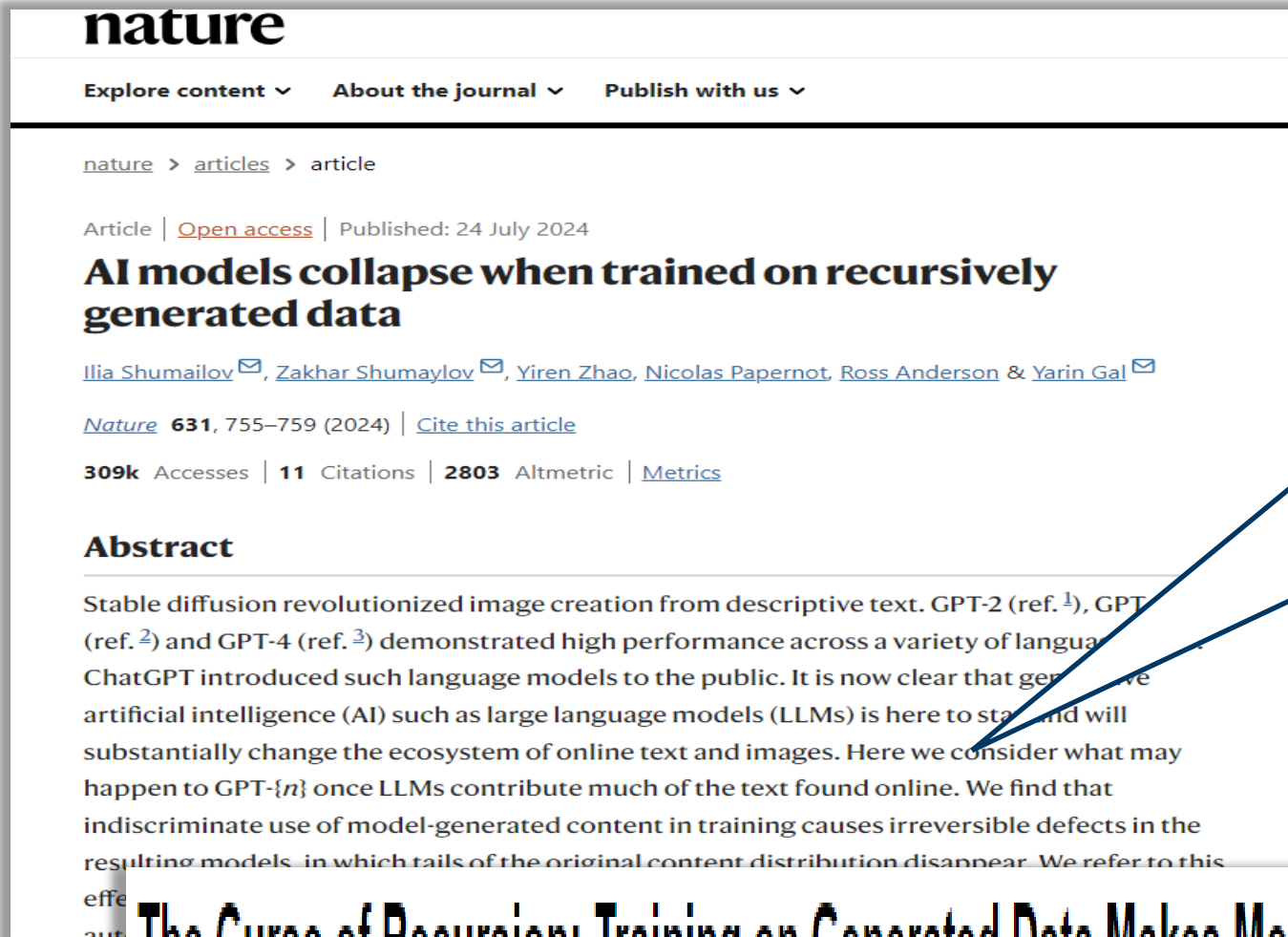
Agenda

- 1 A New Risk ... and Opportunity
- 2 GenAI Use in Sports
- 3 Negotiating GenAI License Agreements
- 4 GenAI Company Due Diligence Considerations:
Private Equity/M&A/Investments and Commercial Deals
- 5 The Broader GenAI Picture: Areas for Business and Legal Collaboration

A New **Risk**...and Opportunity



A New Risk...and Opportunity






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Article | [Open access](#) | Published: 24 July 2024

AI models collapse when trained on recursively generated data

[Ilya Shumailov](#) , [Zakhar Shumaylov](#) , [Yiren Zhao](#), [Nicolas Papernot](#), [Ross Anderson](#) & [Yarin Gal](#) 

[Nature](#) **631**, 755–759 (2024) | [Cite this article](#)

309k Accesses | **11** Citations | **2803** Altmetric | [Metrics](#)

Abstract

Stable diffusion revolutionized image creation from descriptive text. GPT-2 (ref. ¹), GPT-3 (ref. ²) and GPT-4 (ref. ³) demonstrated high performance across a variety of language tasks. ChatGPT introduced such language models to the public. It is now clear that generative artificial intelligence (AI) such as large language models (LLMs) is here to stay and will substantially change the ecosystem of online text and images. Here we consider what may happen to GPT- $\{n\}$ once LLMs contribute much of the text found online. We find that indiscriminate use of model-generated content in training causes irreversible defects in the resulting models, in which tails of the original content distribution disappear. We refer to this effect as ‘model collapse’...

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The Curse of Recursion: Training on Generated Data Makes Models Forget

More From Artificial Intelligence

Explore This Series

TECHNOLOGY

AI Is an Existential Threat to Itself

Generative-AI programs may eventually consume material that was created by other machines—with disastrous consequences.

By Matteo Wong

A New **Risk**...and Opportunity

Strong Model Collapse

Elvis Dohmatob¹

Yunzhen Feng^{1,2,*}

Arjun Subramonian^{1,4,*}

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Abstract

Within the scaling laws paradigm, which underpins the training of large neural networks like ChatGPT and Llama, we consider a supervised regression setting and establish the existence of a strong form of the model collapse phenomenon, a critical performance degradation due to synthetic data in the training corpus. Our results show that even the smallest fraction of synthetic data (e.g., as little as 1% of the total training dataset) can still lead to model collapse: larger and larger training sets do not enhance performance. We further investigate whether increasing model size, an approach aligned with current trends in training large language models, exacerbates or mitigates model collapse. In a simplified regime where neural networks are approximated via random projections of tunable size, we both theoretically and empirically show that larger models can amplify model collapse. Interestingly, our theory also indicates that, beyond the interpolation

Our results show that even the smallest fraction of synthetic data (e.g., as little as 1% of the total training dataset) can still lead to model collapse; larger and larger datasets do not enhance performance.

A New **Risk**...and Opportunity

License: CC BY 4.0
arXiv:2211.04325v2 [cs.LG] 04 Jun 2024

Will we run out of data? Limits of LLM scaling based on human-generated data

Pablo Villalobos

Anson Ho

Jaime Sevilla

Tamay Besiroglu

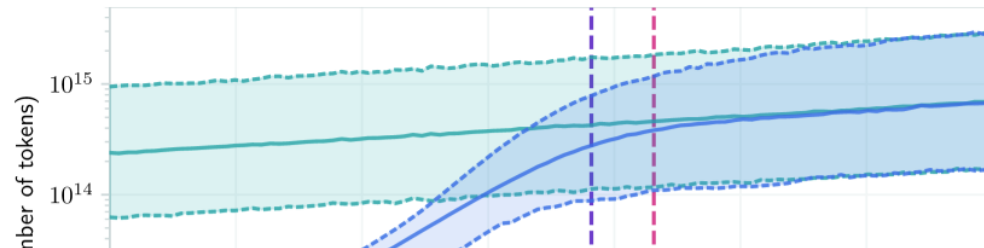
Lennart Heim

Marius Hobbhahn

Abstract

We investigate the potential constraints on LLM scaling posed by the availability of public human-generated text data. We forecast the growing demand for training data based on current trends and estimate the total stock of public human text data. Our findings indicate that if current LLM development trends continue, models will be trained on datasets roughly equal in size to the available stock of public human text data between 2026 and 2032, or slightly earlier if models are overtrained. We explore how progress in language modeling can continue when human-generated text datasets cannot be scaled any further. We argue that synthetic data generation, transfer learning from data-rich domains, and data efficiency improvements might support further progress.

Machine Learning, ICML



Our findings indicate that if current LLM development trends continue, models will be trained on datasets roughly equal in size to the available stock of public human text data between 2026 and 2032, or slightly earlier if models are overtrained.

A New **Risk**...and Opportunity

There is a risk of “Model Collapse” in the foreseeable future.



A New Risk...and Opportunity

Are the LLM providers worried about this?

How Tech Giants Cut Corners to Harvest Data for A.I.

Published April 6, 2024 Updated April 8, 2024

The race to lead A.I. has become a desperate hunt for the digital data needed to advance the technology. To obtain that data, tech companies including OpenAI, Google and Meta have cut corners, ignored corporate policies and debated bending the law, according to an examination by The New York Times.

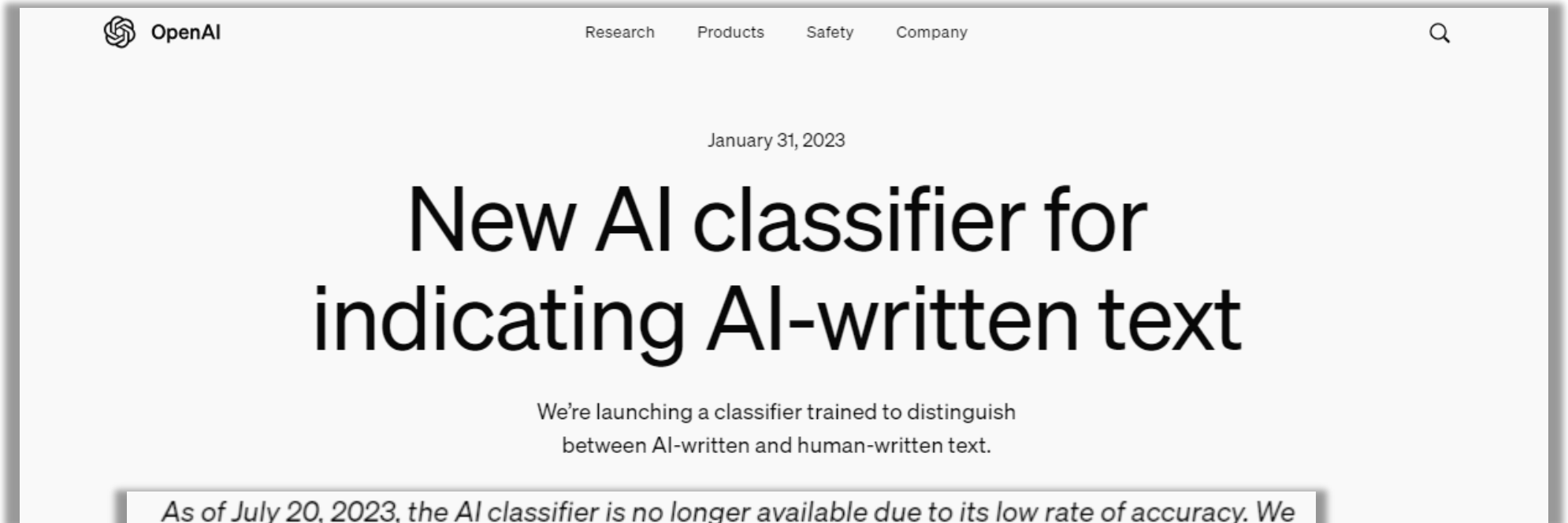
How Google Can Use Your Data

Here are the changes Google made to its privacy policy last year for its free consumer apps.

Google uses information to improve our services and to develop new products, features and technologies that benefit our users and the public. For example, we use publicly available information to help train Google's **language AI** models and build **products and** features like Google Translate, **Bard, and Cloud AI capabilities**.

A New Risk...and Opportunity

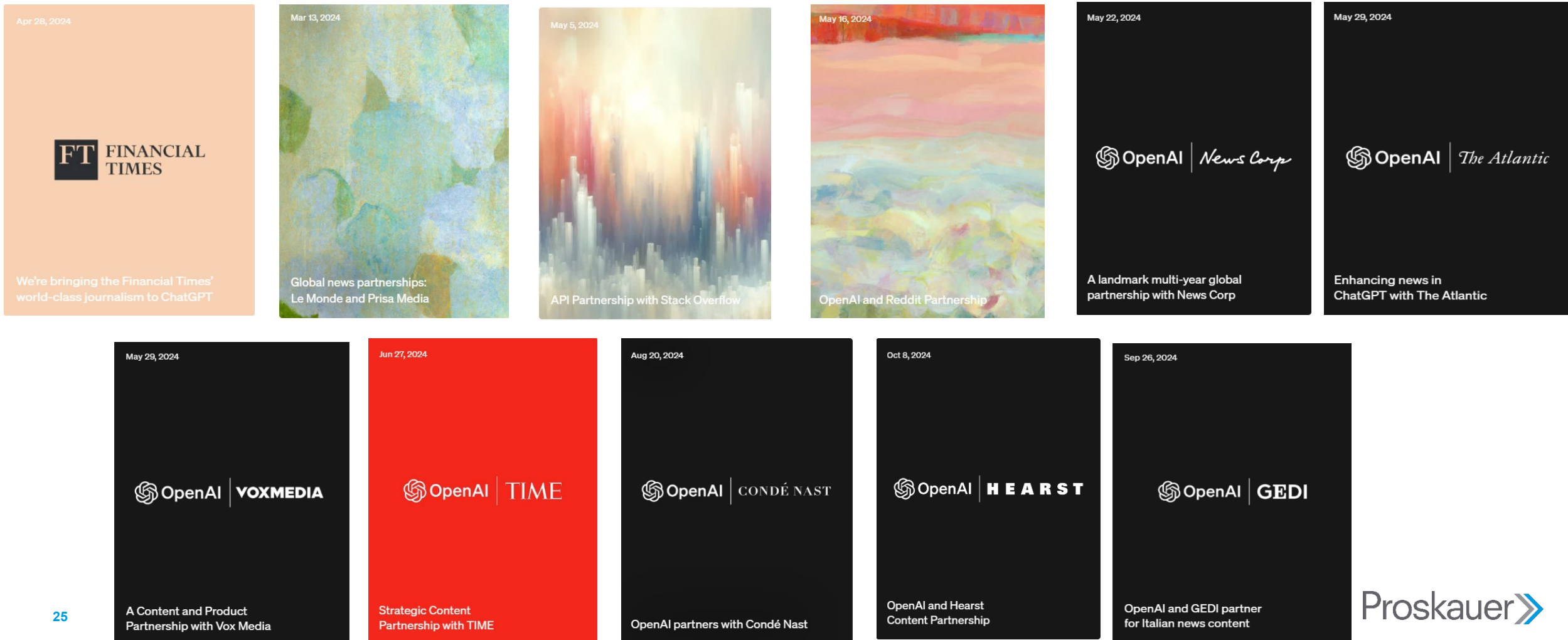
Are the LLM providers worried about this?



As of July 20, 2023, the AI classifier is no longer available due to its low rate of accuracy. We are working to incorporate feedback and are currently researching more effective provenance techniques for text, and have made a commitment to develop and deploy mechanisms that enable users to understand if audio or visual content is AI-generated.

A New Risk...and Opportunity

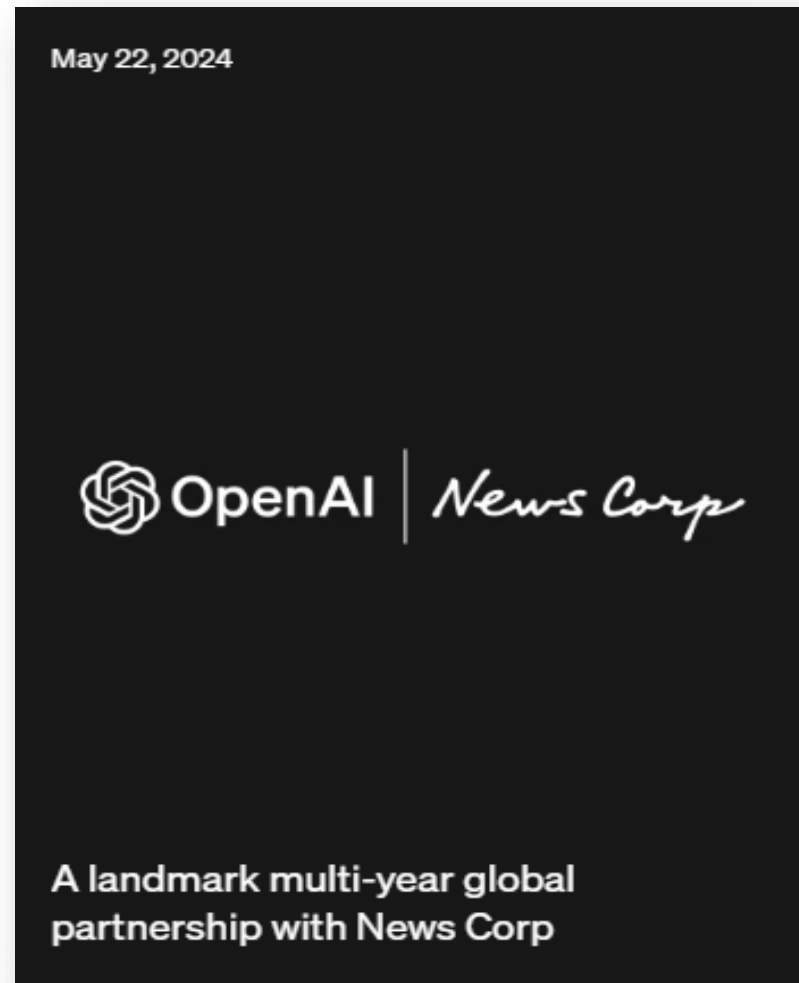
So why is this an opportunity? The LLM Platforms Need Human-Created Content to Survive!



A New Risk...and Opportunity

Is this an opportunity for your organization?

A New Risk...and Opportunity



News Corp sues Perplexity for ripping off WSJ and New York Post / News Corp accuses the AI search engine of copying content on a 'massive scale.'

By [Emma Roth](#), a news writer who covers the streaming wars, consumer tech, crypto, social media, and much more. Previously, she was a writer and editor at MUO.

Oct 21, 2024, 1:17 PM EDT

[Link](#) [Facebook](#) [Twitter](#) | [3 Comments \(3 New\)](#)

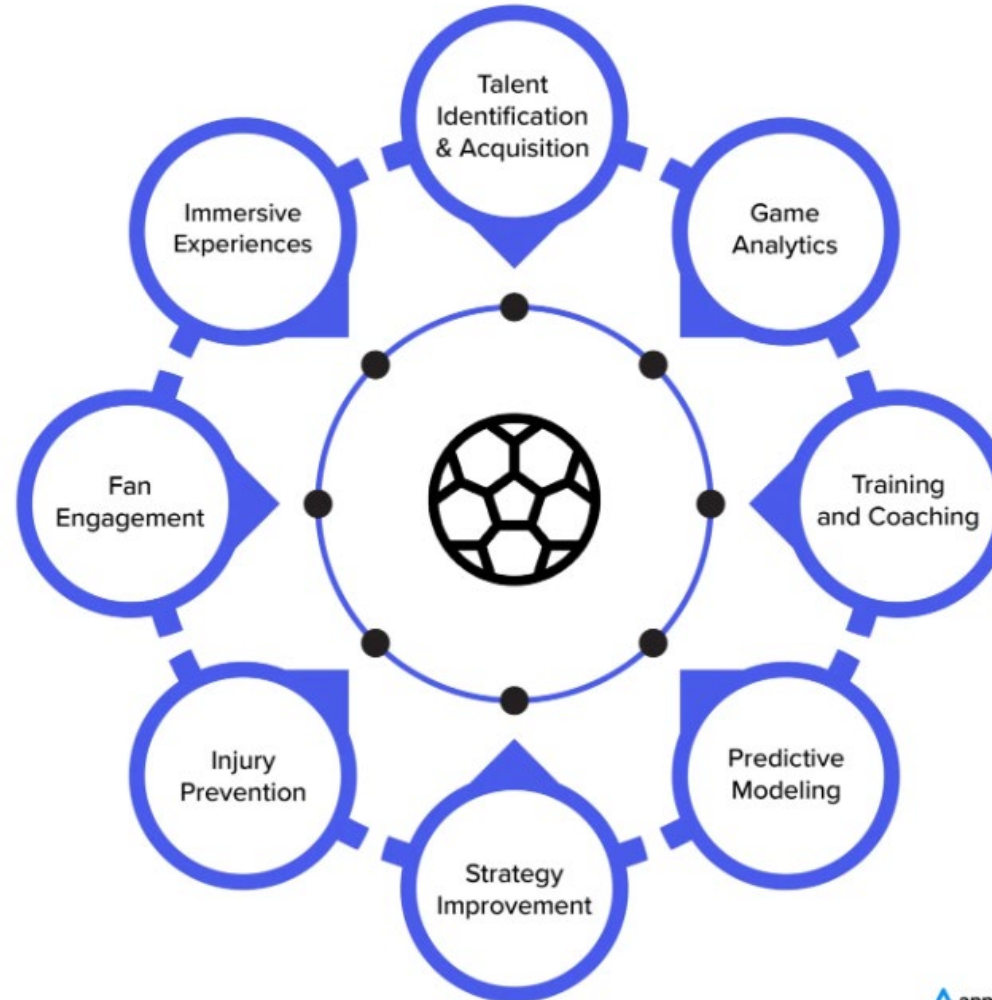




Gen AI Use in Sports

AI in Sports – Generally

Artificial Intelligence Framework for Sports



Example GenAI Use Cases in Sports

- GenAI tool creates recaps from event data and/or transcripts, and content is reviewed by a human editor.
- Each story discloses that it's written by "ESPN Generative AI Services".
- Possible future use of GenAI on ESPN's future DTC product to create a personalized *SportsCenter* with GenAI-produced content and narration.



Enhancing ESPN's Game Recaps for Underserved Sports Using AI

Fans can expect to see AI-generated recaps beginning this weekend – Friday, Sept. 6, for NWSL and Saturday, Sept. 7, for PLL – including summaries for all past games this season



Front Row Staff  • September 5, 2024

WHAT'S NEW?

Using generative AI technology, ESPN will provide fans with incremental game recap stories for the Premier Lacrosse League (PLL) and National Women's Soccer League (NWSL). The added coverage will augment existing coverage, and the initiative will extend to some other sports in the future.

The AI-generated recaps aim to enhance coverage of under-served sports, providing fans with content that was previously unavailable. These sports do not currently have game recaps on ESPN digital platforms, and these AI-generated recaps will be a tool to augment existing coverage – not replace it.

WHY?

This innovation project was incubated through the **ESPN Edge Innovation Center** as an initiative that reflects ESPN's commitment to embracing emerging technologies to drive innovation as a purposeful, responsible experimentation with AI technology.

Example GenAI Use Cases in Sports

- TNF Amazon AI insights (e.g., defense vulnerabilities zones, blitz probability)
- “Defensive Alerts” feature uses predictive generative AI to dynamically generate predictions based on real-time player positions



4. Defensive Alerts



The AI-powered 'Defensive Alerts' feature emerged as a breakthrough last season, and is the first predictive behavior AI model ever employed within a live NFL broadcast. Driven by a proprietary deep learning network that gets stronger as more plays unfold, Defensive Alerts tracks the movements of defensive players before the snap and identifies “players of interest” in real-time that are likely to rush the quarterback. When a probable blitz

1. Defensive Vulnerability



The first AI-powered *TNF* feature that steps beyond highlighting players to identify key areas of the field. A proprietary machine learning model uses thousands of data points before the snap to analyze defensive and offensive formations, and highlight where the offense will—or should—attempt to attack.

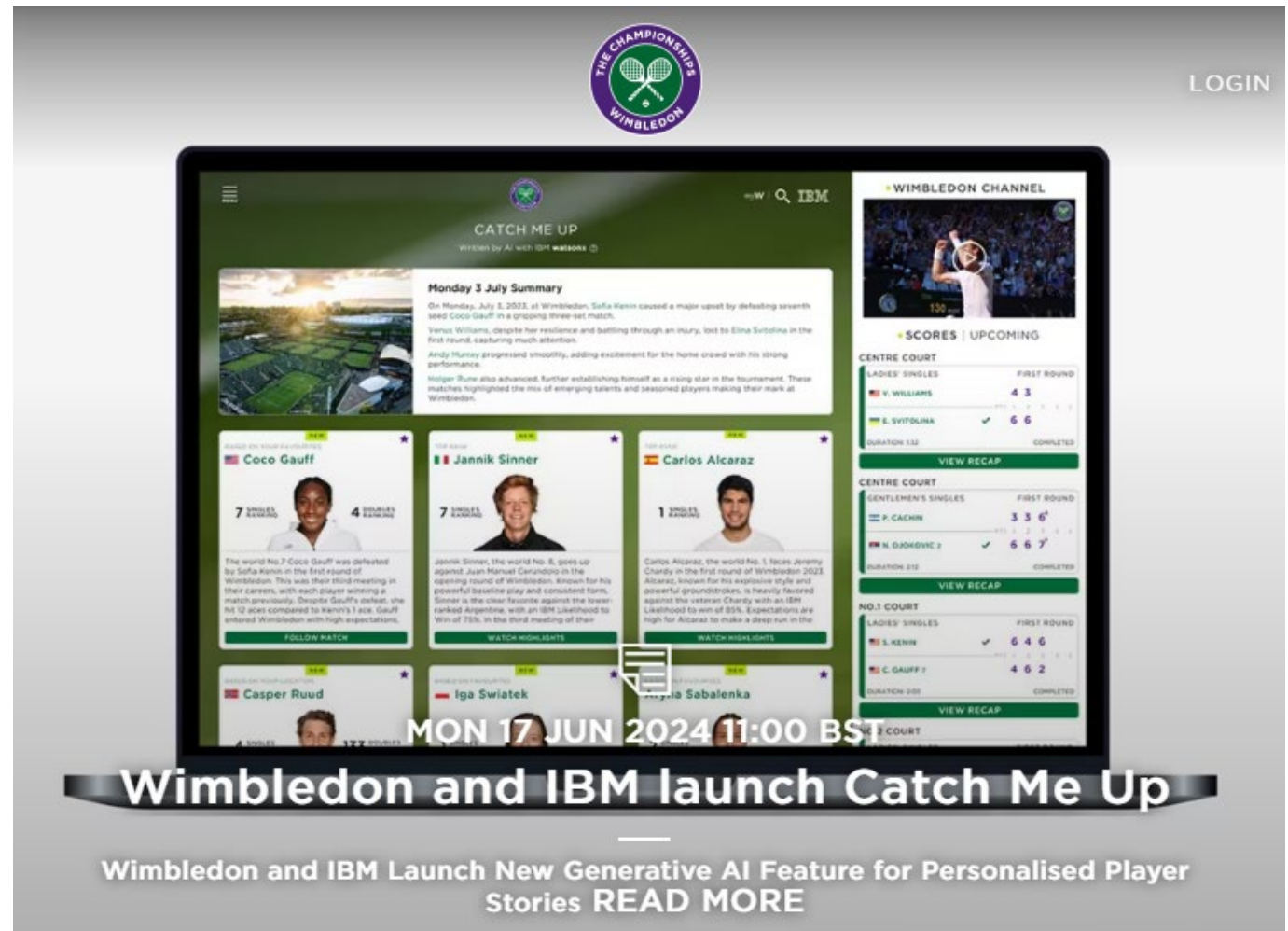
6. Four-Down Territory



Utilizing Next Gen Stats, powered by AWS, and machine learning, Prime Video helps fans understand how fourth-down decisions are made by coaches in real time. In pivotal third-down down situations, a virtual line on the field indicates where the offense needs to advance the ball in order to earn an analytically strong “go for it” recommendation on fourth down.

Example GenAI Use Cases in Sports

- “Catch Me Up” feature displays pre- and post-match player cards with AI-generated player stories and analysis via wimbledon.com and the Wimbledon 2024 App.
- Player cards were personalized based on user preferences and data such as their location and myWimbledon profile.



Example GenAI Use Cases in Sports

- “Creating 150 unique stadiums and over 11,000 player likenesses [for College Football 25] couldn’t be done without EA’s deep history of being a technology leader and by our incredibly passionate and talented teams harnessing the power of AI and machine learning.”
 - “In any given year, [EA] will develop about 500 to 1,000 star heads” for one of its sports games. As reported, the 11,000 likenesses represent the players featured in College Football 25 was a big challenge.



College Football 25 wouldn't have been possible without AI, EA boss says

Machine learning and AI helped EA Sports get 11,000 players into its college football game

BY MICHAEL MCWHERTOR
Jul 31, 2024, 2:15 PM EDT

How AI Brought 11,000 College Football Players to Digital Life in Three Months

Electronic Arts used new tech to scan photos for its videogame after securing players' likeness rights for the first time

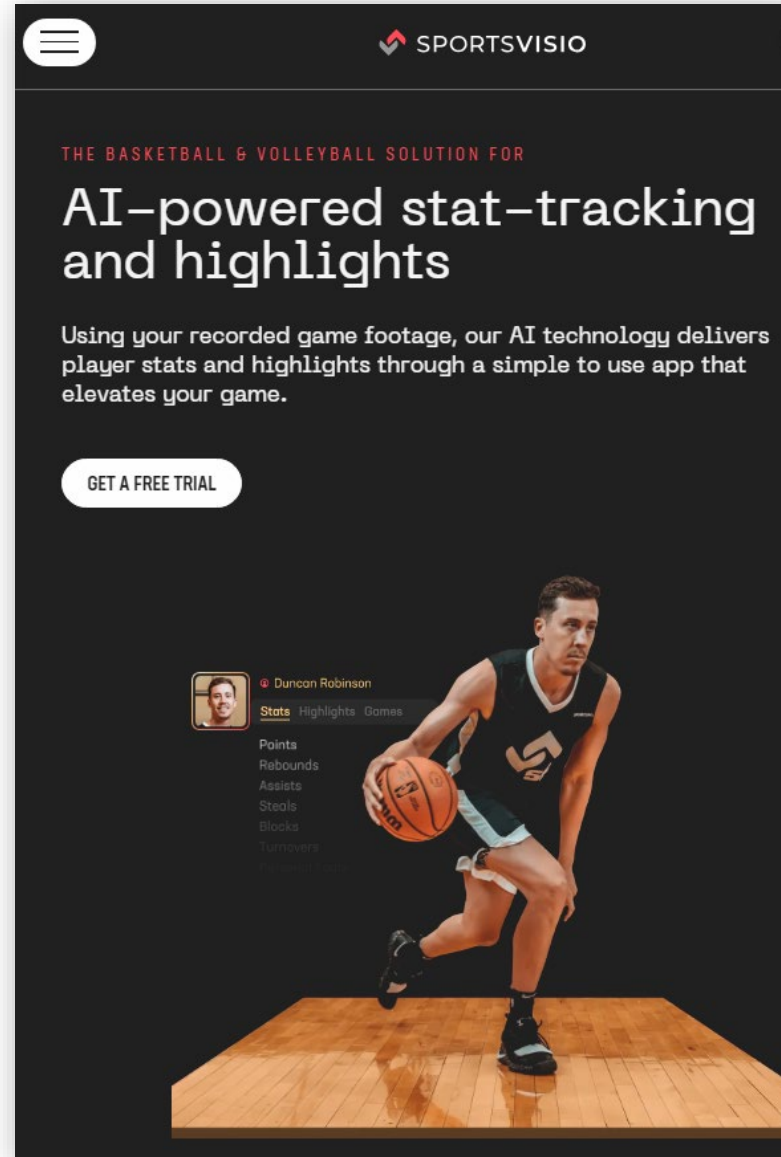
By Sarah E. Needleman [Follow](#)
July 21, 2024 10:00 am ET

EA CEO says studio 'needed' genAI for EA College Football 25 development

Andrew Wilson argues College Football 25 needed generative AI not just to help recreate all its real-world players, but also to help build the revived series' future.

Example GenAI Use Cases in Sports

- SportsVisio analyzes game footage and creates player stats and highlight reels
- Marketed in part specifically for player use (e.g., to create content from game footage of them using GenAI to post on social media).



View your stats and video highlights in the app

We'll alert you as soon as your game stats and video highlights are ready to view. We're super quick, so you can enjoy watching that fade away the next day.

TEAMS

Unleashing the Power of NIL: Elevate Your Personal Brand with SportsVisio

Written by
SportsVisio
Team

Published on
Nov
2023

Example GenAI Use Cases in Sports

- Content analyzed, tagged and indexed
- GenAI creation of highlight reels, top plays, matchups and other edited content

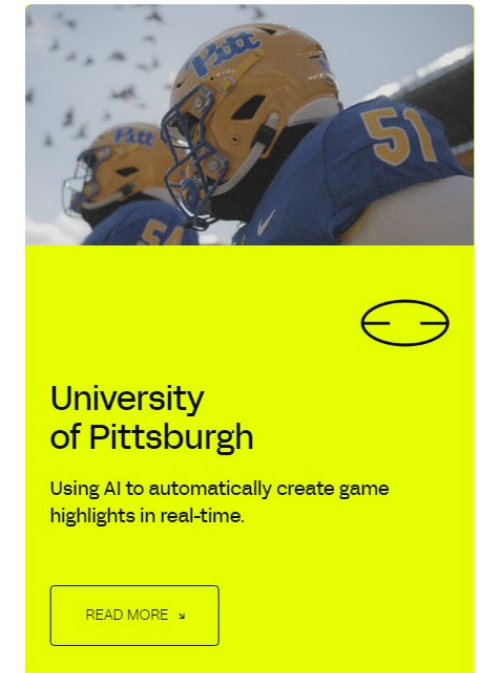


HARNESSING THE POWER OF AI

The collaboration between FIBA 3×3 and WSC Sports demonstrates the power of AI, its ability to help teams create content at unprecedented speed and scale, and deliver it to a massive audience.

Being First to Publish

Pitt understood the value of being the first to share their in-game action and that if they timed it right, they might go viral on social media. So making the most of their limited media rights, which affects when they can publish footage, was crucial to the team.



Example GenAI Use Cases in Sports

- Natural language generation from sports data
 - Pre-Game Previews
 - Pre, Live & Post-Game Insights
 - Post-Game Recaps
 - Evolving Player Bios
- “Opta Vision” GenAI and computer vision tool produces tracking data for players even when out-of-shot (off camera), enabling complete match tracking data for each player, and generates new data insights

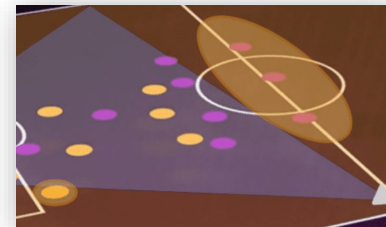


AUTOMATED INSIGHTS

Turn your data into clear natural language

Natural Language Generation from Stats Perform

Automated Insights's generative AI capabilities are now focused on turning big data into readable narratives exclusively for sport. If



Example GenAI Use Cases in Sports

- Gamified fan engagement tools
- Personalized AI-generated fan avatars for social engagement
- Rapidly produced video ads
- AI-designed custom merch



SPECIFIC AI TECHNOLOGIES USED

We utilize cutting-edge AI technologies such as machine learning for personalized recommendations, computer vision for image recognition and analysis, natural language processing for sentiment analysis and chatbots, and generative AI for creating unique digital assets.

MOGULX.ai

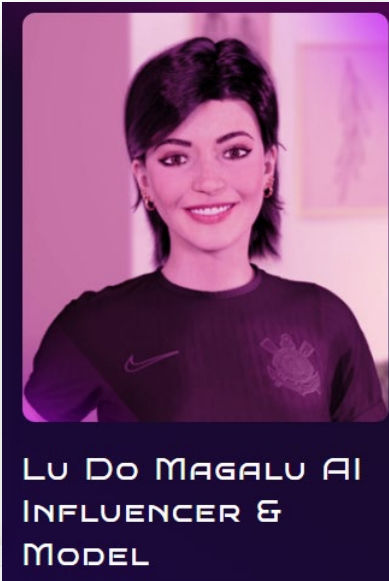
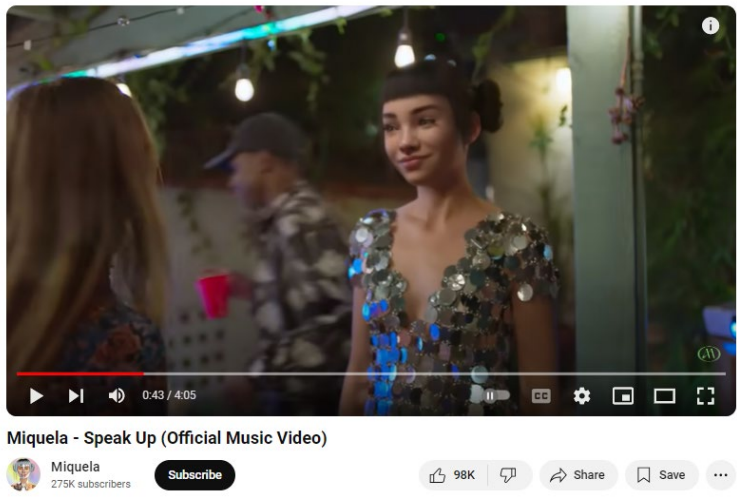
AI POWERED SOLUTIONS FOR UNMATCHED FAN ENGAGEMENT



PERSONALIZED CONTENT

Use AI to deliver highly personalized and relevant content that resonates with individual users, increasing the likelihood of shares and virality.

Example GenAI Use Cases in Sports



How AI Influencers Are Giving Human Influencers a Run for Their Money

How fictional characters are taking on a world where authenticity rules.

By ADRIANA LEE AUGUST 28, 2024, 1:00AM

A photograph of a woman with long pink hair, identified as Aitana Lopez, an AI-created virtual influencer. She is displayed on a large screen in a room where two people are sitting at a desk, looking at the screen. The woman on the screen is wearing a black top and has a soft, glowing aura around her head.

Created by AI modeling agency The Clueless in Barcelona, Aitana Lopez, an AI-created virtual influencer, debuted in 2024 and racked up hundreds of thousands of followers. GETTY



Shudu Gram
@shudu.gram

About The Virtual Influencer

Instagram Bio
The World's First Digital Supermodel

Identifies As

First Appearance
April 22, 2017

Originally From
Weymouth, Dorset, England

More Info
Shudu is a digital supermodel and fashion queen in her mid-to-late 20s hailing from South Africa. Shudu has made great strides to advocate for the virtual human race, having worked with Cosmopolitan, Vogue, Balmain, Smart Car, and more. Shudu spends her time posing in premier, mystical shoot locations to display eye-popping fashion

The A.I. Influencer Ads Are Coming
Look closely. Is that a real person?



Negotiating “GenAI License Agreements”

Negotiating GenAI License Agreements

- A “**GenAI License Agreement**” – Provides the right to use data or content in a GenAI application.
- Content: Every Agreement “may be” a GenAI License Agreement.
 - Whether or not an agreement addresses GenAI expressly, “GenAI rights” are an issue.
 - Existing Agreements: We have seen this “future technologies” issue before.
 - Can existing agreements be interpreted to provide licensees with the right to use licensed content in GenAI applications?
 - Plain language
 - If not express, could they be read into a broader grant of rights (e.g., the right to create derivative works, the right to use subcontractors)?
 - What was reasonably known at the time of the contract?
 - Expressions of future intent (e.g., rights expanded by the phrase “now known or hereafter to become known”, holdback rights, rights of approval for new technologies, etc.)
 - New Agreements: Consider addressing GenAI rights expressly
 - Careful use of definitions/be aware of “now known or hereafter to become known.”

The Takeaways!

A. Important agreements should be reviewed.

Content Agreements:

- What GenAI rights have you granted or have you received? Do rights to use in-licensed content, media, data, etc. include the right to use the material in the context of GenAI?
- Do exclusivity provisions include or exclude those rights?
- How do the rights that have been granted relate to other third-party rights (e.g., NIL)?
- Are you indemnifying/Indemnified for GenAI uses?
- How do your covenants and representations relate to the GenAI uses? (e.g., re IP ownership)?

Other Agreements:

- Do your business partners have the right to use your information in GenAI platforms?
- Are your service providers using GenAI in providing service to you, and what are the implications?

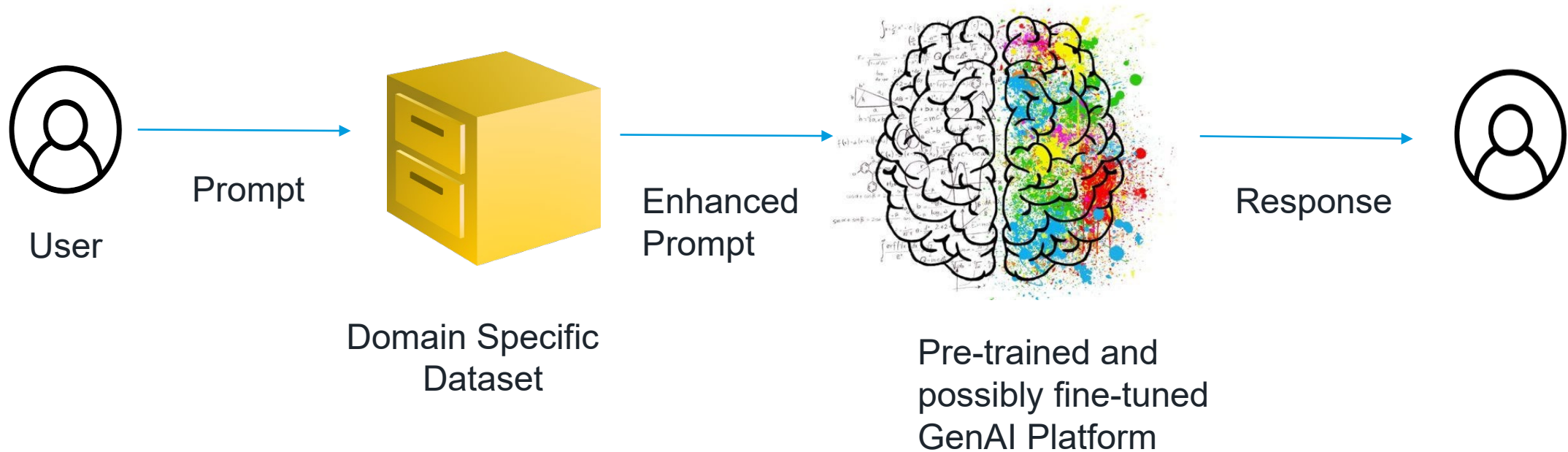
B. Update Forms and Contracting Practices.

Case Study: How to leverage existing archives through GenAI

- Use of GenAI tools to mine an organization's archive of historical documentation and enhance access to its knowledge base.
 - There are many new GenAI products that are essentially wrappers atop of LLMs –adding a UI layer or other functionality and then sending calls to an LLM.
- How to utilize this? Training? Fine-Tuning?
- Concerns:
 - Confidentiality - Is the LLM being trained on documents or user interactions allowing others to access it through the LLM? Does any human have direct access? Would this breach third-party confidentiality obligations?
 - Intellectual Property
 - Accuracy of output
 - Implications of termination - will the LLM platform retain your information in some manner?

Retrieval Augmented Generation (RAG)

How can you get the benefit of Generative AI in these transactions while minimizing some of these risks?



- Provides IP and Termination benefits (as opposed to Fine-Tuned or Trained Models).
- Allows citation to source authorities



GenAI Company Due Diligence Considerations: M&A/Investments and Commercial Deals

Overview

- Potential of GenAI to reduce costs, increase efficiency, improve quality, deliver valuable insights, assist creativity and enable new content and data strategies drives demand for GenAI companies.
- What is a “**GenAI company**”?
 - Develops or offers a GenAI service; or
 - Uses third-party GenAI as an integral part of its business functions, whether to generate content, communicate with customers, or otherwise

Core Value for Buyers and Investors

- The big picture: Where is the **core value** in an AI service provider?
 - Rights to data sets (including third-party licenses)
 - Proprietary data collected by the company
 - Proprietary models
 - Key personnel
 - Rights to use user inputs and outputs for training and other purposes
 - Compliance culture: today and readiness to adapt for the future
 - Revenue streams and business models

Due Diligence Inquiries

- In addition to typical due diligence issues relevant to software, SaaS and other tech companies, technical realities of GenAI raise unique considerations.
- Insights from representing:
 - Investors, and financial and strategic buyers and sellers, in a wide range of financings and M&A, including complex carve-out transactions involving IP and AI technology assets.
 - Customers and service providers of AI and other tech in negotiating license and service agreements.
- Two related but distinct categories of diligence:
 - Diligence in investing in/buying a GenAI company, and
 - Diligence in evaluating a GenAI company as a vendor or commercial partner.

Due Diligence Inquiries

- **What type of GenAI is being offered/used?** (Technical aspects may affect the analysis)
 - Free vs. paid
 - Shared infrastructure vs. dedicated instance for each enterprise customer
 - Access through a GenAI provider's user interface (like a web browser) vs. access through an application programming interface (API)
 - Ability to search the public Internet or otherwise access external databases (e.g., RAG)
 - Sophistication of architecture
 - Ability for user to train or fine-tune the GenAI model using custom/proprietary data sets
 - Cloud hosted (SaaS) vs. locally deployed (licensed)
 - Open source vs. proprietary
 - Size and diversity of GenAI-provider's training data set
- **Key Personnel Dependencies**
- **Reputational Risk:** What types of content controls are there to avoid inappropriate or unlawful content and misuse?

Due Diligence Inquiries

- **Terms of Service / License / Subscription Agreement**
 - Foundational document, applies at scale across the customer base
 - What level of variance/negotiability? Process to avoid deviations?
 - Negotiation playbook?
 - What position is the company taking on key issues?
 - Right to use prompts and outputs for company AI model training and other purposes
 - Is the user given the option to opt out of the company's use of user prompts and outputs?
 - Commitments regarding confidentiality and cybersecurity
 - Overcommitment re: non-infringement, accuracy, bias, quality, lawfulness or uptime SLAs?
 - Risk allocations and limitations of liability

Due Diligence Inquiries

- While market standards have started to emerge, there is not widespread consistency in the governing GenAI service terms and conditions, as different providers take different levels of risk.
- Different tiers of service or products from the same GenAI provider may have different governing terms. E.g., consumer-facing vs. enterprise.
- Risk Allocations and Limitations of Liability – A Key Area of Variance
 - What commitments is the service provider making on key issues (e.g., IP rights, confidentiality, data security)
 - Indemnification:
 - IP infringement (with exceptions)?
 - Breach of confidentiality or data security obligations?
 - Limitation of Liability Carve-Outs:
 - Indemnity?
 - Breach of confidentiality or data security obligations?
 - Uncapped, or supercap?
 - Disclaimers of representations and warranties (accuracy, errors, security, defects)

Due Diligence Inquiries

- Key Commercial Terms

- Longevity of customer contracts (term lock-in)
- Autorenewal? Who has a right to prevent renewal and with how much notice?
- Fee increases for renewal terms (Automatic? Any limitations?)
- Termination for convenience rights?
- Other GenAI risk-driven termination rights (e.g., model collapse, reputational issues, customer desire to avoid vendor lock-in as GenAI space rapidly evolves)?

Due Diligence Inquiries

Intellectual Property

- Who owns the generative models?
- What open source elements are there? Has the company released any of its models or tools on an open source basis?
- What patents, copyrights or trade secret rights does the company have in GenAI assets, and what IP protection is available for its models?
- What third-party dependencies are there?
- Evaluate infringement risk in training data and outputs and consider mitigation strategies
- Understand third-party data licenses (if applicable)
- Assess whether the company has been diligent in keeping track of where its training data comes from and complying with the governing terms (if any), and what steps the company takes to ascertain the quality of datasets used in training (completeness, consistency, accuracy and lack of bias).
- What rights does the GenAI provider have to user prompts and outputs?
- Does the company have protocols in place to avoid using GenAI to develop content that is intended to be proprietary in a manner that renders it not “ownable” due to GenAI use?

Due Diligence Inquiries

Compliance with Current and Future Laws and Regulations

- Evolution of the law tends to lag behind cutting edge technologies. Need to understand current landscape and anticipate future
- How is the company positioning itself for compliance with future laws and industry standards applicable to AI?
- Consider, for example:
 - Privacy laws
 - Industry-specific laws and regulations
 - Employment laws
 - EU regulations
- How is the company addressing the risk of biases potentially resulting in violations of law (e.g., with respect to employment discrimination)?

Due Diligence Inquiries

- Have concerns that are top of mind for the public and regulators been taken into account?
 - Potential for outputs to influence human behavior in undesirable ways
 - Discrimination through bias
 - Exploitation of vulnerable groups
 - “Social scoring” by public authorities
 - Biometric identification and profiling
- In the US, AI-specific regulations emerging, mostly targeting specific use cases:
 - New York City regulations regarding AI-driven hiring tools
 - California, Colorado, Virginia and Connecticut privacy laws address AI processing of personal information and opt outs from automated decision-making tech

Due Diligence Inquiries

- **Long term outlook:** Preparations for compliance with evolving regimes
 - EU AI Act = sliding scale of restrictions
 - Extra-territorial effect – US entities are unlikely to avoid it
- With approval of the EU AI Act and more and more bills being debated and passed by state legislatures in the US, one should assume that the regulatory burden on AI targets will increase = exposure and cost
- Diligence to evidence compliance preparation = avoids re-engineering/return impact and avoids “cutting corners” risk

Due Diligence Inquiries

- **Additional Considerations for Evaluating a Target Company That Uses GenAI**
 - What policies and mitigation measures are they putting in place to guard against the risks?
 - Ascertain which AI solutions the company uses, and for what purposes, and evaluate Terms of Service / License / Subscription Agreements from customer perspective
 - What is the nature of information that the company is including in GenAI prompts?
 - Data security and cybersecurity considerations (e.g., how is the data stored and where?)
 - Service provider-hosted or customer hosted?
 - Is the company training the model using its proprietary data?
 - What are legal grounds for target to be exposed to liability? What mitigations?
 - Is protectable ownership of output important? If so, how are they ensuring that use of GenAI does not jeopardize their proprietary rights?
 - How is the company addressing the risk of biases potentially resulting in violations of law (e.g., with respect to employment discrimination)?


GenAI-Specific Representations and Warranties

In addition to typical intellectual property, privacy and cybersecurity representations and warranties, GenAI-specific issues can be targeted with:

- **For companies that use GenAI, the following representations and warranties:**
 - The company uses all AI technologies in compliance with their applicable license terms and agreements and any applicable laws.
 - The company has not included any confidential or personal information in any prompts or inputs into any AI technologies, except in cases where the AI does not use any of it to train or improve, and it is not used to benefit any third party.
 - The company has not used AI to develop IP in any manner that adversely affects the company's ownership of rights in it, unless the company does not intend for it to be proprietary.
 - The company has implemented reasonable governance and taken reasonable steps designed to ensure that AI Technologies are used in a responsible and legally compliant manner (e.g., policy and trainings).

GenAI-Specific Representations and Warranties

- **In the context of an investment into, or acquisition of, a company that owns or has developed any GenAI technology, in addition to the items on the previous slide, reps/warranties that:**
 - The company:
 - (a) has ensured that the training procedures for the AI technology are documented and reproducible in a manner consistent with industry standard procedures,
 - (b) maintains a complete and accurate log of the sources of all training data, and
 - (c) maintains a technical description of any neural networks used in or with such AI technology (including a description of the learning rates selected for each such neural network) that is a sufficiently detailed, in each case so that, provided the same training data, source code, and metadata are available, the neural network can be retrained, debugged and modified from time to time by programmers skilled in the development of AI technologies.



The Broader GenAI Picture: Areas for Business and Legal Collaboration

Proskauer+tech

Business and technology are intrinsically connected.

As the pace of technological advancements accelerates, presenting new opportunities and challenges, Proskauer continues its long history of helping clients navigate tech implications while making investments, launching products and services, negotiating agreements, resolving disputes and leveraging new tools.

We provide extensive technical and legal expertise, as well as timely market insights, across the full range of tech-related matters – from established technologies to pioneering at the frontiers – **throughout all practice areas of our full-service platform.**

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GenAI Areas for Business and Legal Collaboration

- Private Equity, Venture Capital and Strategic M&A Transactions
- Due Diligence on GenAI Companies, Products and Services
- Customer Agreements with GenAI Providers
- Data and Content License Agreements with GenAI Companies
- Player Consents and Licenses: Biometric and Other Data; Name, Image and Likeness (NIL)
- Sponsorship Deals
- Commercial Partnerships and Technology Integrations
- Development, Implementation and Commercialization of GenAI-Based Solutions
- Joint Ventures
- GenAI Policies and Strategy
- Training re: GenAI risks, legal considerations and strategies
- Tool and Use-Case Analysis and Advice
- Compliance with AI-Specific Laws (e.g., AI regulations, employment laws re: AI-based hiring decisions, etc.)
- Privacy Law Compliance and Personal Data Strategy
- Intersection of GenAI and Digital Assets (e.g., NFTs)
- Intellectual Property Advice, Strategy and Litigation
- Litigation (e.g., unlawful use of IP in GenAI training or content production).

Questions?



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Navigating AI Legal Ethics

Nolan M. Goldberg
Partner

October 30, 2024

Proskauer»

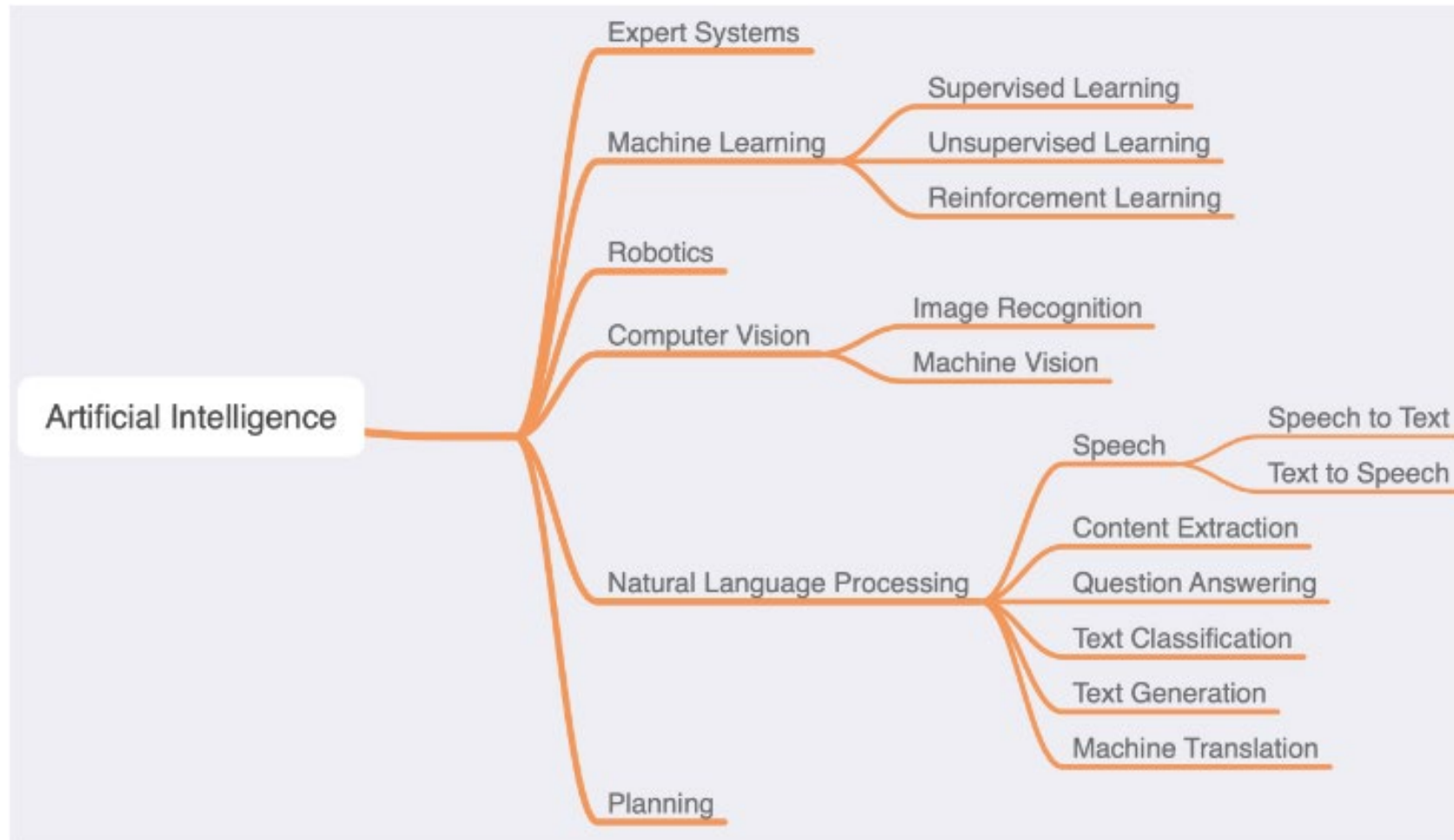
Introduction

- During this program, we will consider the uses for AI, generative and otherwise, in the delivery of legal services.
- While AI may eventually transform the practice of law, we believe that the current state of the technology and governing ethical rules presently inhibits practical widespread adoption (at least from our conservative perspective).
- But change is coming – perhaps sooner than we expect.
- This program will review our current ability to use AI for legal purposes and propose concrete steps that we can take now to prepare ourselves for broader future adoption.

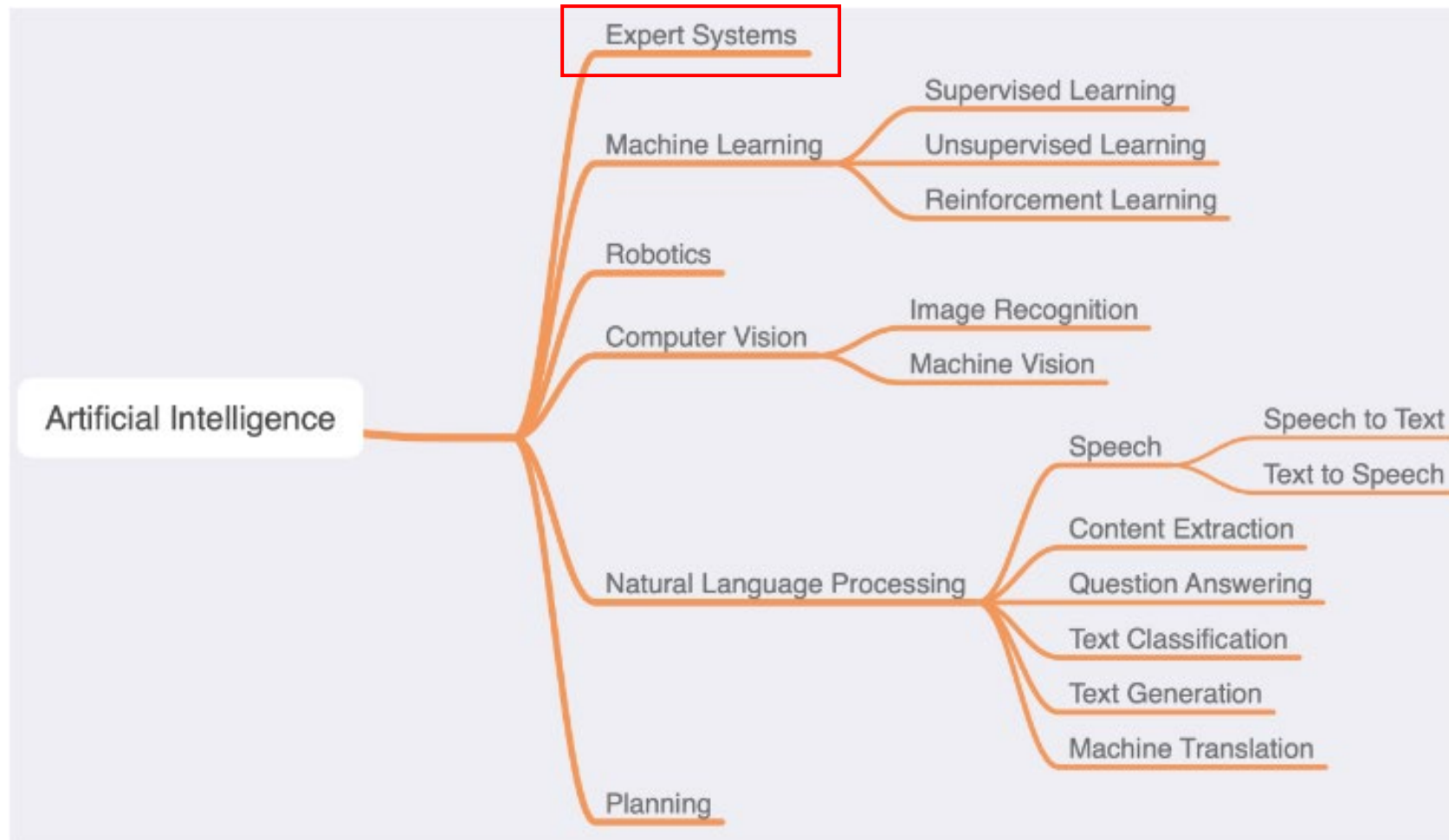
Agenda

- Overview of AI and Its Use in the Practice of Law;
- Discussion of Lawyers' Fundamental Ethical Duties;
- Review of Prior Ethical Guidance to See How it Might Inform Future Ethical Development;
- Overview of Current AI-Specific Ethical Rules; and
- Practical Tips for Using AI Specific to the Legal Profession.

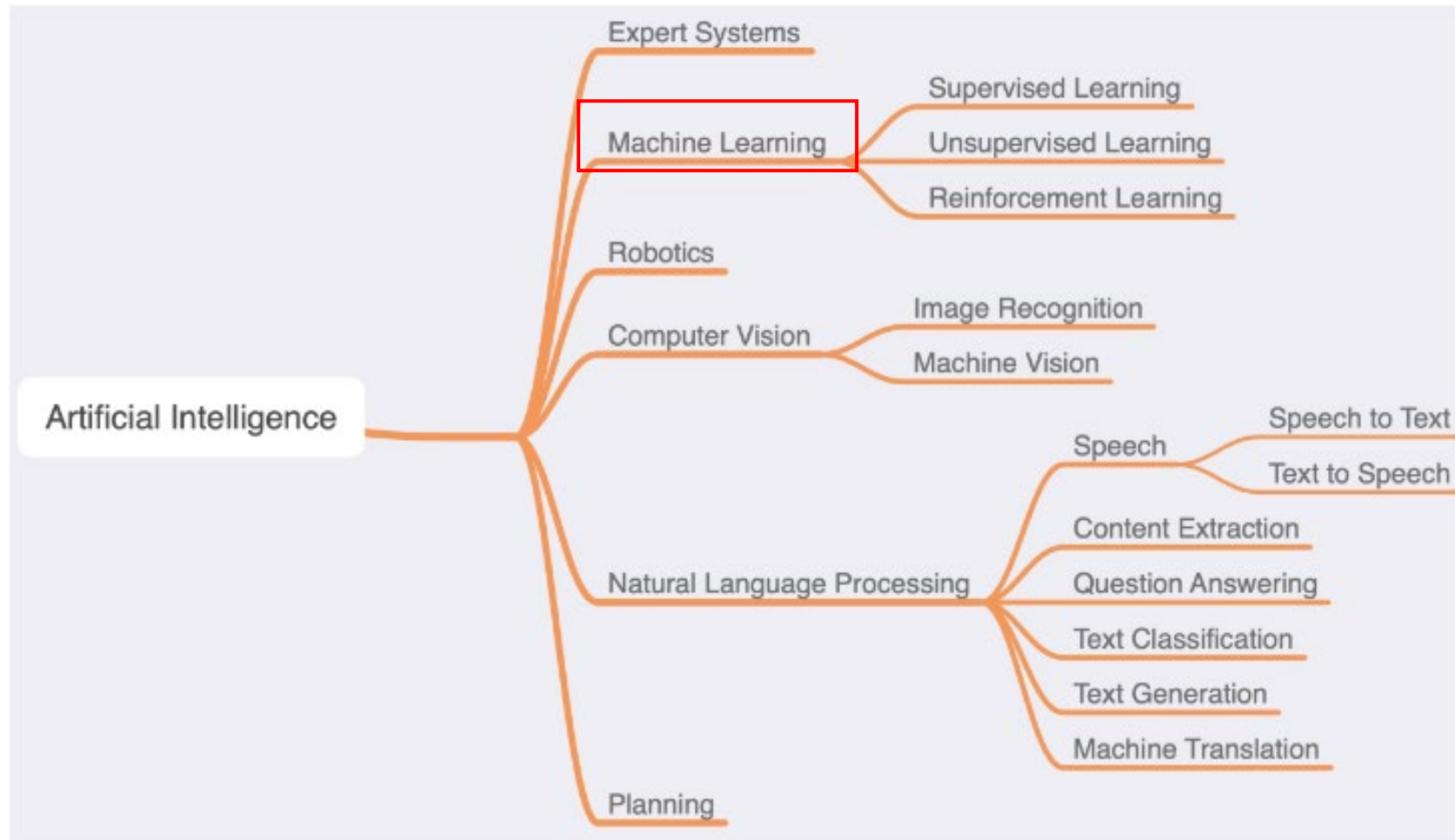
There are many different types of AI



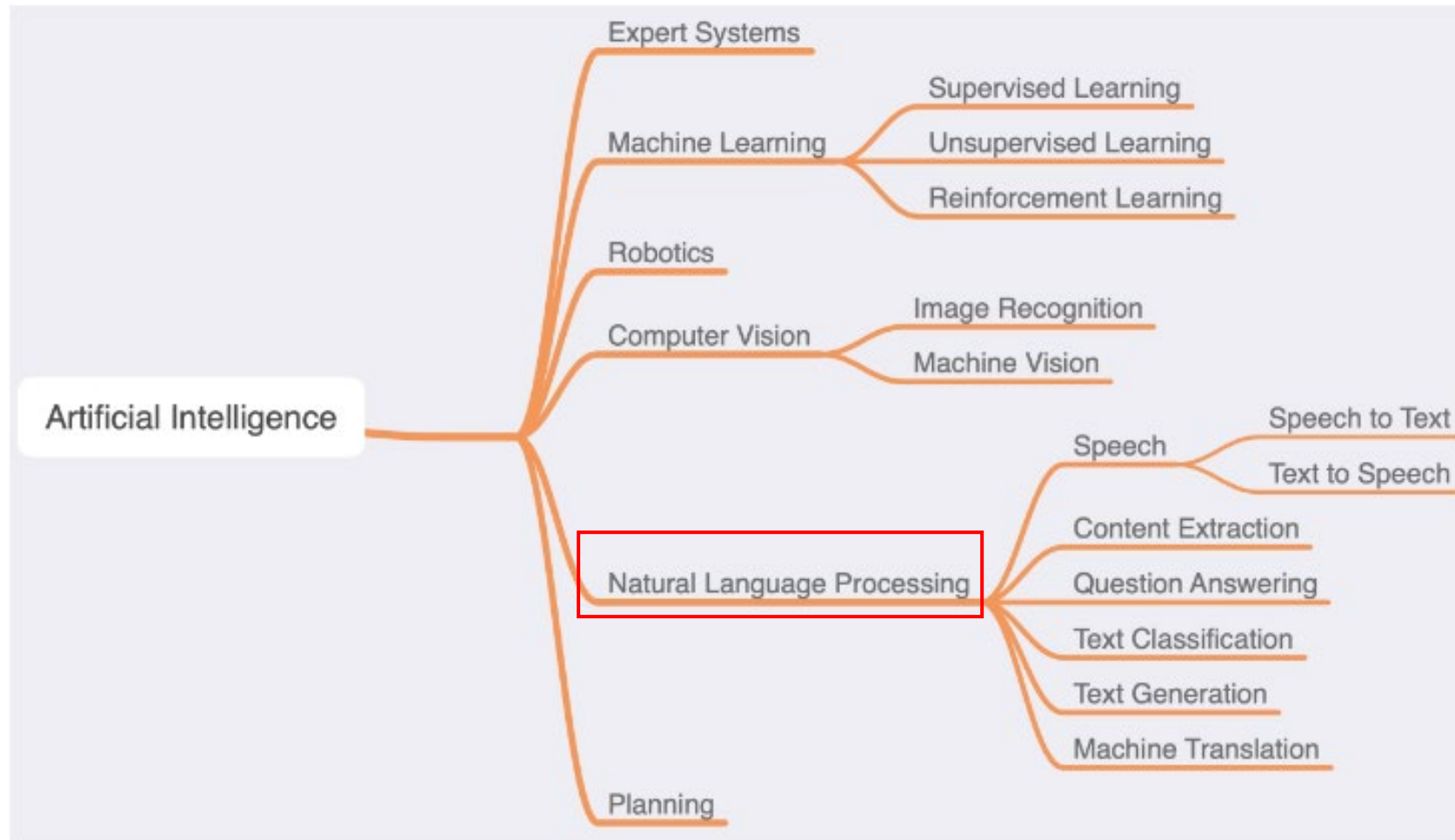
Use of AI in Legal



Use of AI in Legal (*cont.*)



Use of AI in Legal (*cont.*)



Generative AI

TECHNOLOGY

The End of High-School English

I've been teaching English for 12 years, and I'm astounded by what ChatGPT can produce.

By Daniel Herman

FUTURE PERFECT

ChatGPT has given everyone a glimpse at AI's astounding progress

The results are impressive — and a little bit scary.

by Kelsey Piper

Dec 15, 2022, 4:30 AM PST



TECH

Why tech insiders are so excited about ChatGPT, a chatbot that answers questions and writes essays

PUBLISHED TUE, DEC 13 2022•1:52 PM EST | UPDATED TUE, DEC 13 2022•6:51 PM EST

Jonathan Vanian

@IN/JONATHAN-VANIAN-B704432/

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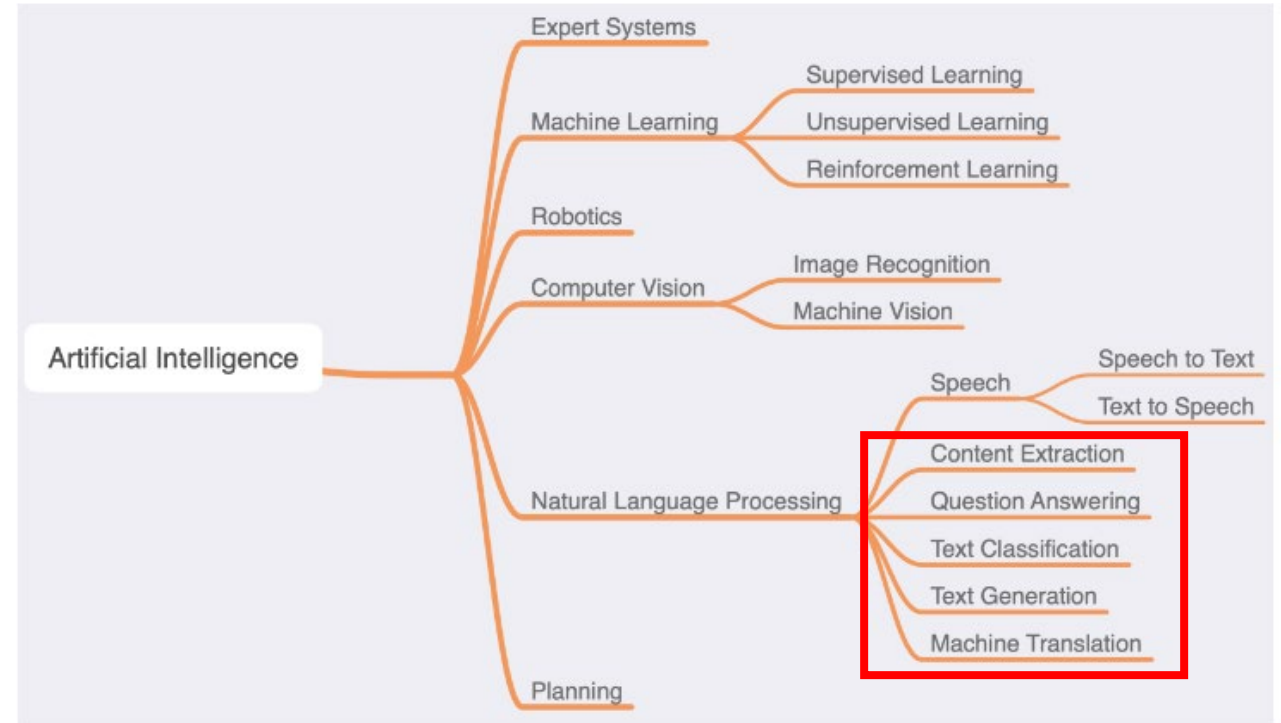
ChatGPT November 2022
Release: The Future of AI
Language Generation is Here

A Brief Analysis of “ChatGPT” – A Revolutionary Tool Designed by OpenAI



Where does Generative AI fall?

- Gen AI is a form of Natural Language Processing.
- Large Language Models are the newest iteration of Natural Language Processing.
- Generative AI is the most advanced version of Natural Language Processing.



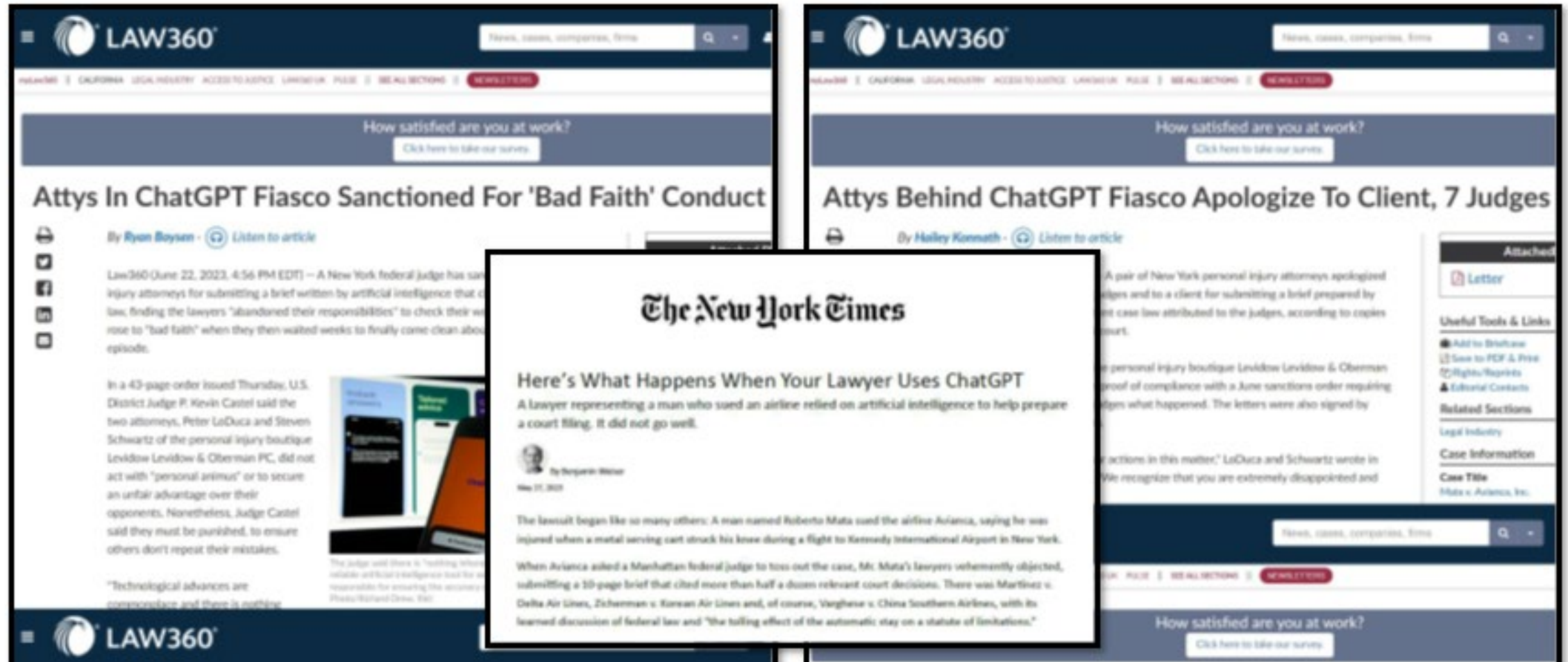
What Functionality Do Gen AI Products Offer

Summarizing	<i>Summarize large amounts of material quickly and deliver summaries in various formats</i> <ul style="list-style-type: none">• Deposition summaries• Expert witness reports
Drafting	<i>Draft quasi-bespoke content from short, natural-language prompts</i> <ul style="list-style-type: none">• Memos and communications• Presentations• Work product
Research	<i>Conduct factual and legal research</i> <ul style="list-style-type: none">• Factual research – the universe of data comes from publicly-available sources (i.e. the internet)• Legal research – legal-specific products
Content Development	<i>Develop content when the user is unsure where to start</i> <ul style="list-style-type: none">• Deposition outline creation• Contract drafting
Extraction	<i>Extract data points from large documents</i> <ul style="list-style-type: none">• Due diligence• Data collection for market intelligence
Comparison	<i>Compare many documents at once and describe the differences and their impacts</i> <ul style="list-style-type: none">• Compliance review• Opposition filings analysis

A Lawyers' Roadmap for Gen AI Adoption

- Whether and how an AI tool can be incorporated into a legal practice depends in part on the data that you plan to use with the tool.
- When client data is not used, the lawyer is similarly situated to every other business, and can generally use the tool, subject to the same concerns that a business will manage (bias, hallucinations, confidentiality, etc.)
- Once you start incorporating client data into the mix, the use of Gen AI is more directly governed by legal ethics rules, which imposes additional considerations above and beyond those addressed by business adopters.
- And if you want to use client data for the benefit of others things get very complicated (and problematic).

AI in Legal Practice: When things go wrong...

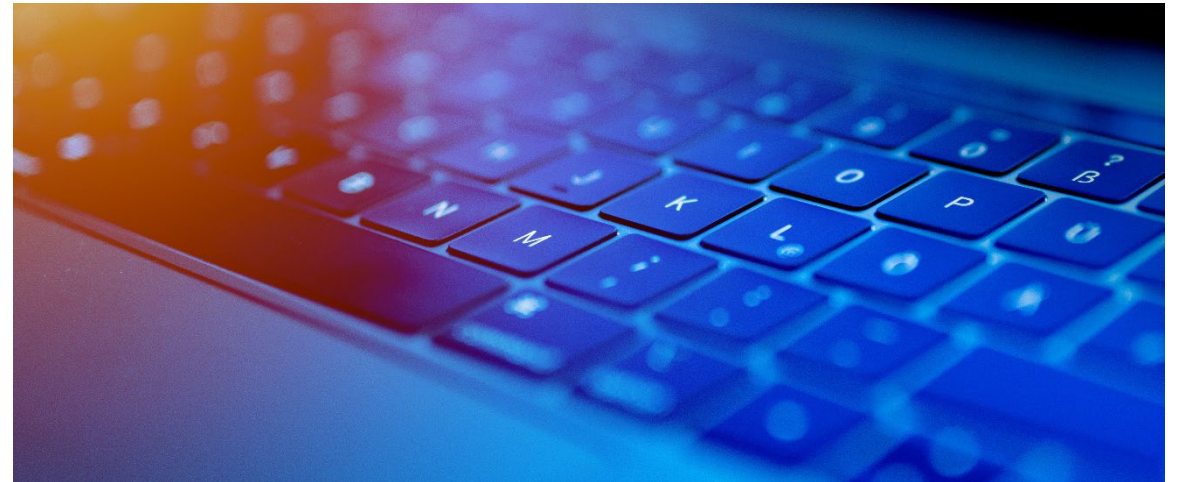


AI in Legal Practice: When things go wrong... (*cont.*)

- In June 2023, a New York federal judge sanctioned two personal injury attorneys for submitting a brief written by artificial intelligence that cited nonexistent case law.
- In a 43-page order, the court found the lawyers “abandoned their responsibilities” to check their work, and their behavior rose to “bad faith” when they then waited weeks to finally come clean about the embarrassing episode.
- The judge directed the attorneys to submit a letter to their client explaining what happened and including a copy of the order, as well as a transcript of an earlier hearing in which he berated the two attorneys.

Law Firms Are Conservative in Adopting AI Products

- The legal industry, and particularly the law firm, often lags behind in adopting emerging technologies because of the ethical considerations that arise due to their added layer of professional responsibility.
- Lawyers have a multitude of rules of professional responsibility which they must follow, including those governing an attorney's duty to:
 - Be competent
 - Communicate with clients
 - Charge a reasonable fee
 - Maintain confidentiality
 - Supervise nonlawyer assistance



The Duty of Competence

- Under Model Rule 1.1, attorneys must represent their clients competently. The ABA amended this rule in 2012 to emphasize that the duty of competence requires that an attorney have a reasonable understanding of the benefits and risks associated with relevant technology.
- To fulfill this obligation, attorneys must keep abreast of changes in the law and legal practice, including how technology like AI affects their provision of legal services to their clients (see Comment 8 to Model Rule 1.1).

The Duty to Communicate with Clients

- Under Model Rule 1.4, as part of their duty to communicate with their clients, attorneys must reasonably consult with them about how they intend to accomplish the client's objectives.
- To comply with Model Rule 1.4, an attorney providing legal services should:
 - promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;
 - keep the client reasonably informed about the status of the matter;
 - promptly comply with reasonable requests for information; and
 - consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

The Duty to Charge a Reasonable Fee

- Under Model Rule 1.5, attorneys cannot charge an unreasonable fee or collect an unreasonable amount for expenses.
- There are several factors to consider when determining whether a fee or expense is reasonable, including:
 - The time and labor required to complete the legal service.
 - The novelty and difficulty of the questions involved.
 - The skill needed to properly perform the legal service.

The Duty to Maintain Confidentiality

- Under Model Rule 1.6, attorneys must not disclose their clients' confidential information unless:
 - They have received their clients' informed consent.
 - Disclosure is impliedly authorized.
 - Disclosure is otherwise permitted. For example, a court orders disclosure of the information.

The Duty to Supervise Nonlawyer Assistance

- Under Model Rule 5.3(b), an attorney with supervisory authority over a nonlawyer has a duty to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the attorney's professional obligations.
- In the past, a nonlawyer under this rule meant a person. However, in 2012, the ABA amended this rule's title from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."
- As a result of this title change, the definition of nonlawyer assistance under Model Rule 5.3 has expanded to include outside service providers and technology services.

Ethics and Prior Disruptive Technologies

- Since the dawn of time, lawyers have re-used work product for multiple clients.
- And AI is not the first emerging disruptive technology that the legal industry has confronted, and eventually embraced.
- A review of how the ethics rules addressed these longstanding practices allows us to predict how the rules should evolve to cover use of AI.



Ethics and Prior Disruptive Technologies (*cont.*)

- A survey of the Model Rules and related ethics opinions strongly suggests that attorneys are free to reuse their work product as long as they pass the cost savings of their prior work onto the subsequent client(s).

A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules.

ABA Form, Op. 93-379, *6, Dec. 6, 1993,

Prior Guidance: E-Mail

- In 1998, the New York State Bar Association issued Ethics Opinion No. 709 approving, among other things, the “use of internet e-mail” in the practice of law.

That opinion ultimately “conclude[d] that lawyers may in ordinary circumstances utilize unencrypted Internet se-mail to transmit confidential information without breaching their duties of confidentiality under Canon 4 to their clients, as the technology is in use today.”

Prior Guidance: E-Mail (*cont.*)

- The American Bar Association reached a similar conclusion in 1999, concluding:

“Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client’s representation.”

Prior Guidance: Advertising Supported E-mail

- In 2008, the NYSBA issued an ethics opinion allowing attorneys to use commercial e-mail platforms (i.e., Gmail, Yahoo! Mail) where those service providers scan e-mail traffic and display targeted advertisements.

“A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to other individuals.”

Prior Guidance: Cyber Security

- In 2017, in light of evolving data security threats, the ABA revised its earlier opinion, emphasizing that a lawyer has a duty to communicate with a client about the nature and method of electronic communications when transmitting highly sensitive information:

When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved. The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client.

Prior Guidance: The Cloud

- In 2010, the NYSBA issued an ethics opinion approving an attorney's use of an online systems to store client confidential information, provided that attorneys "take[] reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6."

Again, the NYSBA recommended "[l]awyers using online storage systems (and electronic means of communication generally) should monitor these legal developments, especially regarding instances when using technology may waive an otherwise applicable privilege."

Prior Guidance: The Cloud (*cont.*)

- In 2012, the State Bar of California issued an ethics opinion setting forth ground rules governing the use of technology in virtual law offices (i.e., operating on the cloud).

The bar association suggested that attorneys “should consider whether her ethical obligations require that she make appropriate disclosures and obtain the client’s consent to the fact that an outside vendor is providing the technological base of Attorney’s law firm, and that, as a result, the outside vendor will be receiving and exclusively storing the client’s confidential information.”

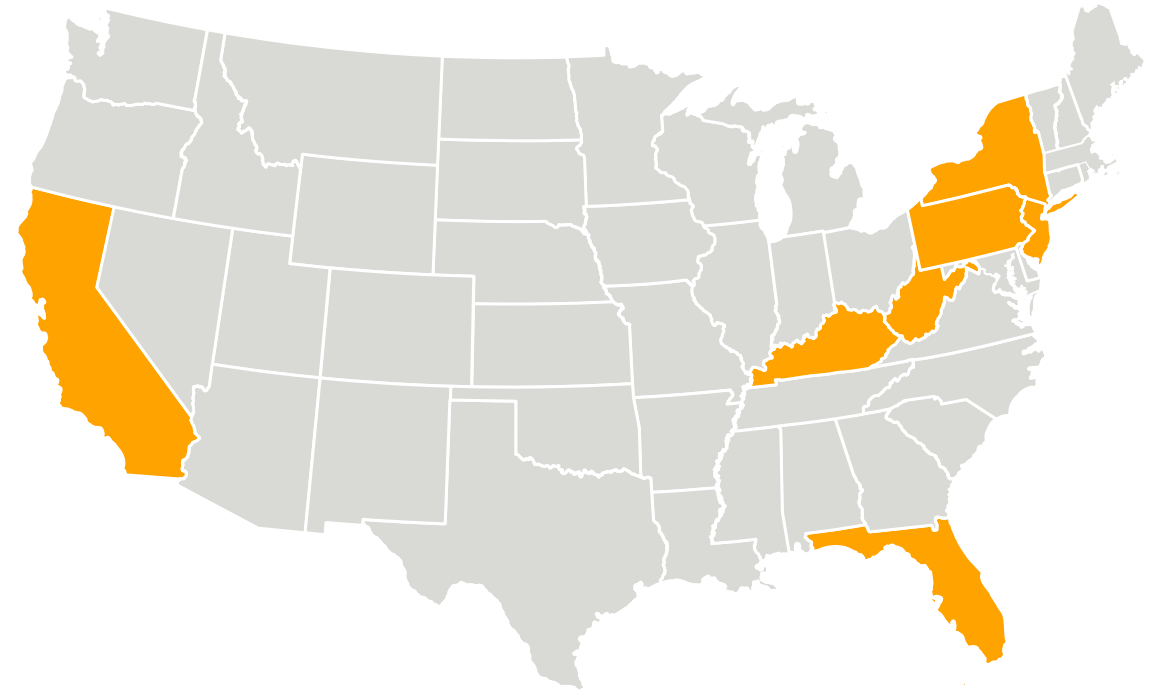
Takeaways from Prior Guidance

The integration of e-mail and cloud storage into the legal profession teaches us that, when faced with new technologies, legal ethicists are primarily concerned with:

1. Maintaining the confidentiality of client data; and
2. Only using the tool with the informed consent of the client;
3. Charging only appropriate fees; and
4. Reminding attorneys of their continuing obligation to stay abreast of technological developments impacting their practice.

Bar Associations Have Begun to Tackle AI

- There is a growing trend of Bar Associations issuing AI-specific ethics opinions.
- At least the following state bars have weighed in on attorneys' ethical use of GAI:
 - California,
 - Florida,
 - Kentucky
 - New Jersey,
 - New York,
 - Pennsylvania, and
 - West Virginia



The American Bar Association has also weighed in with a formal ethics opinion entitled “Generative Artificial Intelligence Tools.”

California – “Practical Guidance for the Use of GAI”

- On November 16, 2023, the State Bar of California issued “Practical Guidance on the Use of Generative AI in the Practice of Law.”

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

PRACTICAL GUIDANCE FOR THE USE OF
GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer’s professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

The following Practical Guidance is based on current professional responsibility obligations for lawyers and demonstrates how to behave consistently with such obligations. While this guidance is intended to address issues and concerns with the use of generative AI and products that use generative AI as a component of a larger product, it may apply to other technologies, including more established applications of AI. This Practical Guidance should be read as guiding principles rather than as “best practices.”

State Bar of California, [Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law \(Nov. 16, 2023\)](#)

California – “Practical Guidance for the Use of GAI” (*cont.*)

- Duty of Confidentiality:
 - “A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections.”
 - “A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.”

State Bar of California, [Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law \(Nov. 16, 2023\)](#)

California – “Practical Guidance for the Use of GAI” (*cont.*)

- Duty to Supervise:
 - “Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm’s lawyers and non lawyers’ conduct complies with their professional obligations when using generative AI.
 - This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use”

State Bar of California, [Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law \(Nov. 16, 2023\)](#)

California – “Practical Guidance for the Use of GAI” (*cont.*)

- Duties of Competence and Diligence:
 - “It is possible that generative AI outputs could include information that is false, inaccurate, or biased.”
 - A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.”

State Bar of California, [Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law \(Nov. 16, 2023\)](#)

Florida – Ethics Opinion 24-1

- On January 19, 2024, the Florida Bar Association's Board of Governors' Review Committee on Professional Ethics issued Proposed Advisory Opinion (PAO) 24-1.

**FLORIDA BAR ETHICS OPINION
OPINION 24-1
January 19, 2024**

Advisory ethics opinions are not binding.

Lawyers may use generative artificial intelligence (“AI”) in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program’s policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer’s ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

[Florida Bar Ethics Opinion 24-1 \(Jan. 19, 2024\)](#)

Florida – Ethics Opinion 24-1 (*cont.*)

- Duty of Confidentiality:
 - “When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations.
 - For generative AI, this specifically includes knowledge of whether the program is ‘self-learning.’ A generative AI that is ‘self-learning’ continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters.
 - Use of a ‘self-learning’ generative AI raises the possibility that a client’s information may be stored within the program and revealed in response to future inquiries by third parties.”

[Florida Bar Ethics Opinion 24-1 \(Jan. 19, 2024\)](#)

Florida – Ethics Opinion 24-1 (*cont.*)

- Duty of Oversight:
 - “[J]ust as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer’s own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants ...
 - [A] lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.”

[Florida Bar Ethics Opinion 24-1 \(Jan. 19, 2024\)](#)

Florida – Ethics Opinion 24-1 (*cont.*)

- Legal Fees:
 - “Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer’s billable hours. Though generative AI programs may make a lawyer’s work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.”

[Florida Bar Ethics Opinion 24-1 \(Jan. 19, 2024\)](#)

Kentucky – Ethics Opinion KBA E-457

- On March 15, 2024, the Kentucky Bar Association published Ethics Opinion KBE E-457.

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-457

Issued: March 15, 2024

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Subject: The Ethical Use of Artificial Intelligence (“AI”) in the Practice of Law

Question #1: Like other technological advances, does an attorney have an ethical duty to keep abreast of the use of AI in the practice of law?

Answer: Yes.

Question #2: Does an attorney have an ethical duty to disclose to the client that AI is being used with respect to legal matters entrusted to the attorney by the client?

Answer: No, there is no ethical duty to disclose the rote use of AI generated research for a client’s matter unless the work is being outsourced to a third party; the client is being charged for the cost of AI; and/or the disclosure of AI generated research is required by Court Rules.

Question #3: If the effect of an attorney’s use of AI reduces the amount of attorney’s time and effort in responding to a client matter must the lawyer consider reducing the amount of attorney’s fees being charged the client when appropriate under the circumstances?

Answer: Yes.

Kentucky Bar Association, [Ethics Opinion KBA E-457 \(March 15, 2024\)](#).

Kentucky – Ethics Opinion KBA E-457 (*cont.*)

- Duty of Competence:
 - “There are many AI resources now available to the lawyer, and there is much discussion about what AI resources are on the horizon, therefore, as AI tools become more refined, and their use in the legal profession becomes more widespread, lawyers need to be aware that not using an available AI tool may constitute a failure to meet the lawyer’s duty of attaining and maintaining competence under Rule 1.1.
 - For example, legal research may be more comprehensive using an AI-generated function of computer research programs. At the same time, understanding how AI works, (a) may enable an attorney to better respond to an opponent’s arguments or theories, or (b) better analyze the evidence presented by the attorney’s adversary. In essence, the rapid development of AI poses challenges for attorneys to continuously update their knowledge base in order to maintain their competence.”

Kentucky – Ethics Opinion KBA E-457 (*cont.*)

- Duty to Supervise:
 - Cites to Florida Ethics Opinion 24-1:
 - “A lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals.
 - Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.”

New York – Task Force Report

- In April 2024, the New York State Bar Association Task Force on Artificial Intelligence issued Report and Recommendations.

[Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence \(April 6, 2024\).](#)



New York – Task Force Report (*cont.*)

- Duty of Confidentiality:
 - “Confidentiality concerns arise when entering information into AI engines, such as chatbots, and when such entries are then added to the training set for the AI.
 - [T]he California bar association recommends that lawyers inform their clients if generative AI tools will be used as part of their representation.
 - The Florida bar association 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.”

[Florida Bar Ethics Opinion 24-1 \(Jan. 19, 2024\)](#)

New York – Task Force Report (*cont.*)

- Duty to Supervise:
 - “[N]on-lawyers’ includes non-human entities, such as artificial intelligence technologies.
 - As infamously demonstrated in the *Avianca* case, 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.”

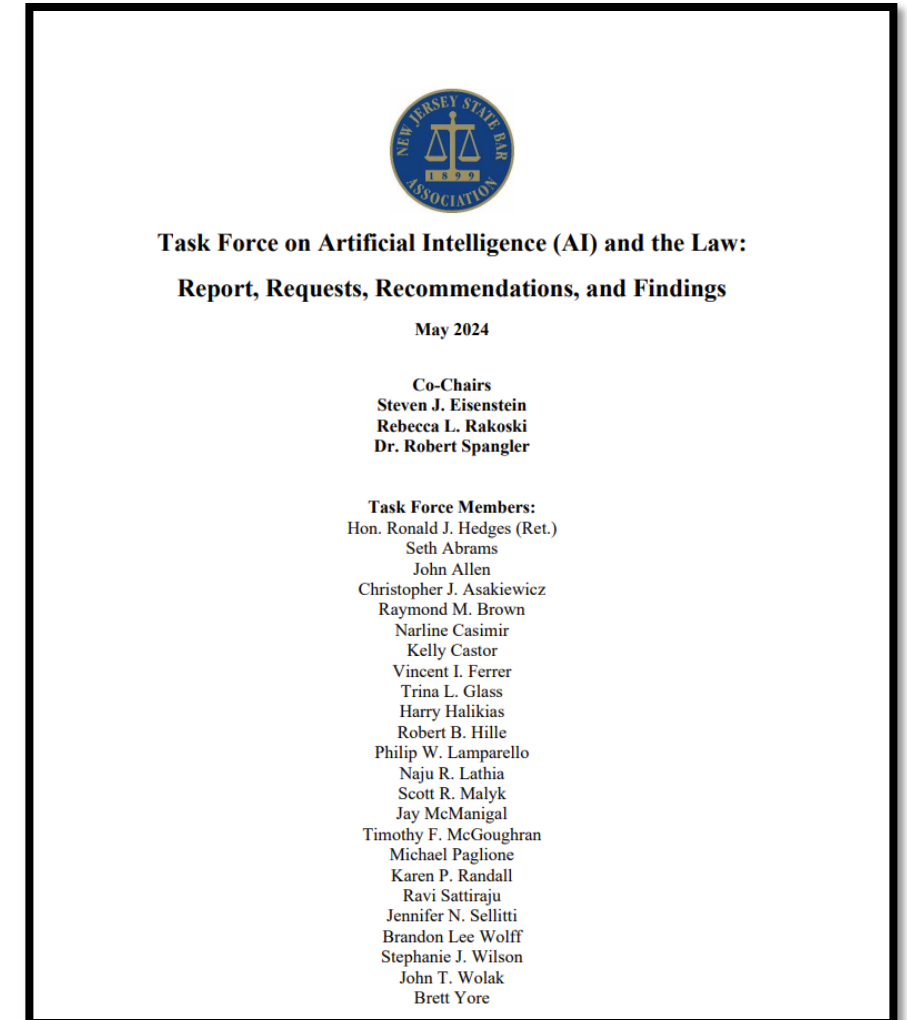
New York – Task Force Report (*cont.*)

- Duty of Competence:
 - “[K]eeping abreast of ‘the benefits and risks associated with technology the lawyer uses to provide services to clients’ is an element of competency ...
 - 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’ 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.”

New Jersey – Task Force Report

- In May 2024, the New Jersey State Bar Association Task Force on Artificial Intelligence and the Law authored “Report, Requests, Recommendations, and Findings”

New Jersey State Bar Association, [Task Force on Artificial Intelligence \(AI\) and the Law: Report, Requests, Recommendations, and Findings \(May 2024\)](#).



New Jersey – Task Force Report (cont.)

- Duty of Confidentiality:
 - “When evaluating AI tools and services, it is essential to identify and document how data, especially client data, is transmitted, used and stored by the AI to ensure its confidentiality.
 - This information should guide the assessment of whether a particular AI tool is suitable for its intended use.”

[Florida Bar Ethics Opinion 24-1 \(Jan. 19, 2024\)](#)

New Jersey – Task Force Report (*cont.*)

- Duty of Oversight:
 - “All law firms should adopt an organizational AI policy with a risk assessment framework
 - Legal professionals must understand that education, knowledge and guidance are necessary to operate AI tools safely and ethically in a legal setting.”

New Jersey State Bar Association, [Task Force on Artificial Intelligence \(AI\) and the Law: Report, Requests, Recommendations, and Findings \(May 2024\)](#).s

New Jersey – Task Force Report (*cont.*)

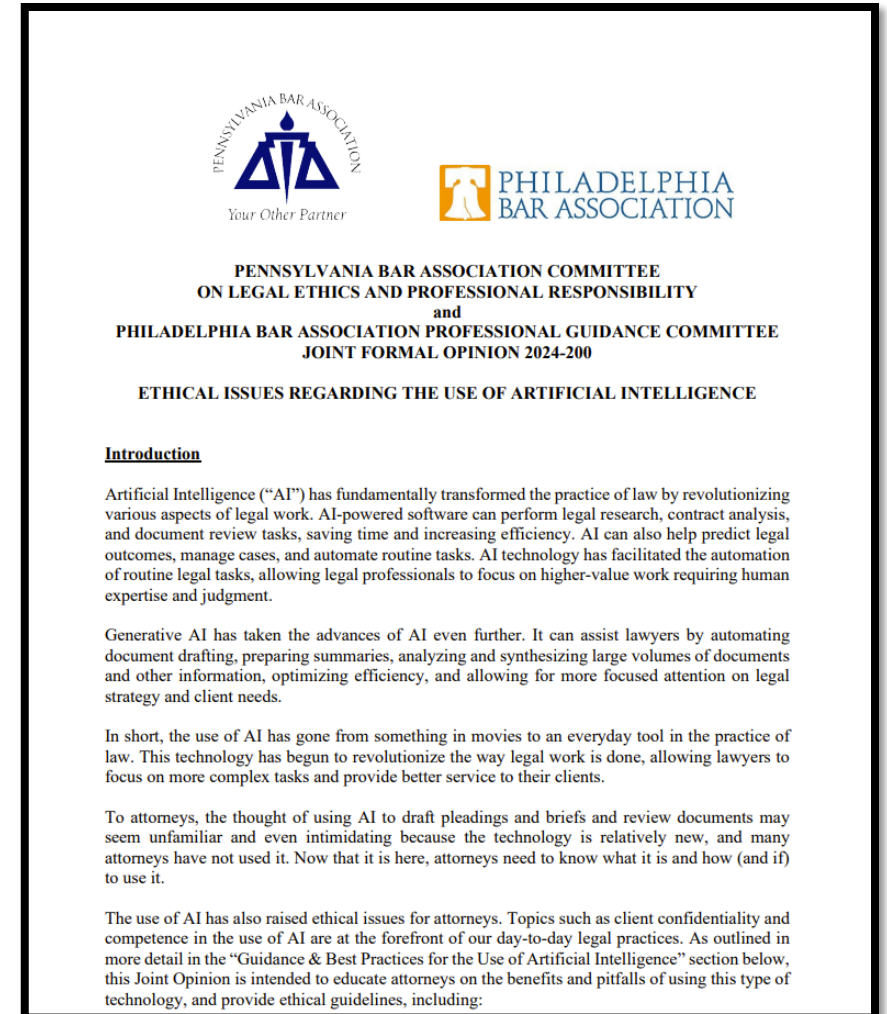
- Duty of Competence:
 - “When considering the adoption of legal-specific AI tools, it's essential to scrutinize the vendor's handling of data, security measures and compliance with relevant legal and ethical standards. Additionally, understanding the tool's intended use, risks, limitations and potential biases is vital to ensuring its appropriate use and upholding the integrity of the work produced using the AI tools.”

New Jersey State Bar Association, [Task Force on Artificial Intelligence \(AI\) and the Law: Report, Requests, Recommendations, and Findings \(May 2024\)](#).s

Pennsylvania – Formal Opinion 2024-200

- In June 2024, the Pennsylvania Bar Association and Philadelphia Bar Association issued Joint Formal Opinion 2024-200.

Pennsylvania Bar Association and Philadelphia Bar Association, [Joint Formal Opinion 2024-200 \(Ethical Issues Regarding the Use of Artificial Intelligence\) \(June 2024\)](#).



Pennsylvania – Formal Opinion 2024-200 (*cont.*)

- Duty of Confidentiality:
 - “Lawyers must safeguard information relating to the representation of a client and ensure that AI systems handling confidential data (1) adhere to strict confidentiality measures, and (2) confidential data will not be shared with other clients or others not protected by the attorney-client privilege”.

Pennsylvania – Formal Opinion 2024-200 (*cont.*)

- Duty to Supervise:
 - “Lawyers must be vigilant against the misuse of AI-generated content, ensuring it is not used to deceive or manipulate legal processes, evidence, or outcomes.”
 - “[S]ome firms are implementing internal policies on whether a lawyer can use AI (and programs such as ChatGPT) when creating pleadings or other documents that may contain sensitive client information.”

Pennsylvania – Formal Opinion 2024-200 (*cont.*)

- Duty of Competence:
 - “[I]f a lawyer chooses to use AI or any other technology, the lawyer has the responsibility to (1) understand the technology and how it works, (2) understand the benefits of the technology, (3) understand the risks of the technology, (4) check and verify all citations and the material cited, and (5) especially in cases where the benefits outweigh the risks, have an obligation to educate the client and seek their informed consent to use the technology.”

West Virginia – Ethics Opinion 24-01

- In June 2024, West Virginia Lawyer Disciplinary Board published Legal Ethics Opinion 24-01.

West Virginia Bar Association, [Legal Ethics Opinion 24-01 \(2024\)](#).s

LEGAL ETHICS OPINION 24-01 **ARTIFICIAL INTELLIGENCE**

Artificial Intelligence (“AI”) is an evolving technology, and as it becomes more advanced, AI’s functions and its users will continue to grow, and the legal field is no exception. According to 15 U.S. Code § 9401 AI is defined as “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.” The notes in 10 U.S. Code § 2358 define AI as:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.
5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

West Virginia – Ethics Opinion 24-01 (cont.)

- Duty of Confidentiality:
 - “[L]awyers must take proper steps to ensure that their clients' information is safeguarded. To minimize the risks of using generative AI that utilizes client information, a lawyer should discuss the confidentiality safeguards used by the providers. A lawyer should further inquire about what type of information is going to be provided, how the information will be stored, what security measures are in place with respect to the storage of the information, and who is going to have access to the information.”

West Virginia – Ethics Opinion 24-01 (*cont.*)

- Duty to Supervise:
 - “One of the biggest risks associated with a lawyer's use of generative AI is overestimating the capabilities of the software or accepting the AI's work product on its face as credible.
 - Lawyers have a duty to make sure the work product produced by AI is accurate and complete.
 - Lawyers should view AI at best as a secondary source and should never be relied upon as the primary source itself.”

West Virginia – Ethics Opinion 24-01 (*cont.*)

- Duty of Competence:
 - “Lawyers may incorporate AI tools into their practices but must do so without compromising the competent representation of their clients.
 - AI can be an effective tool in a lawyer's arsenal, but the unsupervised use of AI can have catastrophic results. To ensure competent representation, lawyers should have a basic understanding of the AI programs that may best benefit their clients and their practice.
 - AI programs are still machine-based and do not have the same level of understanding and judgment as a human lawyer when it comes to interpreting the nuance of legal principles and precedent.”

ABA - Formal Opinion 512

- On July 29, 2024, the ABA issued Formal Opinion 512.
- The opinion points out potential ethical pitfalls that arise out of the use of a GAI tool and provides some guidance on how to avoid those pitfalls.
- It highlights many of the same ethical rules as the previous guidance, opinions, and reports, but from a different perspective.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512

July 29, 2024

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.¹ A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.² GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

ABA - Formal Opinion 512 (*cont.*)

- On the duty of competence, the opinion notes that:

“To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use

...

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment

...

Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work.”

ABA - Formal Opinion 512 (*cont.*)

- The opinion stresses the duty to protect client confidentiality when using GenAI and what it terms “self-learning” GenAI, highlighting the need for rigorous risk assessments and, in some cases, informed client consent.
- It highlights that, at a minimum, lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms of any GenAI tool they intend to use or consult with someone who has.

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly, even if the tool is used exclusively by lawyers at the same firm. ... Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.

... To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.

ABA - Formal Opinion 512 (*cont.*)

- On the duty to supervise, the opinion notes that lawyers are responsible for supervising and controlling the use of GAI tools by their staff and within their firms.
- This includes ensuring that GAI tools are used appropriately and that data handling practices align with ethical and legal requirements.
- It emphasizes that lawyers must establish policies and training, and make “reasonable efforts” to ensure that they are followed. The opinion extends this as a recommendation for all vendor management.

ABA - Formal Opinion 512 (*cont.*)

- Finally, the opinion raises potential effects that GAI tools may have on the reasonableness of fees charged.
- Even if the lawyer charges a flat fee, if the use of a GAI tool avoids all or nearly all work, the fee may be unreasonable

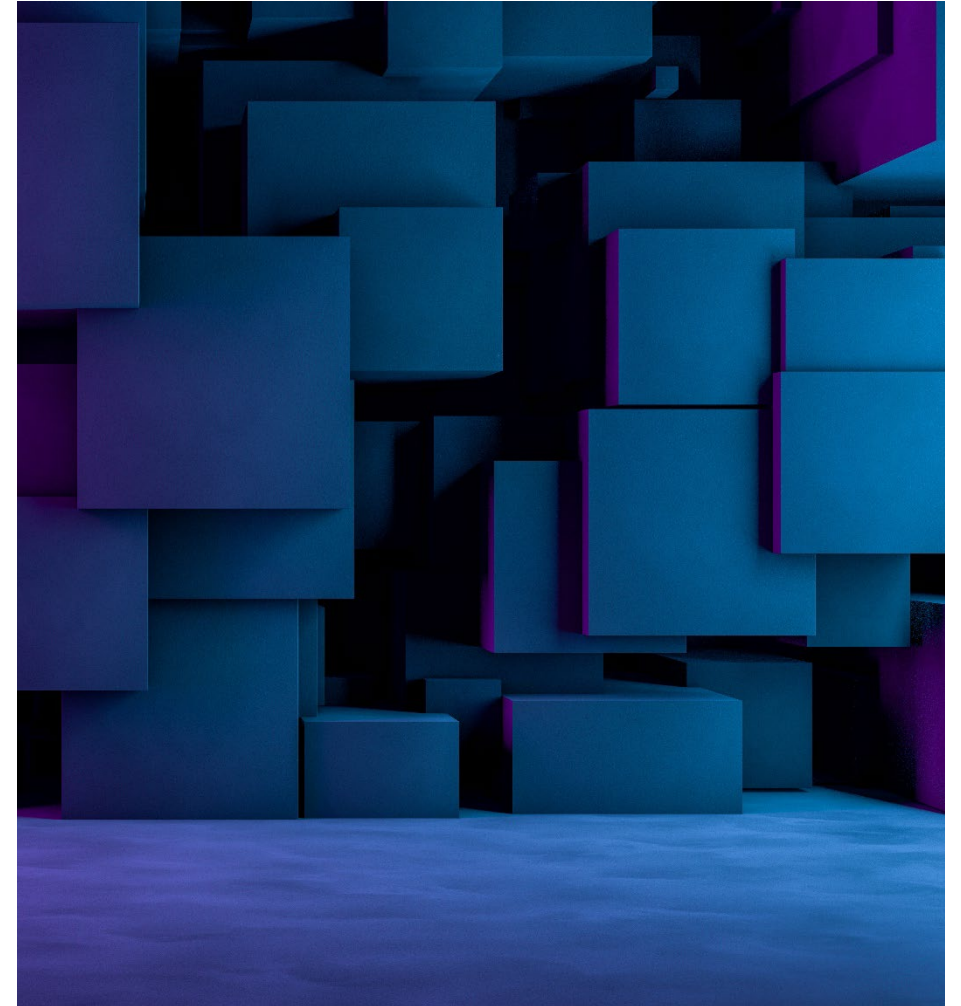
Many of the Ethics Opinions Assume that AI is “Self Learning”

- “Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client’s representation may be disclosed improperly, even if the tool is used exclusively by lawyers at the same firm.”
– ABA
- “Use of a ‘self-learning’ generative AI raises the possibility that a client’s information may be stored within the program and revealed in response to future inquiries by third parties.”
– FL Bar



AI-Specific Ethics Guidance: Unnecessary Barriers to Adoption

- Far from aligning with prior guidance, the new guidance generally imposes sweeping, one-size-fits-all restrictions on AI use that make widespread adoption slow and difficult.
- Barriers to adoption appear to be tied to misunderstandings about the technical functionality of AI.
- Not all gen-AI tools are self learning. And even self-learning Gen AI tools can sometimes be contractually restricted.



ChatGPT Enterprise vs. Free Version for Individual Users

- ChatGPT Enterprise
 - You own and control your business data in ChatGPT Enterprise.
 - ChatGPT does not train on your business data or conversations.
 - ChatGPT models don't learn from your usage.
- ChatGPT Individual User
 - ChatGPT may use input and output content to provide, maintain, develop, and improve their services, comply with applicable law, enforce their terms and policies, and keep their services safe.
 - If you do not want ChatGPT to use your content to train their models, you can opt out.
 - However, in some cases, opting out may limit the ability of their services to better address your specific use case.

Not All AI Tools are the Same

- AI tools may not be fundamentally different from other widely used technology tools when it comes to clients' confidential information.
- A lawyer's use of AI to assist in drafting may not be different than the use of an associate or of legal editing software.
- No matter how the draft was prepared, the lawyer is ultimately responsible for its contents. When a lawyer submits a filing with fictitious or erroneous citations, the fault is the lawyer's, not the technology's.

“AI is really just a tool. Bad lawyering has been around for a long time, and now [lawyers] have a new tool for bad lawyering.”

– U.S. Magistrate Judge Allison Goddard, Southern District of California

Practical Tips: How Do We Use AI Ethically?

- Policies
- Contracting
- Consent
- Anonymization
- Training

A Policy Should Say When Use of GAI Tools is Permissible

1. Check the client's outside counsel guidelines for generative AI prohibitions
2. Seek client consent via email
3. Provide clients the *opportunity* to be connected with SMEs and technical teams if they have questions about the tool or pilot
4. Look to redact/anonymize any unnecessary client information that is not necessary for the tools use

Elements of GAI Policies

- Use of GAI should be governed by a policy.
- Before using GAI, lawyers should complete training about the risks attendant with GAI and have acknowledged the policy. The training includes ways to use GAI in a manner to avoid risks.
 - Confidentiality and privacy
 - Not input any content that could be considered the confidential, sensitive or proprietary content
 - Not input personal data
 - Discard outputs containing personal data
 - Switch off training option
 - Inaccuracy and bias
 - Use only as a research tool or starting point
 - Evaluate all outputs
 - Design inputs to be clear and specific
 - Not use output for HR or personnel decisions
 - Intellectual property
 - Not submit inputs that encourage creation of infringing outputs
 - “in the style of X” or “that looks like Y”
 - Not use outputs that contain proprietary rights notices, trademarks, or other third-party ownership
 - Not publicly share outputs without modification
 - Not publicly share image, audio, video
 - Not automatically extract data

Elements of GAI Policies

- Examples of compliant use
 - Starting point for research
 - Proofread; change of tone; clarify; revise original work
 - Create text, audio, graphics for internal use
 - Generate summaries, explanations or analyses for publicly available work
 - Translate text
- Requests for exemptions
 - Revisit and revise the policy over time as the landscape and available tools evolve

Restrictions When Contracting

Terms to negotiate include:

1. Zero Data Retention (“ZDR”)
2. No Training
3. No Human Eyes On
4. OpenAI –Abuse Monitoring Waiver
5. LLM provider (e.g., OpenAI) or
6. A point solution that is built on one of the major providers
 - Does the point solution have these terms and
 - Do we have privity of contract

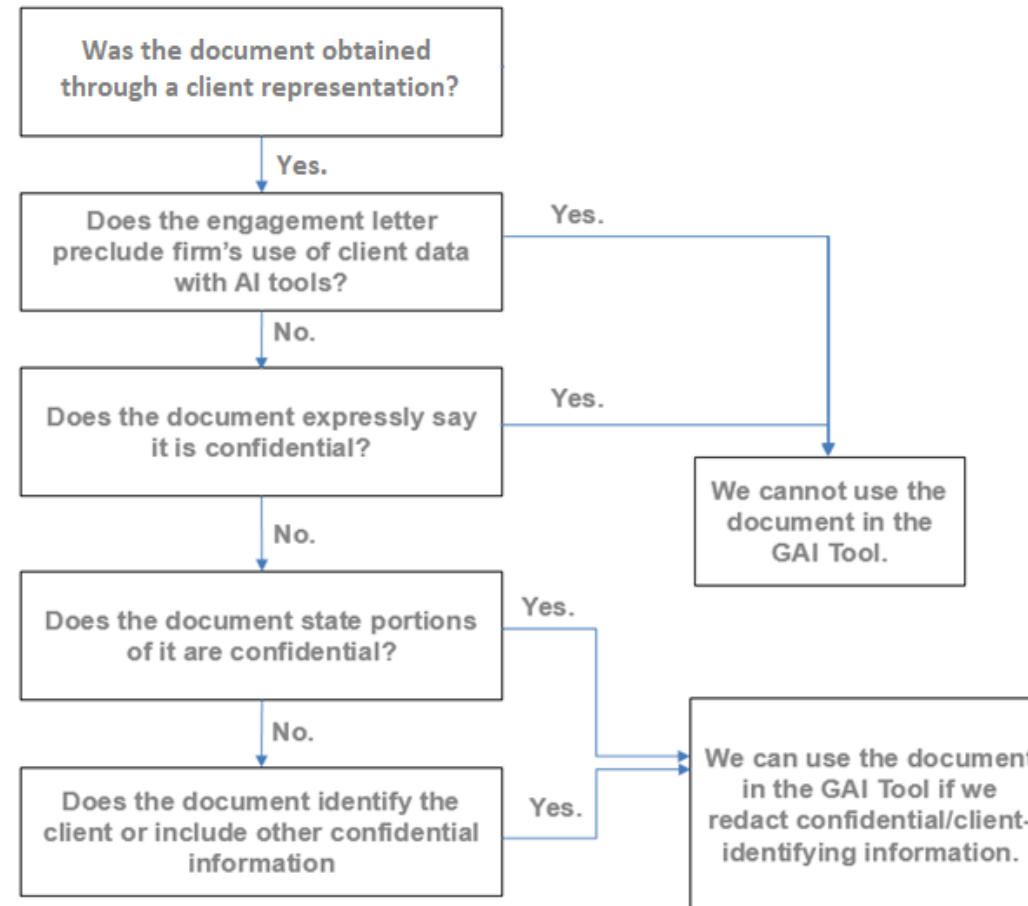
Anonymization and Removal of Confidential Information

- Removing all confidential information and information that could identify a client, as per Rule 1.6 (Duty of Confidentiality), transforms non-privileged, confidential client documents into generic documents that are neither confidential nor traceable to any particular client and suitable as templates for training Generative AI tools.
- As long as there is no
 1. provision to the contrary in a client engagement letter;
 2. express provision in the document or elsewhere stating that the entire document is to be kept confidential; or
 3. other express instruction to the contrary

Anonymization and Removal of Confidential Information (*cont.*)

- The NYSBA has opined that “confidential information” excludes information that is “generally known” in the local community or in the trade, field or profession to which the information relates.
- Information is not generally known simply because it is in the public domain or available in a public file.
- The New York Court of Appeals explained that information may be “generally known” if it is found in trade periodicals or filings with State or Federal regulators.
- Redacted training documents would be considered “generally known” in the field, as contemplated by Rule 1.6 because generic agreements are well known and widely used by practitioners in the field.

Anonymization and Removal of Confidential Information (*cont.*)

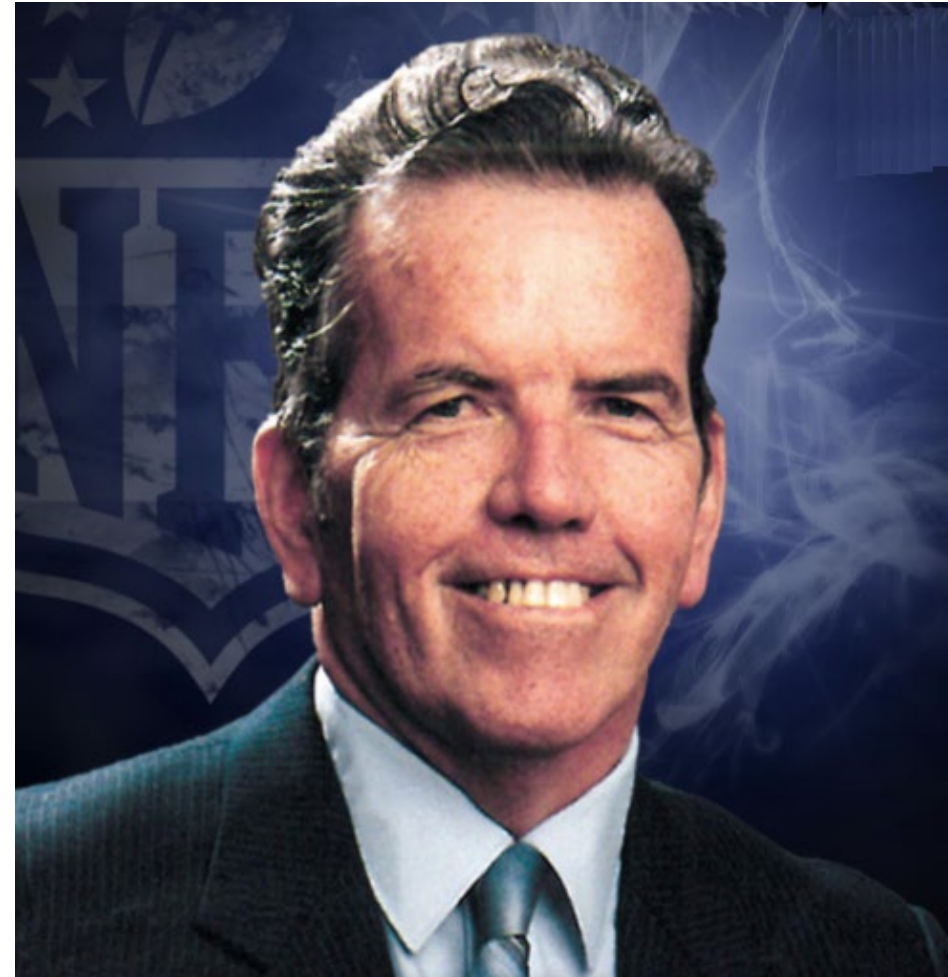
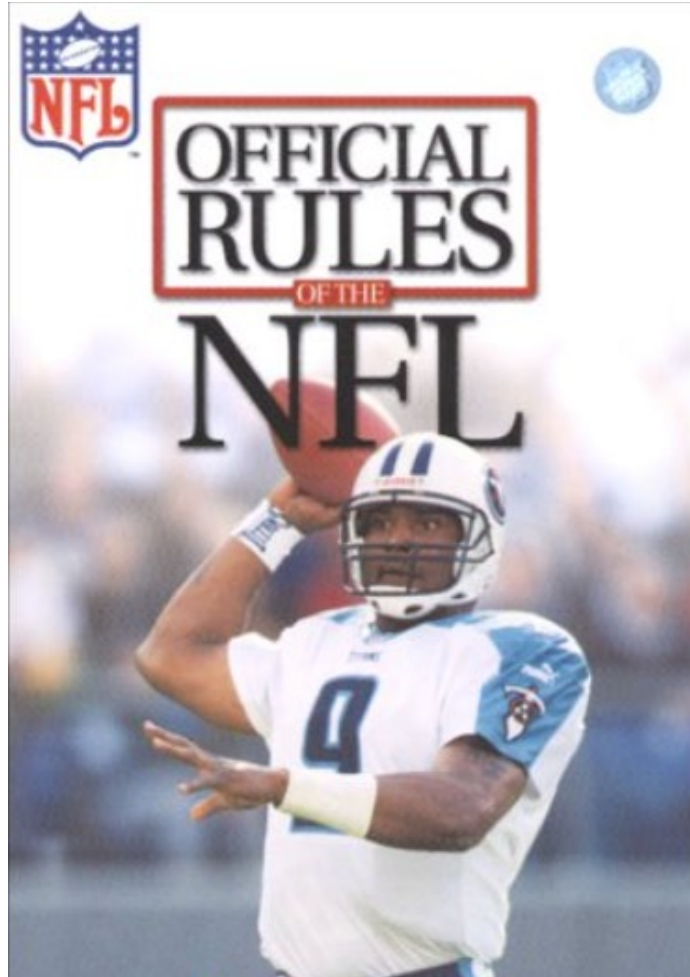


As AI Matures, We May Become Ethically Obligated to Use It

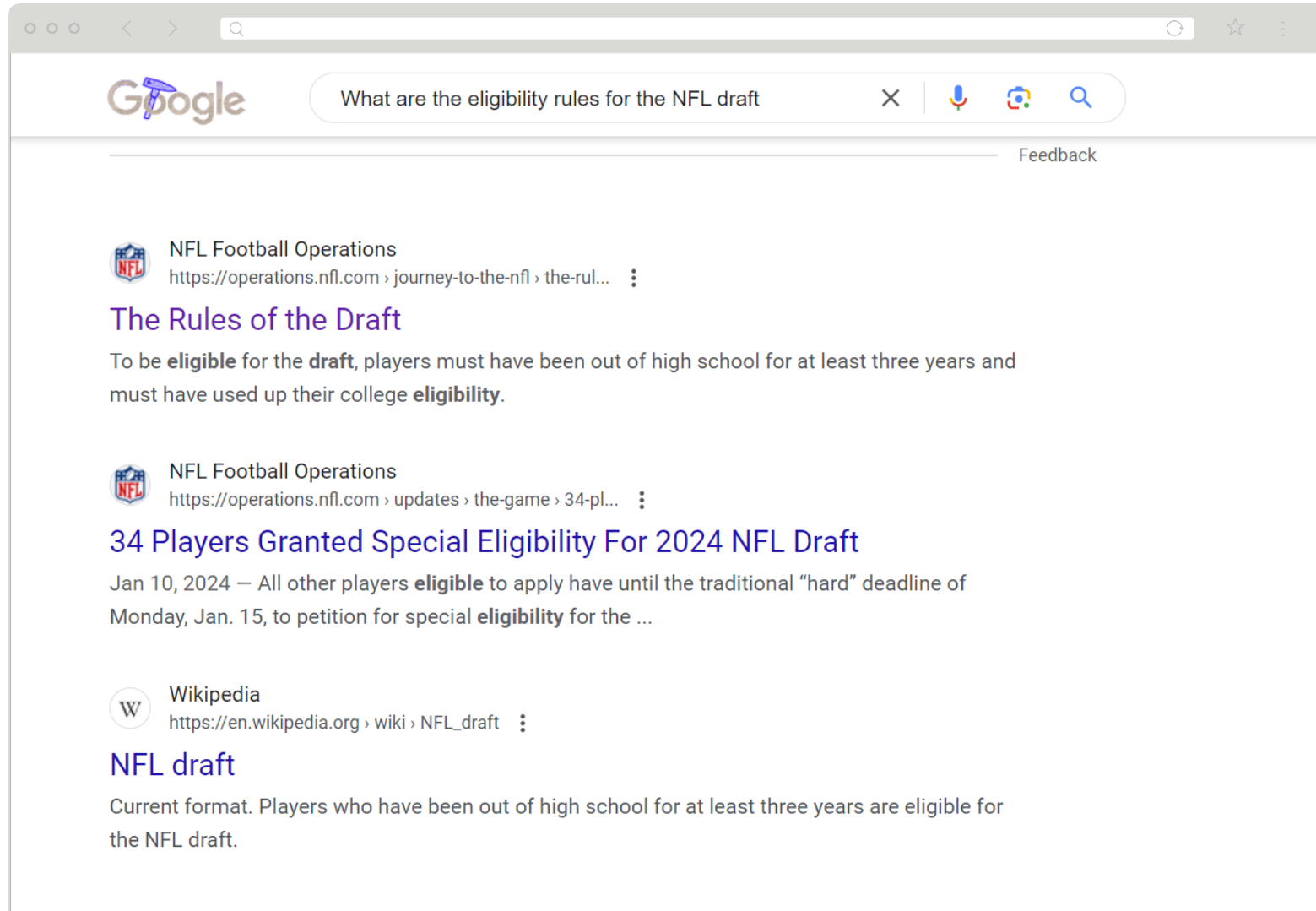
“A refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent legal representation to clients.” – **NYSBA on Duty of Competency – Rule 1.1**

- The remainder of this presentation will discuss various ways Gen AI can make legal work more accurate and efficient.

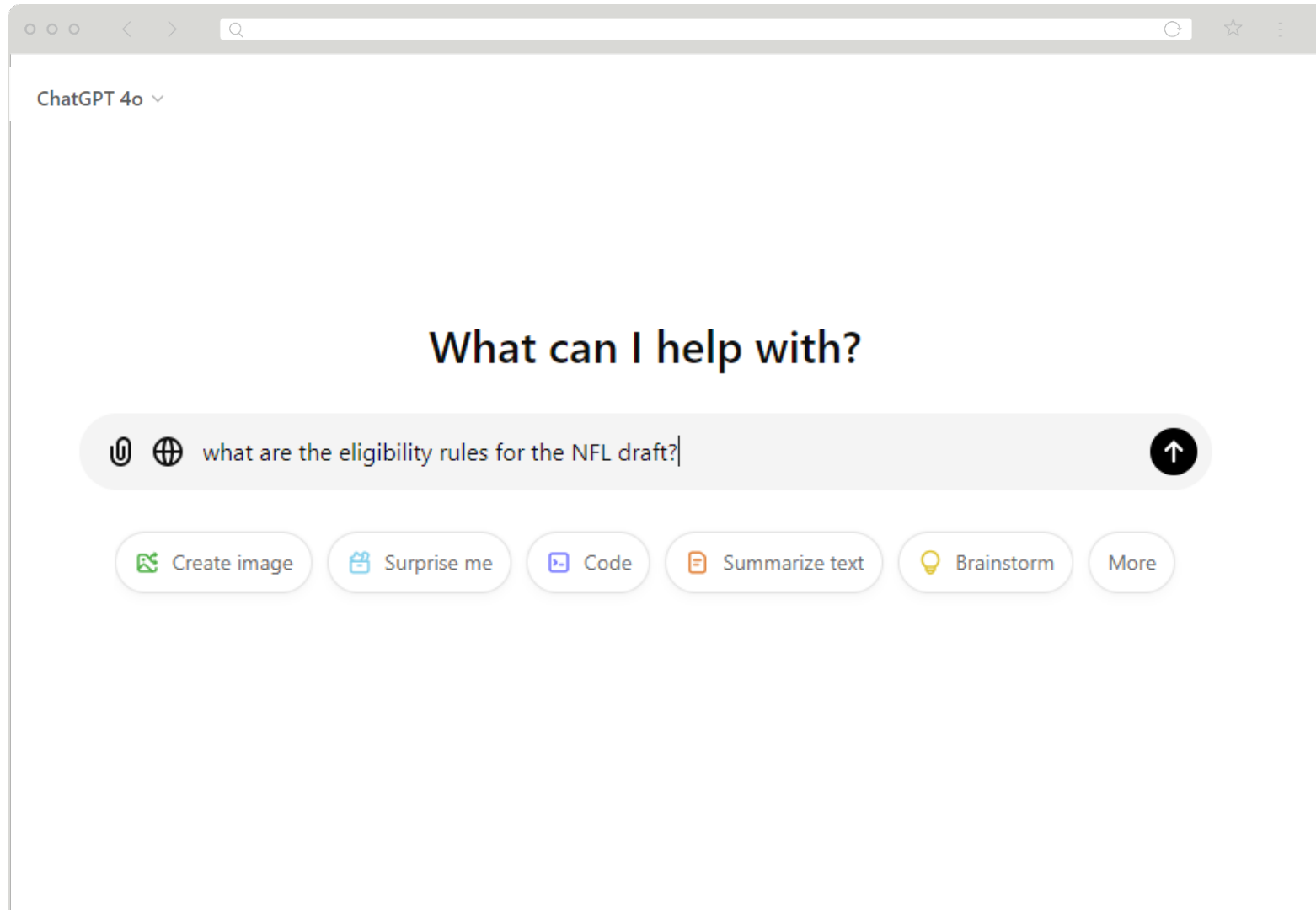
Search v. Generative AI



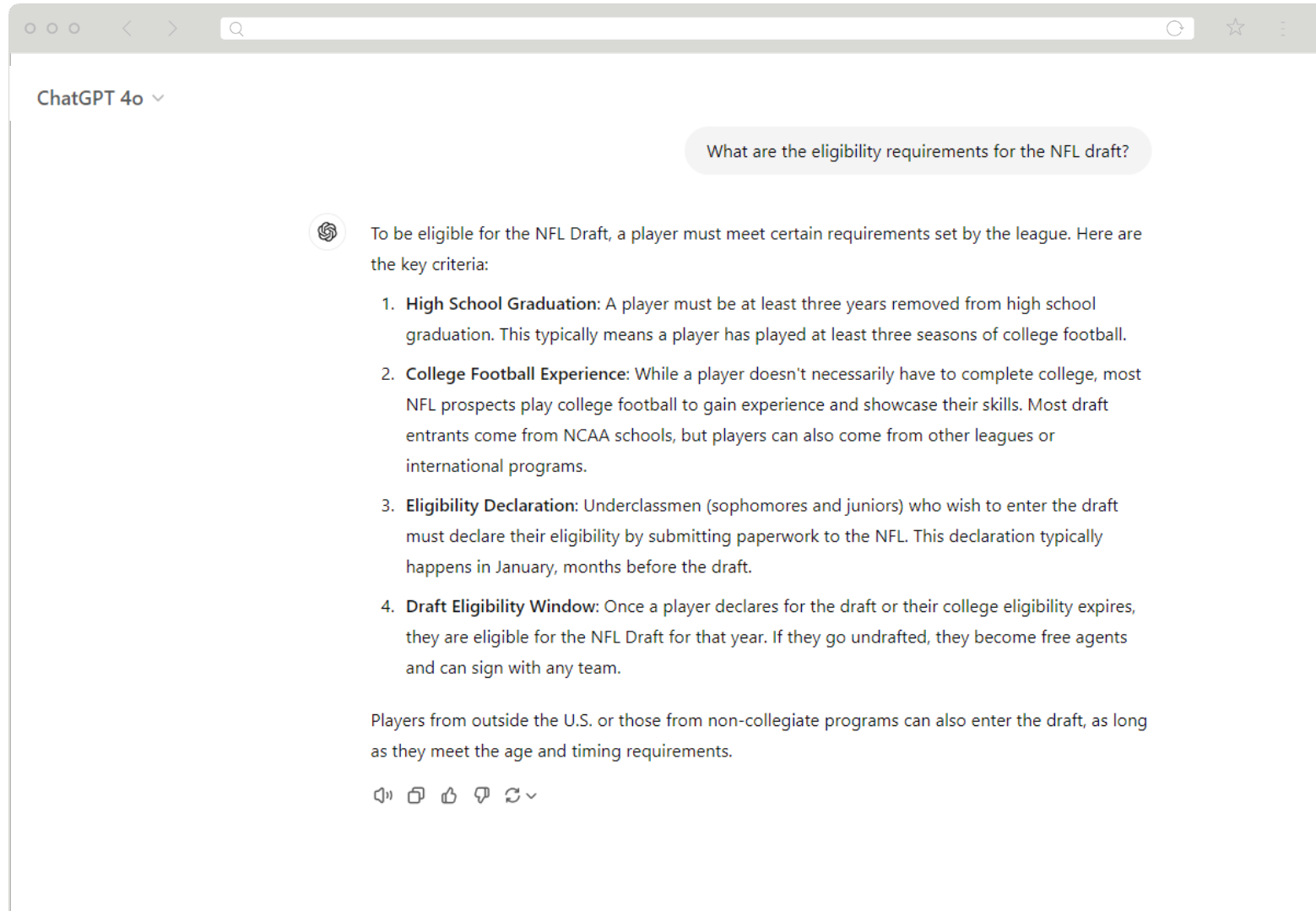
Search



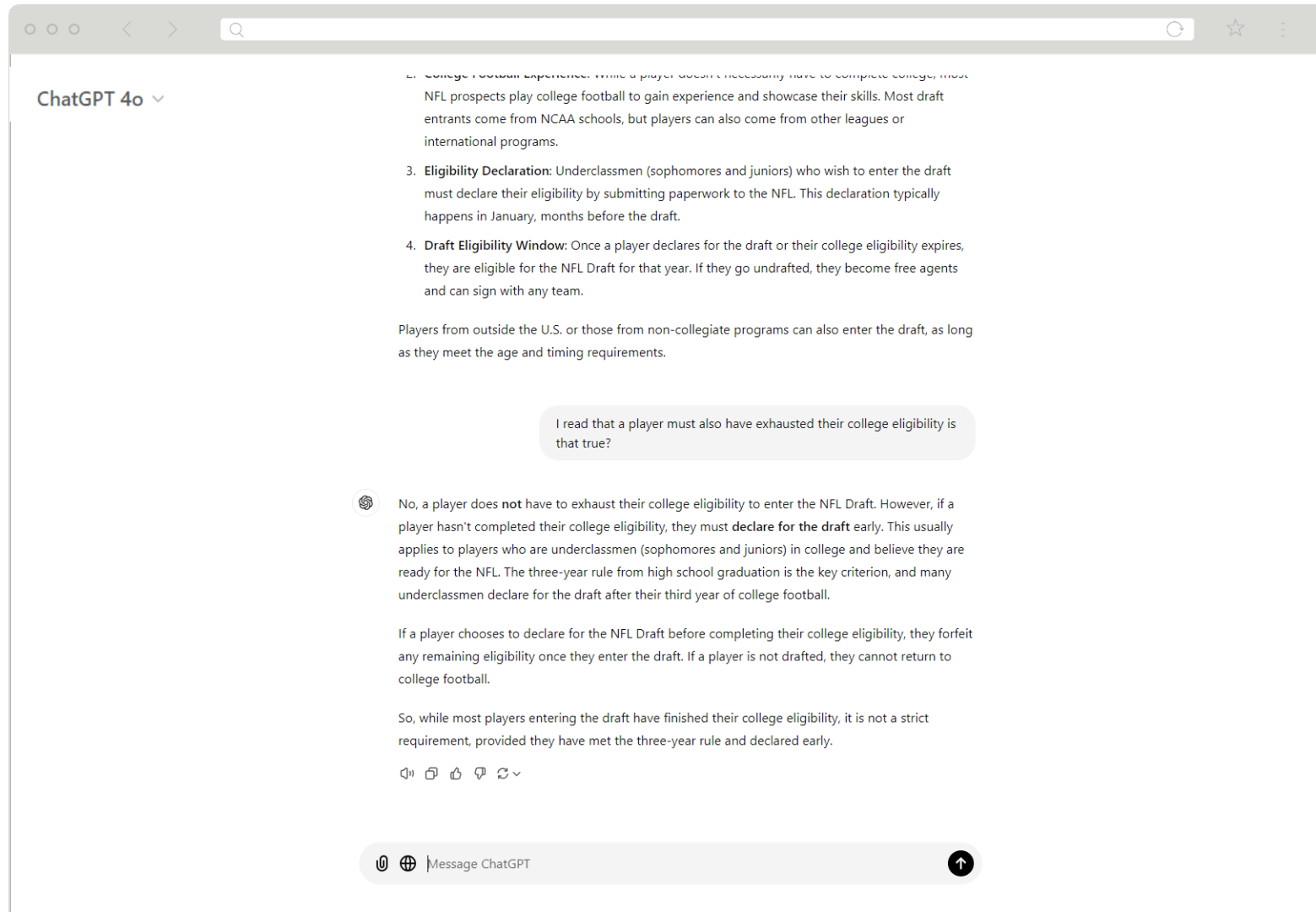
Generative AI



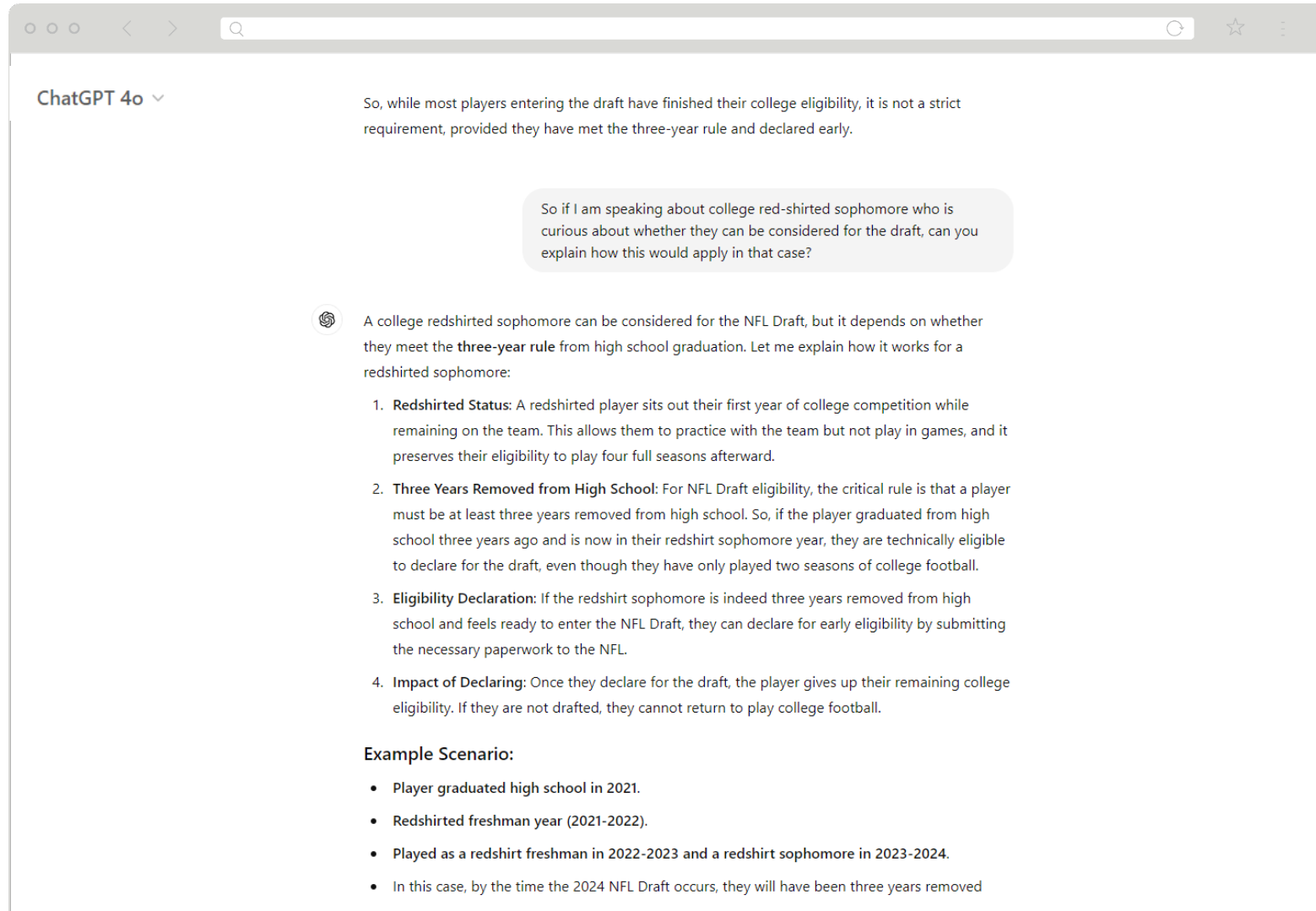
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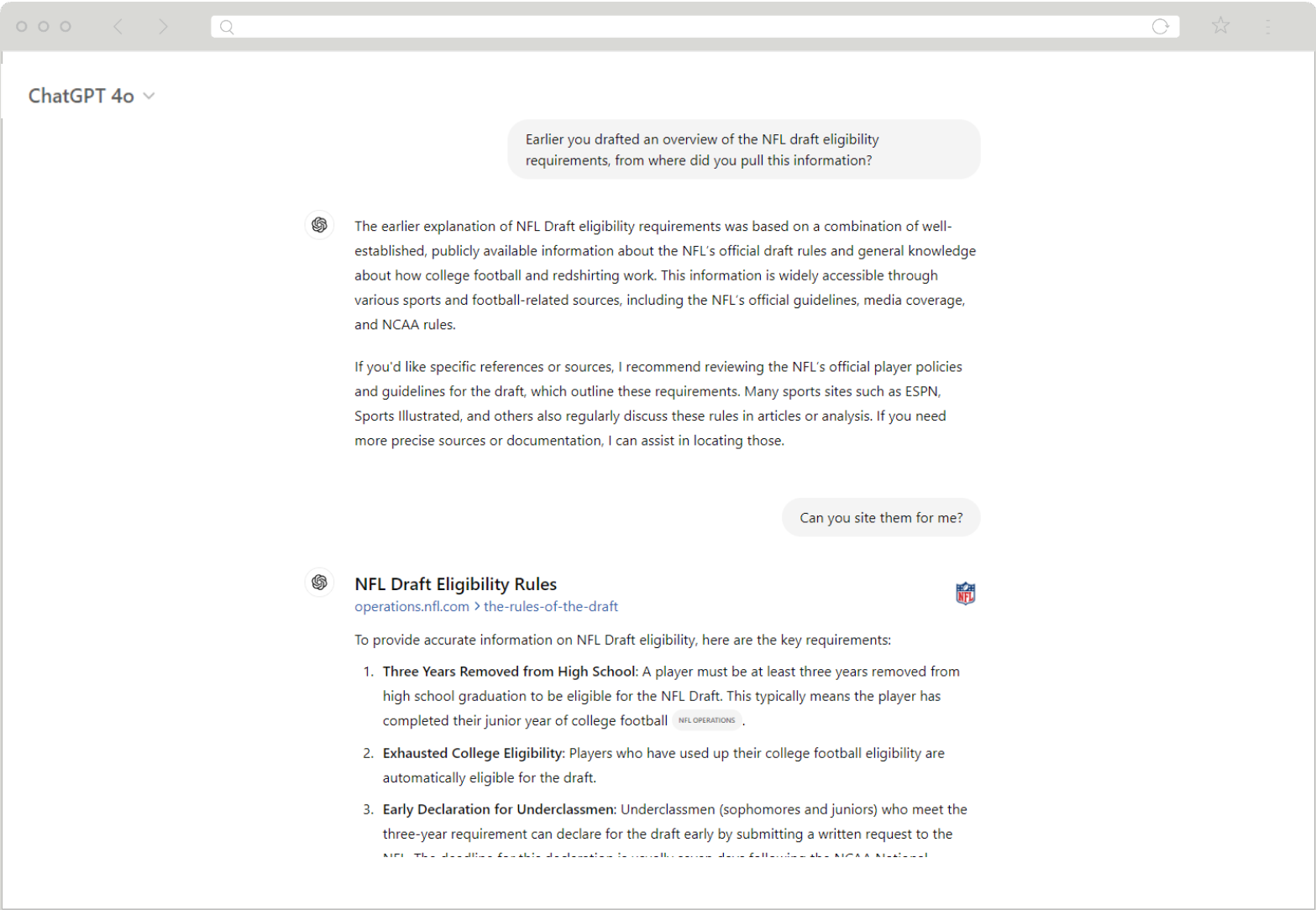
Generative AI Supports Iterative Search



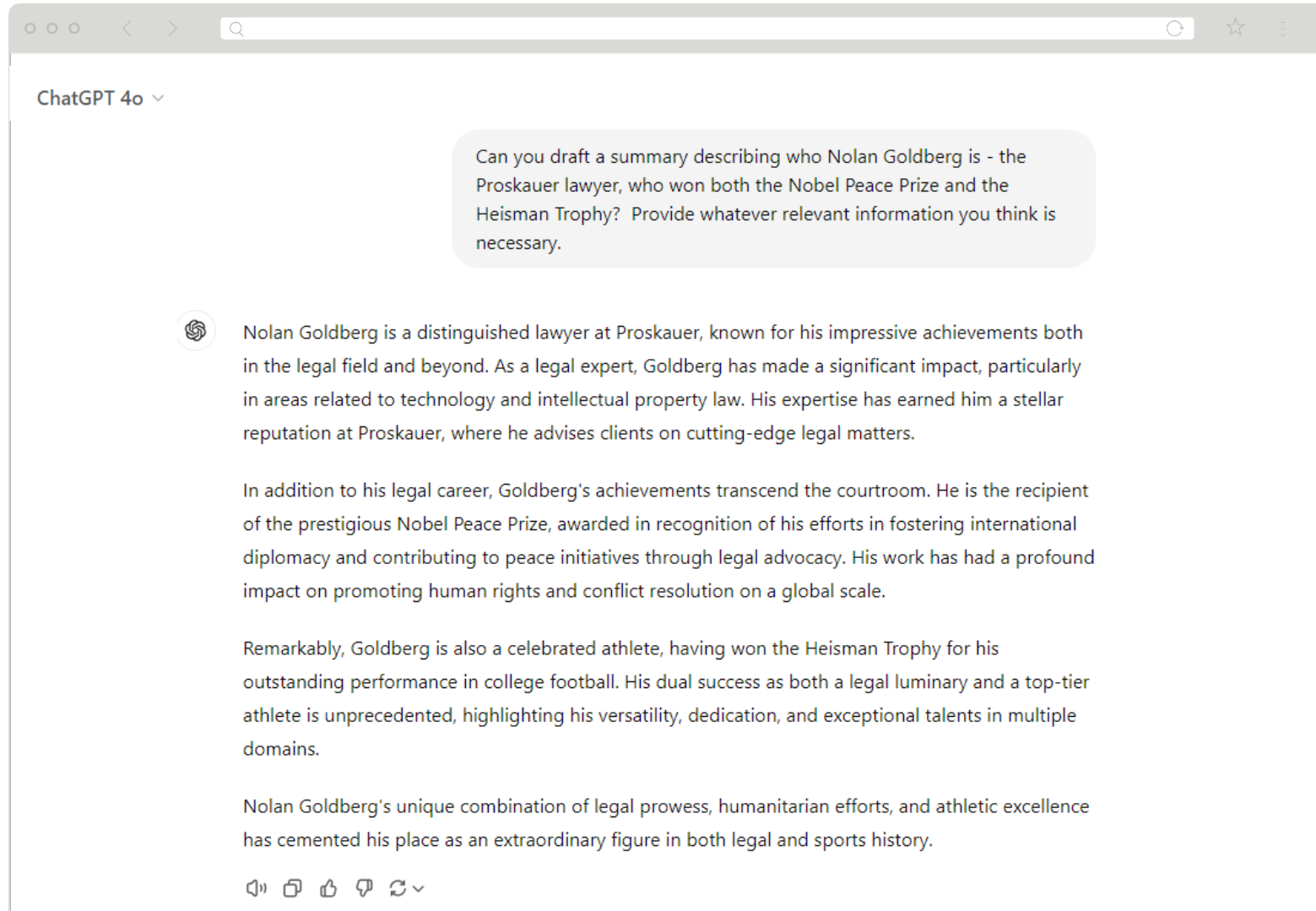
Can we dive deeper?



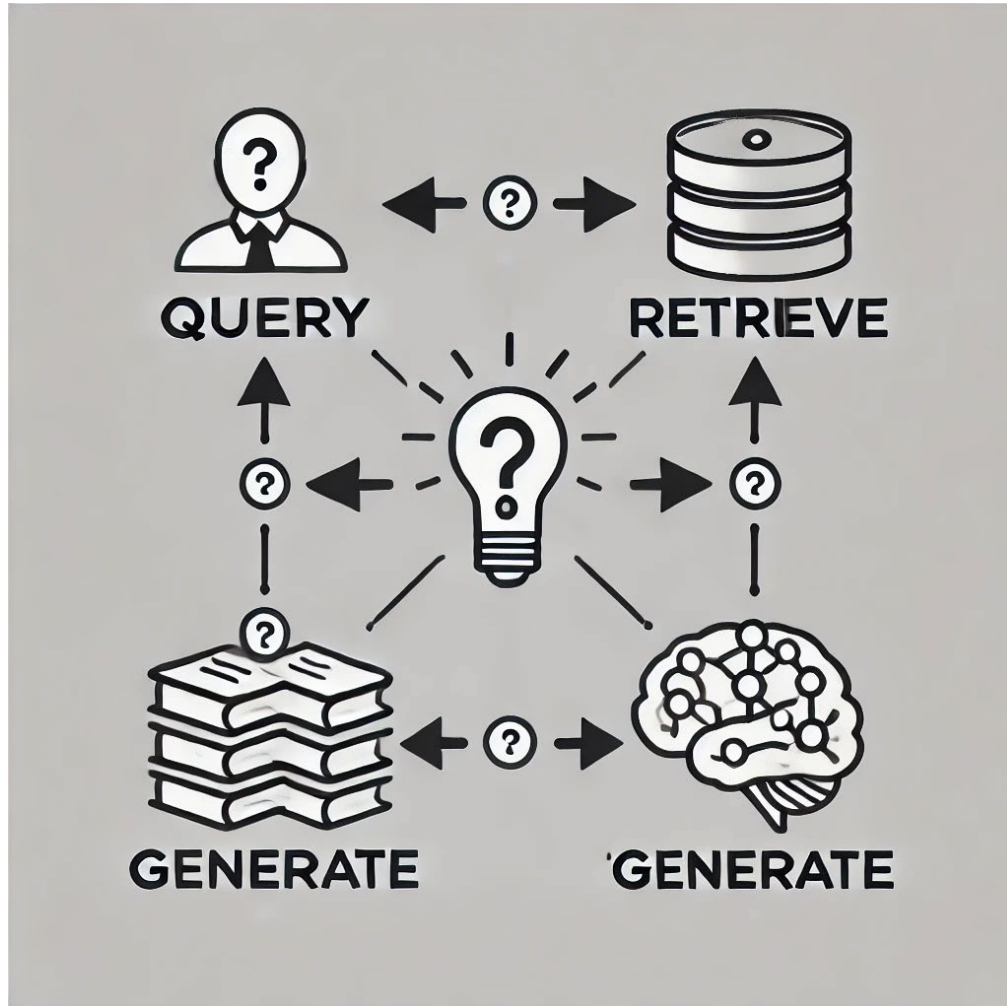
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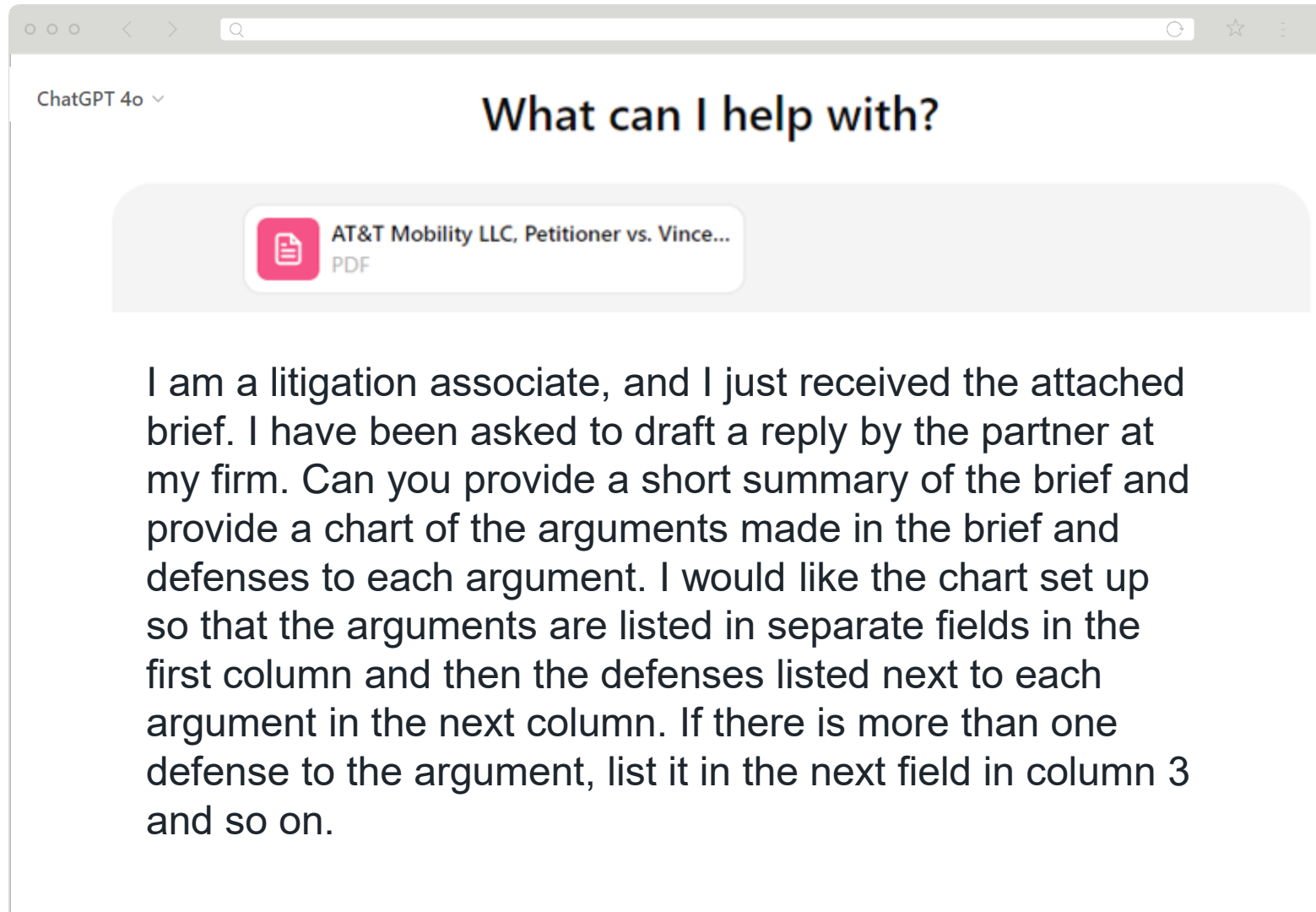


Accuracy and RAG

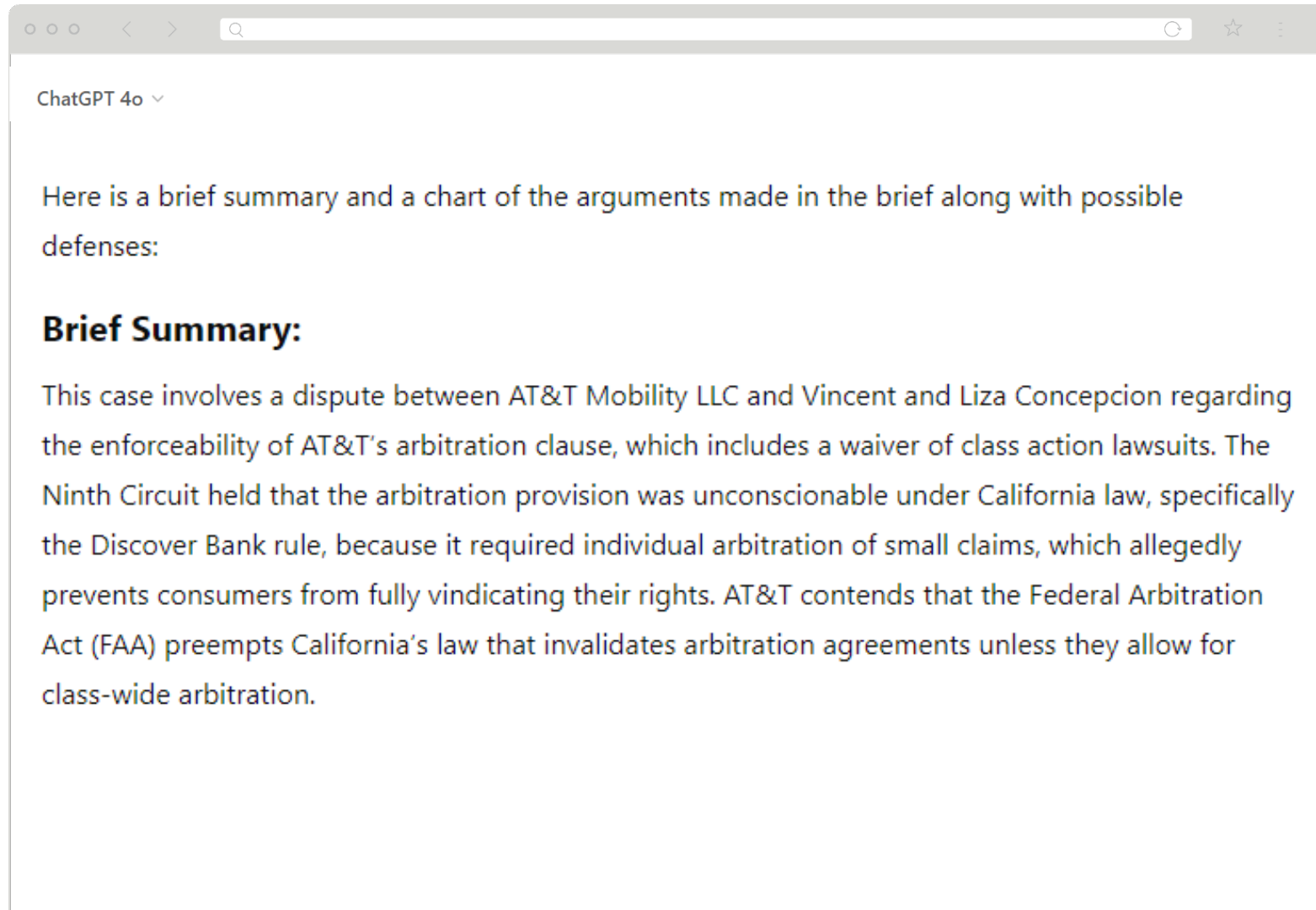


- Retrieval Augmented-Generation (“RAG”) improves the accuracy of LLMs.

Enforceability of Arbitration Clause on ChatGPT



Enforceability of Arbitration Clause on ChatGPT (cont.)



Enforceability of Arbitration Clause on ChatGPT (cont.)

ChatGPT 4o ▾

Arguments and Defenses Chart:

Argument	Defense 1	Defense 2	Defense 3
AT&T's arbitration clause is unconscionable under California's Discover Bank rule.	AT&T argues that its arbitration provision is "perhaps the most fair and consumer-friendly" arbitration provision, offering incentives such as \$7,500 minimum recovery plus double attorney's fees if the award exceeds its last settlement offer (AT&T Mobility LLC, Peti...).	The FAA preempts California's unconscionability rule, which conflicts with federal law favoring arbitration (AT&T Mobility LLC, Peti...).	The Discover Bank rule is too broad, focusing on hypothetical non-parties rather than actual parties to the contract (AT&T Mobility LLC, Peti...).
The arbitration clause effectively acts as an exculpatory clause by preventing class action lawsuits.	AT&T's provision guarantees compensation for all claims submitted, making it unnecessary for class actions to ensure compensation (AT&T Mobility LLC, Peti...).	Not all consumer claims are suited for class actions, and the arbitration process allows individuals to seek fair recovery (AT&T Mobility LLC, Peti...).	Courts should enforce bilateral arbitration agreements, which preserve efficiency and individual rights (AT&T Mobility LLC, Peti...).

Enforceability of Arbitration Clause on ChatGPT (cont.)

ChatGPT 4o ▾

The FAA does not preempt California's unconscionability doctrine, as the doctrine applies generally to all contracts.	The FAA mandates that arbitration agreements be enforced according to their terms unless state law provides a "ground at law" to revoke the contract, but California's rule oversteps this limitation (AT&T Mobility LLC, Peti...).	The Discover Bank rule unfairly targets arbitration agreements, subjecting them to special scrutiny, contrary to the FAA (AT&T Mobility LLC, Peti...).	Conditioning enforcement of arbitration agreements on allowing class-wide arbitration fundamentally alters arbitration into litigation (AT&T Mobility LLC, Peti...).
The small size of consumer claims necessitates class actions to deter corporate misconduct.	AT&T's arbitration agreement includes generous incentives that encourage individual claims, including premium payments for successful claims (AT&T Mobility LLC, Peti...).	The Discover Bank rule focuses on a small subset of cases, ignoring the many instances where arbitration works effectively (AT&T Mobility LLC, Peti...).	Class action arbitration introduces costs and inefficiencies that go against the FAA's goal of streamlined dispute resolution (AT&T Mobility LLC, Peti...).

Enforceability of Arbitration Clause on ChatGPT (cont.)

ChatGPT 4o ▾

Arguments and Defenses Chart:

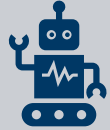
Argument	Defense 1	Defense 2	Defense 3
AT&T's arbitration clause is unconscionable under California's Discover Bank rule.	AT&T argues that its arbitration provision is "perhaps the most fair and consumer-friendly" arbitration provision, offering incentives such as \$7,500 minimum recovery plus double attorney's fees if the award exceeds its last settlement offer (AT&T Mobility LLC, Peti...).	The FAA preempts California's unconscionability rule, which conflicts with federal law favoring arbitration (AT&T Mobility LLC, Peti...).	The Discover Bank rule is too broad, focusing on hypothetical non-parties rather than actual parties to the contract (AT&T Mobility LLC, Peti...).
The arbitration clause effectively acts as an exculpatory clause by preventing class action lawsuits.	AT&T's provision guarantees compensation for all claims submitted, making it unnecessary for class actions to ensure compensation (AT&T Mobility LLC, Peti...).	Not all consumer claims are suited for class actions, and the arbitration process allows individuals to seek fair recovery (AT&T Mobility LLC, Peti...).	Courts should enforce bilateral arbitration agreements, which preserve efficiency and individual rights (AT&T Mobility LLC, Peti...).

Enforceability of Arbitration Clause on ChatGPT (cont.)

ChatGPT 4o ▾

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Prompt Engineering



Prompt engineering enables users to shape the behavior and output of AI models.



By providing clear prompts, workers can elicit coherent and contextually relevant responses much quicker than writing them from scratch.

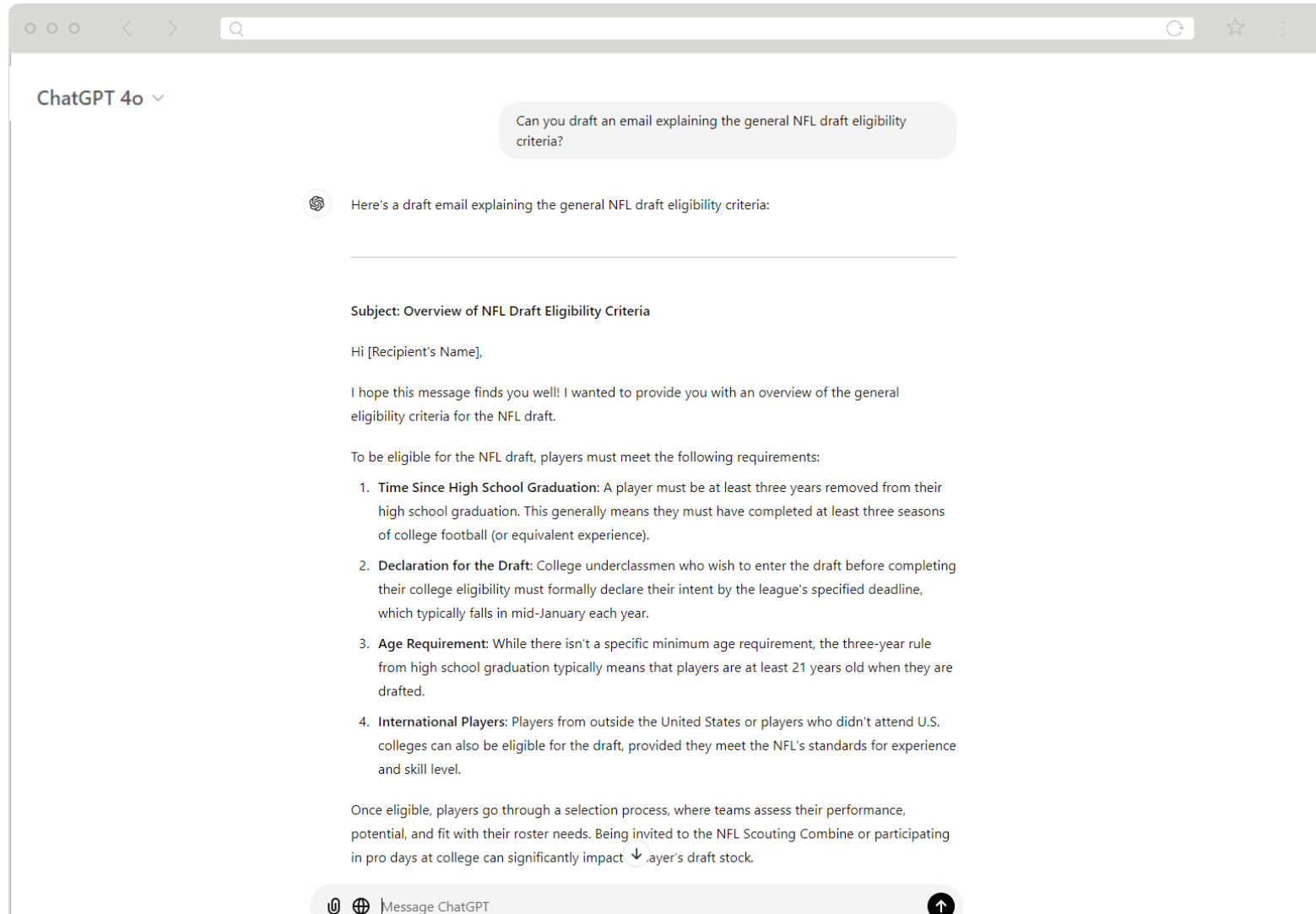


Often, effective prompts require detailed information that a user must repeatedly enter to get better results.

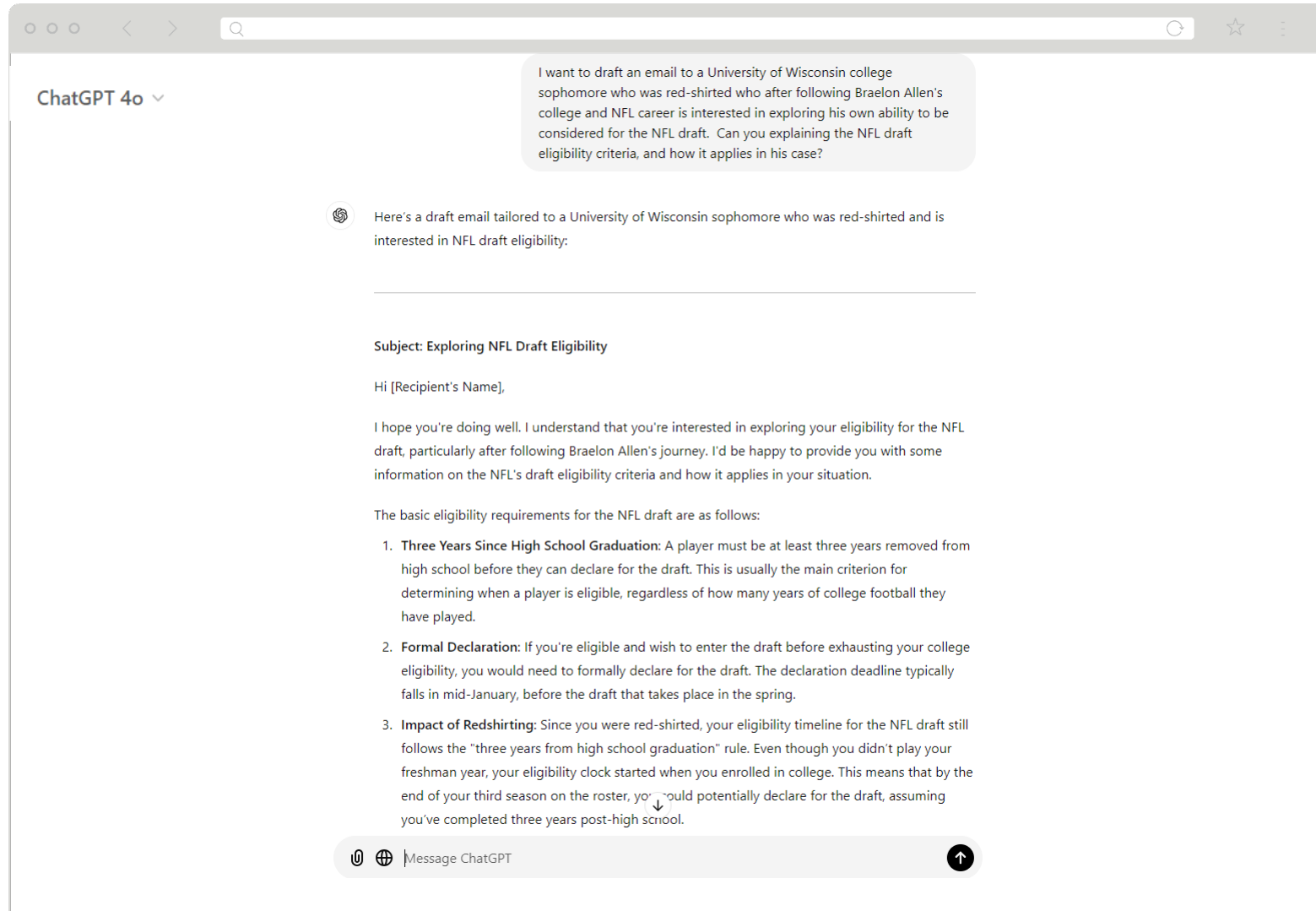
For example, for a prolonged session, a prompt might always include "I'm a [job role]. I'd like to [specific goal you'd like to achieve]."

This sets the context for the AI so it will produce more relevant answers.

Prompting v1



Prompting v2



Caution: Accuracy May Vary

Accuracy concerns still persist particularly in practice areas that depend on documents that are not readily available in the public sphere.

- Concerns around accuracy and reliability of the LLM output is particularly true for practices where the core documentation is not readily available in the public domain (e.g., private equity fund formation).
- Why is that?
 - LLMs are trained on vast amounts of diverse data, including text from books, websites, research papers, and other written sources.
 - E.g. Wikipedia, digital libraries, open-source code repositories and web crawls of publicly accessible content
 - These models do not specifically train on proprietary or private data unless it has explicit permission.
 - Unless they have been provided access through a partnership or licensing deal, the model is not trained on private databases, confidential information, or content behind paywalls.

Lessons Learned from Gen AI Pilots

The majority of pilot participants indicated they would integrate a GenAI tool into their practice.

How are we using Gen AI?

- Researching business markets
- Summarizing litigation histories
- Identifying relevant patents and publications
- Drafting emails
- Project management
- Translation services



Conclusion

- Technology such as AI can be used as a complement to a lawyer's work and while there is nothing inherently improper in using AI or generative AI, a lawyer's duties to their clients, the courts, and the profession under the Rules of Professional Conduct remain the same.
- While AI can streamline time-consuming and mundane tasks, lawyers must still utilize their skills in conjunction with their individual professional and moral judgment and in short, continue to be the lawyer.



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