Sessions on:

Emerging AI: A Law & Technology Perspective
Advanced Perspectives on Law & Technology

Data Science and Artificial Intelligence Initiative
Workshop on Adjudication of AI

Neurotechnologies, Brain Function & Cognition

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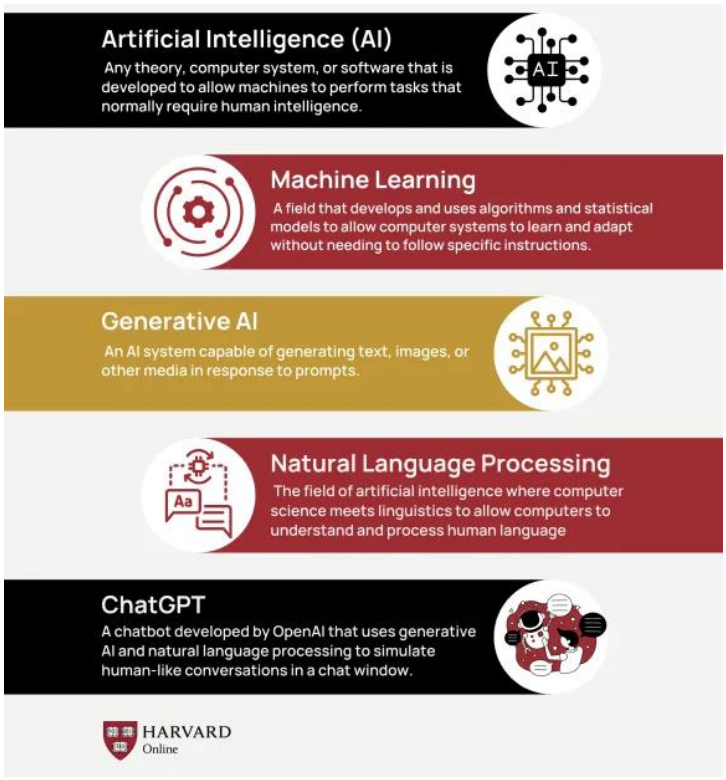
About Professor Heverly

Robert Heverly is an associate professor of law at Albany Law School, having joined Albany Law School's faculty in 2010. Prof. Heverly formerly taught at Michigan State University College of Law after serving as a faculty member and the director of the Masters in Law (LL.M.) in Information, Technology and Intellectual Property at the University of East Anglia in Norwich, England. Prior to moving to England, Prof. Heverly was a Resident Fellow with the Information Society Project at Yale Law School. Prof. Heverly was also on the staff at the Government Law Center of Albany Law School in the 1990s, and served as Interim Director of the Center for one year after he returned to Albany Law as a faculty member. Prof. Heverly researches and writes in areas at the intersection of technology, law and society, including the quantum internet, cyberspace, drones, robots, AI, and human augmentation (cyborgs!). He teaches classes in Torts, cyberspace law, copyright law, art & entertainment law, and unmanned aerial vehicles (drones!), among others. He has published articles and book chapters on drones, intellectual property, artificial intelligence, and the internet. His article on liability of compromised system owners in denial of service attacks was published in 2020 in the Florida State University Law Review and his book chapter on Tort Law and Artificial Intelligence was published in 2022. Prof. Heverly has held the position of Chair of the American Association of Law Schools' Internet and Computer Law Section, is a member of the American Bar Association and the New York State Bar Association, and was the Reporter for the Uniform Law Commission's "Uniform Tort Law Relating to Drones Act." He holds a J.D. from Albany Law School, an LL.M. from Yale Law School, is a Fellow with the Center for Quantum Networks, and remains an Affiliated Fellow with the Information Society Project at Yale Law School.

Introduction to "Generative Artificial Intelligence"

The phrase "Artificial intelligence" is very much in vogue today. Today's usages are influenced by the splashy debut of generative artificial intelligence made available with the release of ChatGPT in November of 2022. What it means varies by how it is used, and none of those uses currently include the kinds of true artificial intelligence that have long populated science fiction films. To be clear, artificial intelligence as it is used today does not equate with sentience or human-level reasoning. Instead, there are variety of ways of implementing the various types of what is generically referred to as "AI," and each has different ways in which it must be understood, can be used, and should be considered. Throughout these materials I will often refer solely to ChatGPT as it is the best known and most widely adopted generative AI technology, but readers should keep in mind that other implementations of generative AI exist and will likely grow in usage alongside the GPT technologies (the current version of which is GTP-4).

Let's start with the basics of artificial intelligence as it is currently conceived and implemented:



https://www.harvardonline.harvard.edu/blog/benefits-limitations-generative-ai

The general overview of artificial intelligence is useful in setting the foundation for understanding where modern developments are taking place. There are generally two broad categories by which AI technologies are grouped: The following chart describes the ways in which artificial intelligences can be categorized:

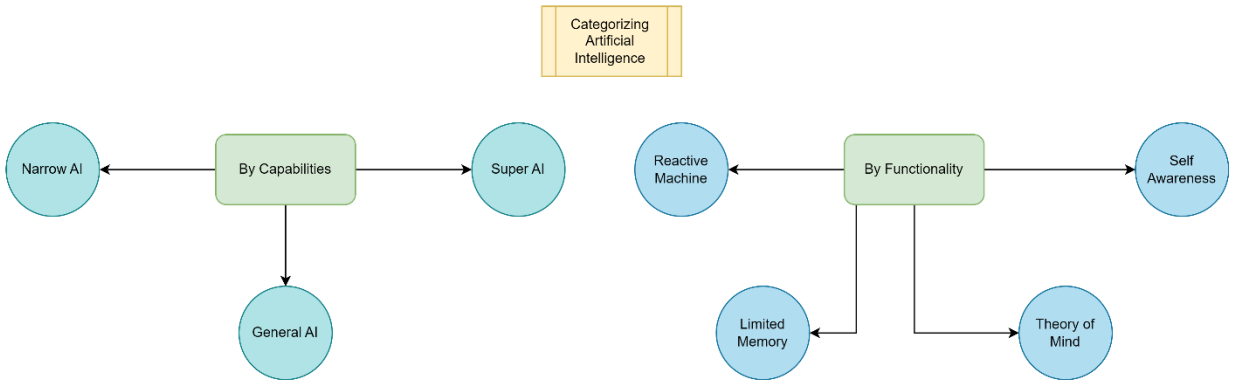


Chart by R. Heverly

Categorization by Capability

Narrow AI is the type of artificial intelligence that we have today, which is also sometimes referred to as "weak AI." It is goal oriented and created to accomplish a specific task or tasks. Technologies currently available fall into the "Narrow AI" category, though some feel OpenAI's GPT systems are too advanced for this classification.

General AI, also known as "strong AI," describes a technology that can understand in the same way as humans, and thus can learn any intellectual task that a person can do. Knowledge in this type of AI is fungible: it can move knowledge and understanding between and among domains in the same way that humans can. While OpenAI's GPT systems are considered by some to be too advanced to be considered narrow AI, they are not yet advanced enough to be considered general AI.

Super AI is the kind of AI that we read about in books and see in movies in that it surpasses human intelligence and human problem-solving capabilities. Such systems would, should they be developed, have their own thoughts, emotions and wishes and make decisions completely on their own, having grown "beyond" any programming and data training provided in their development. They are also known as superintelligent AI. Super AI technologies do not currently exist.

Categorization by Decision-making Functionality

Reactive machines are generally considered the forerunners of modern AI technologies. They react only to existing, real-time situations, and maintain no "memory" of past exchanges or experiences. Chess playing super computers are a well-known example of reactive machines. Highly skilled, but also limited in how they can interact with the world.

A **limited memory** is a technology that arises from machine learning using previously known information, events, and other data that can grow over time. These machines can learn from their own interactions with the world and thus create experiential knowledge that can form the basis for future actions.

Theory of mind systems are those that are intended to achieve near parity with human decision-making. This is not just outward characteristics, such as voice or appearance, but the ability to essentially "pass as human" when interacting with human beings. This category generally would require behavior as well as providing outputs, behavior including things such as emotional responses that occur as expected based on context. There are not yet any practical applications of theory of mind AI at this point in time.

A **self-aware** AI would be one that was on par with or better than human beings, with a consciousness and true self-awareness. These, like the superintelligent AI capability category above, do not exist.

Generative AI, the technology that is available and progressing rapidly today, is thus an advanced narrow AI in the form of a limited memory. According to IBM, Generative AI refers to deep-learning models that can generate high-quality text, images, and other content based on the data they were trained on.[1]

Artificial Intelligence in the Current Context

Generative AI, regardless of its form or its output, is focused on predictive methods of generating content. That is, a text created by generative AI is not trying to be accurate but is instead trying to use predictive algorithms to provide output that would be expected next in a logical sense. In his short book, "What is ChatGPT … and why does it work?" Stephan Wolfram explains it as follows:

> The first thing to explain is that what ChatGPT is always fundamentally trying to do is to produce a "reasonable continuation" of whatever text it's got so far, where by "reasonable" we mean "what one might expect someone to write after seeing what people have written on billions of webpages, etc."[2]

The University of Alberta's Centre for Teaching and Learning provides the following, more detailed discussion of text based generative AI:

> ChatGPT's AI does not reason, nor does it think for itself in a manner akin to human cognition based on lived human experience. Instead, it is an AI tool designed to generate human-like text output based on its default Large Language Models (LLMs). Responses are often plausible across a wide range of topics. At the core of its machine learning activities, it is, based on human inputs (prompts), able to perform natural language tasks by estimating the probabilities of word sequences to create coherent, sentence, paragraph, and essay-length text-based output. To accomplish this, ChatGPT employs a neural network trained on vast amounts of data ('data lakes') collected from the Internet (current to 2021).
>
> Here is a simple example: Let's assume ChatGPT is given the unfinished prompt, "The golf ball rolls down… ." Given this data, it will seek to generate the next word based on its estimation of the most probable word sequences to complete the utterance. Many are already very familiar with and use on

[1] What is Generative AI? https://research.ibm.com/blog/what-is-generative-AI (last visited November 26, 2023).
[2] Stephan Wolfram, What is ChatGPT and Why Does it Work, p. 10 (2023).

> an almost daily basis a much simpler version of this kind of AI: predictive text. We use it when we message on an app, when we craft an email, or when we write using Google Docs. Here's a possible step-by-step reenactment of how ChatGPT might predict the sequence of words to complete the sentence:
>
> Prompt: "The golf ball rolls down"
> Prediction 1: "the"
> New Input: "The golf ball rolls down the"
> Prediction 2: "hill"
> New Input: "The golf ball rolls down the hill"
> Prediction 3: "and"
> New Input: "The golf ball rolls down the hill and"
> Prediction 4: "into"
> New Input: "The golf ball rolls down the hill and into"
> Prediction 5: "the"
> New Input: "The golf ball rolls down the hill and into the"
> Prediction 6: "hole."
>
> **Final Output:** "The golf ball rolls down the hill and into the hole."
>
> ChatGPT predicts each subsequent word based on the probability of the word sequence, ultimately generating a coherent sentence related to the unfinished starting prompt. This example demonstrates how the AI model can extend a given input phrase by estimating the most likely word sequences, using its transformer architecture and the Large Language Model on which it is trained.[3]

What can a person do using generative AI technologies? One summary in January 2023 provided this synopsis:

> One of the most notable tasks that ChatGPT can perform is natural language processing (NLP). This allows it to understand and respond to human language in a way that is similar to how a human would. Here are the list of the task that ChatGPT can perform.

[3] About Generative AI, https://www.ualberta.ca/centre-for-teaching-and-learning/teaching-toolkit/teaching-in-the-context-of-ai/generative-ai.html (citations omitted)(last visited November 26, 2023).

Text generation: ChatGPT can generate text in various formats such as stories, news articles, and poetry.

Automatic summarization: ChatGPT can take a long piece of text and summarize it into a shorter version.

Natural language understanding (NLU): ChatGPT can understand the meaning of text and can be used for tasks such as sentiment analysis, named entity recognition, and text classification.

Language translation: ChatGPT can be fine-tuned for language translation tasks to translate text from one language to another.

Dialogue generation: ChatGPT can generate human-like dialogues, making it useful for chatbot and virtual assistant applications.

Text-to-speech: ChatGPT can be fine-tuned for text-to-speech tasks to convert text into spoken words.

Image captioning: ChatGPT can be fine-tuned for image captioning tasks, where it can generate captions for images and videos.

Reading comprehension: ChatGPT can be fine-tuned for reading comprehension tasks, where it can answer questions based on a given text.

Question answering: ChatGPT can answer questions based on a given context or knowledge base.

Text completion: ChatGPT can complete a given text based on a given context or prompt.[4]

Changes in GPT-4 show the progress that OpenAI—ChatGPT's developer and operator—is making in relation to the technology. Version 4 advances certain aspects of generative AI and adds significant new features. Differences between the current and last version include:

Size: GPT-4 is larger and more complex than previous versions, both in size and computational power, which allows

[4] Dilap Kashyap, ChatGPT's abilities, https://levelup.gitconnected.com/chatgpts-abilities-a-comprehensive-list-of-tasks-the-ai-language-model-can-perform-5a44492ab94 (last visited November 26, 2023).

it to respond to more complex requests and handle more complex tasks.

Memory: GPT-4 can retain context longer than previous versions, meaning that it can retain continuity in conversations and prompts for longer requests.

Speed: GTP-4 is more efficient—ie, faster—at accomplishing its tasks than previous versions.

Image Input: For the first time, GPT-4 is able to process images, allowing users to upload images for analysis by GPT-4.

Languages: GPT-4 has begun to be multilingual, while past versions were primarily focused on the English language.

Generative AI and the Law

ChatGPT's release led to a flurry of public policy developments surrounding its creation, implementation, and use. President Biden, for example, has attempted to compensate for Congress's inaction by adopting an executive order entitled, "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." This sixty-four page Executive Order attempts to address AI safety, innovation, responsible development in the workforce context, civil rights, user rights, privacy and civil rights, AI risks, and the federal government's role in AI development.[5] The National Institute of Standards and Technology (NIST) has adopted a risk management framework for AI, as well.[6] The Federal Office of Management and Budget has requested comments on its draft memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," that would establish new agency requirements in relation to AI.[7] That AI development, and generative AI development in particular, poses policy and legal challenges remains clear as governments at all levels work to address this new framework of research and content creation.

When ChatGPT was first released using the GPT-3.5 framework just over a year ago, it was met with much fanfare. More than a million people signed up to use the technology, and screenshots of GPT "chats" became common on social media sites including what was then known as Twitter. Users asked it to explain in Biblical style how to remove a peanut butter sandwich from a VCR, to review and improve computer code, and to write essays and papers.[8]

Lawyers were not to be left out of the fun, however, and since ChatGPT's introduction, lawyers and judges have been using and experimenting with the technology in a host of ways. A number of software and legal technology providers have begun offering AI related services within their products. These include well established companies, such as Microsoft, which offers its "CoPilot"

[5] The White House, Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, October 30, 2023.
[6] NIST, Artificial Intelligence Risk Management Framework (AI RMF 1.0) (January 2023), https://doi.org/10.6028/NIST.AI.100-1 (Last visited, November 26, 2023).
[7] 88 Fed. Reg. 75625 (Nov. 3, 2023).
[8] *See, e.g.*, Kevin Roose, The Brilliance and Weirdness of ChatGPT, New York Times (Dec. 5, 2022), https://www.nytimes.com/2022/12/05/technology/chatgpt-ai-twitter.html?unlocked_article_code=1.B00.ebF_.GamD49oD6KaL&smid=url-share (last visited November 26, 2023; this is a shared, free link that does not require a subscription to view).

AI both as a standalone technology and within its Office365 product suite. Lexis/Nexis, Westlaw and Bloomberg Law are either offering or soon will be offering the inclusion of AI technologies within their products. ChatGPT and the GPT-3.5 and GPT-4.0 products are being offered by OpenAI for integration into various products, and some of the mentioned products use GPT in their services. In addition, a variety of stand-alone or limited purpose products are also being offered to lawyers and law firms globally. These include Gracenote.ai,[9] KelvinChat,[10] Spellbook,[11] and Reveal.[12]

With the numerous offerings to lawyers, how will AI fit into the future of legal practice? Some are pondering a future practice with fewer lawyers and more bots—a term, from the word "robots," often used when referring to automated processes.[13] Others think about increased access to the courts, especially for traditionally underserved and geographically distant populations.[14] Given that significant issues of bias in AI training and utilization have arisen even in the relatively brief time that the technologies have been publicly available for use, concerns over use of AI in the legal profession remain pronounced.[15]

Lawyers and judges have already engaged, some in spectacular fashion, with AI in legal practice. Some of the ways in which AI related technologies, especially chat-bots, may be useful in law practice include drafting and reviewing contracts, keep abreast of regulatory and legal changes, assisting with crafting legal arguments, conducting legal research, understanding complex terms and concepts, and even generating generalized descriptions of areas of the law or specific legal doctrines for non-experts.[16] It is with this variety of uses in mind that we turn to actual experience to date with AI technologies.

AI and Law: Selected Experiences to Date

Many, but not all, of the recent instances of lawyers using generative AI are what one might term, "a mess." One of the most publicized examples occurred in New York City in the summer of 2023 in a case filed in the Federal District Court for the Southern District of New York.[17] In that case, an attorney working on a motion used ChatGPT to conduct legal research and included the outputs of the research in the brief as they received them from ChatGPT. Unfortunately for the lawyer, many of the cases that ChatGPT cited to support their client's position were not real. ChatGPT had made them up, citations and all, along with their holdings and facts.[18] ChatGPT was also apparently willing to provide the lawyer with the cases themselves when the lawyer requested them, which fictional cases the lawyer then provided to the Court.

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[9] https://gracenote.ai/
[10] https://kelvin.legal/software_agents_part1/
[11] https://www.spellbook.legal/
[12] https://www.revealdata.com/
[13] *See, e.g.,* Will ChatGPT make lawyers obsolete? (Hint: be afraid), Reuters (Dec. 9, 2022), https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/
[14] *See, e.g.,* Andrew Perlman, The Implications of ChatGPT for Legal Services and Society, *forthcoming*, Michigan Journal of Technology Law (2023); John Villasenor, How AI will Revolutionize the Practice of Law (Brookings Institution, March 20, 2023) *https://www.brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/* (last visited November 26, 2023); Ashwin Telang, The Promise and Peril of AI Legal Services to Equalize Justice, Harvard Journal of Law and Technology Digest (March 14, 2023), https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice
[15] *See, e.g.,* Drew Simshaw, Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services, 24 Yale J.L. & Tech. 150 (2022).
[16] *See*, Perlman, *supra* note 14.
[17] Mata v. Avianca, Inc., Opinion and Order on Sanctions, Case 1:22-cv-01461-PKC, p. 6 (S.D.N.Y. 2023).
[18] The tendency of chat-bots such as ChatGPT to "make up" things that appear to be factual is often referred to as "hallucinating" by the AI, but is probably more accurately referred to as "fabrication" by the AI (hallucinating would seem to require that the AI have thought the fabrications were "true," as one does with hallucinations, but today's AI's don't have the ability to believe or "know" things in that sense, which seems to make "fabrication" the more appropriate term, and it is the term Judge Castel used in his order. Mata v. Avianca, Inc., Opinion and Order on Sanctions, Case 1:22-cv-01461-PKC, p. 6 (S.D.N.Y. 2023).

The court had requested the cases when opposing counsel notified the Court that they could not locate them.

The Court, as you might imagine, was not amused. District Court Judge Castel's forty-three page sanctions order went step-by-step through a number of the fabricated cases. For one of the cases, the Court noted: "The "Varghese" decision shows stylistic and reasoning flaws that do not generally appear in decisions issued by United States Courts of Appeals. Its legal analysis is gibberish."[19] Note also the lawyers' actions after the defendants brought the problem with the cases to the attention of the plaintiff's attorneys, including a lie by one that he was out of town and needed more time to respond. These actions exacerbated the situation significantly. The judge sanctioned the attorneys $5,000, and ordered them to take a host of actions related to their claims (such as notifying any judge who they had named as having authored one of the fictitious decisions that they had done so).

The *Mata* case drew a significant amount of attention in the legal, and the non-legal, press, but further cases have occurred since then and related legal issues have confronted a number of courts. A number of approaches to them have evolved and are likely to evolve further. In addition to court orders regarding the use of generative AI by attorneys in their courts (see below), courts have addressed additional instances of generative AI use in a variety of ways. For example, in *Ex parte Lee*, Texas's Tenth Court of Appeals suspected that generative AI had been used in briefing a case in which the opposing party found what appeared to be fabricated caselaw:

> Based upon a recent Texas Bar CLE, "Have the Robot Lawyers Finally Arrived? Practical Concerns and Ethical Dimension of ChatGPT," presented by John G. Browning of Spencer Fane LLP, it appears that at least the "Argument" portion of the brief may have been prepared by artificial intelligence (AI).[20]

Rather than sanction the lawyer who submitted the brief, however, the court simply moved on with its business, noting:

> Because we have no information regarding why the briefing is illogical, and because we have addressed the issue raised on appeal, we resist the temptation to issue a show cause order as a New York federal district judge did in Mata v. Avianca, Inc., 2023 U.S. Dist. Lexis 94323 (S.D.N.Y., May 4, 2023, order), or report the attorney to the State Bar of Texas for a potential investigation for a violation of the State Bar rules.[21]

A Colorado attorney was not so lucky, having been suspended from the practice of law for not reading cases or otherwise verifying the information he found using ChatGPT and later incorporated into his papers. The disciplinary ruling notes:

> In April 2023, a client hired Crabill to prepare a motion to set aside judgment in the client's civil case. Crabill, who had never drafted such a motion before working on his client's

[19] Mata v. Avianca at page 11.
[20] *Ex parte Lee*, 673 S.W.3d 755, 757, note 2 (Tex. App.—Waco 2023).
[21] *Id.*

> matter, cited case law that he found through the artificial intelligence platform, ChatGPT. Crabill did not read the cases he found through ChatGPT or otherwise attempt to verify that the citations were accurate. In May 2023, Crabill filed the motion with the presiding court. Before a hearing on the motion, Crabill discovered that the cases from ChatGPT were either incorrect or fictitious. But Crabill did not alert the court to the sham cases at the hearing. Nor did he withdraw the motion. When the judge expressed concerns about the accuracy of the cases, Crabill falsely attributed the mistakes to a legal intern. Six days after the hearing, Crabill filed an affidavit with the court, explaining that he used ChatGPT when he drafted the motion.[22]

As attorneys are certainly having their own difficulties in incorporating generative AI technologies into their work, *pro se* litigants are likewise struggling to stay within judicial expectations, as one might reasonably expect. For example, in *Taranov v. Area Agency of Greater Nashua*, the court noted:

> "In her objection, Taranov cites to several cases that she claims hold "that a state's Single Medicaid Agency can be held liable for the actions of local Medicaid agencies[.]" Doc. 79 at 12-13. The cases cited, however, do no such thing. Most of the cases appear to be nonexistent. The reporter citations provided for Coles v. Granholm, Blake v. Hammon, and Rodgers v. Ritter are for different, and irrelevant, cases, and I have been unable to locate the cases referenced. The remaining cases are entirely inapposite."[23]

A similar finding was made in *Morgan v. Community Against Violence*, in which the Court found the following errors (the full quotation is included here to show the general and thorough approach that courts are taking when confronted with fabricated legal sources and claims):

> First, on page 16, Plaintiff cites to "*Doe v. United Airlines, Inc.*, 754 F.3d 576 (7th Cir. 2014)." This is actually *Young v. Builders Steel Co.*, 754 F.3d 573 (8th Cir. 2014). Next, Plaintiff cites to "*EEOC v. Lockheed Martin Corp.*, 116 F. Supp. 3d 734 (E.D. Pa. 2015)" on page 16. This citation is actually *Caldwell ex rel. La. v. Bristol Myers Squibb Sanofi Pharms. Holding P'ship*, 116 F. Supp. 3d 727 (W.D. La. 2015). On the next page, Plaintiff cites to

[22] People v. Crabill, 23PDJ0627 (Colorado Nov. 22, 2023).
[23] Taranov v. Area Agency of Greater Nashua, No. 21-CV-995-PB, 2022 WL 1018234 (D.N.H. Apr. 5, 2022), reconsideration denied sub nom. Taranov by & through Taranov v. Area Agency of Greater Nashua, No. 21-CV-995-PB, 2022 WL 1686917 (D.N.H. May 26, 2022)

> "*Beck v. University of Kansas Medical Center*, 953 F.3d 1215, 1224 (l0th Cir. 2020)," but the actual citation is *United States v. Goldman*, 953 F.3d 1213 (11th Cir. 2020). On page 20, Plaintiff cites to a nonexistent case out of Las Cruces: "*Las Cruces Sun-News v. City of Las Cruces* (2003-NMCA-099, 134 N.M. 224, 75 P.3d 824)," which is in actuality *State v. Foster*, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824 (N.M. Ct. App. 2003). Finally, Plaintiff cites to a "*Secretary of Labor v. Mega-Construction Co.* (2018)" on page 23—yet again, no such case exists.[24]

Added to these individual cases are the efforts of various bar and attorney disciplinary organizations. For example, the Florida Bar Board of Governors Committee on Professional Ethics has issued an opinion on attorney use of AI.[25] The opinion relies on past opinions related to other computing technologies, including cloud computing, in identifying and commenting on lawyers' responsibilities in relation to attorney use of generative AI technologies. In the notice of the proposed opinion, the Florida Bar Board of Governors noted:

1. Generative AI risks many of the same problems that are raised by the work of nonlawyer assistants, whom lawyers are also professionally responsible for overseeing;
2. In a similar vein, a lawyer must review any work a generative AI has produced that the lawyer intends to use, emphasizing the lawyer's responsibility for their own work product;
3. These duties apply even where the generative AI is operated by an outside company;
4. Lawyers should be careful about delegating any task to a generative AI that might constitute the practice of law, including negotiation of claims;
5. Lawyers must communicate to a client that they will bill actual costs of tasks that were accomplished using generative AI; and,
6. While lawyers may advertise that they use generative AI, they are not to advertise that their generative AI is somehow "superior" to that used by others unless that claim is objective verifiable.[26]

A number of judicial orders require either an admission that generative AI was used or, in at least one case, forbid its use. Judge Michael Newman of the United States District Court for the Southern District of Ohio has prohibited generative AI use in all cases.[27] He emphasized this point in a recent case, noting:

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[24] *Morgan v. Cmty. Against Violence*, No. 23-CV-353-WPJ/JMR, 2023 WL 6976510, at *8, note 3 (D.N.M. Oct. 23, 2023); see also, *Taranov v. Area Agency of Greater Nashua*, Case No. 21-cv-955-PB (D.N.H. Oct. 16, 2023), footnote 9: "In her objection, Taranov cites to several cases that she claims hold "that a state's Single Medicaid Agency can be held liable for the actions of local Medicaid agencies[.]" Doc. 79 at 12-13. The cases cited, however, do no such thing. Most of the cases appear to be nonexistent. The reporter citations provided for Coles v. Granholm, Blake v. Hammon, and Rodgers v. Ritter are for different, and irrelevant, cases, and I have been unable to locate the cases referenced. The remaining cases are entirely inapposite."

[25] Florida Bar Ethics Opinion, Opinion 24-1 (January 19, 2024).
[26] Florida Bar Board of Governors' Review Committee on Professional Ethics, Proposed Advisory Opinion 24-1 Regarding Lawyers' Use of Generative Artificial Intelligence – Official Notice, Nov. 13, 2023.
[27] Hon. Michael J. Newman, Standing Order Governing Civil Cases, Part VI, provides as follows:

> No attorney for a party, or a pro se party, may use Artificial Intelligence ("AI") in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, inter alia, striking the pleading

> Plaintiff admits that he used Artificial Intelligence ("AI") to prepare case filings. *See* Doc. No. 25 at PageID 536–37. The Court reminds all parties that they are not allowed to use AI—for any purpose—to prepare any filings in the instant case or any case before the undersigned. *See* Judge Newman's *Civil Standing Order at VI*. Both parties, and their respective counsel, have an obligation to immediately inform the Court if they discover that a party has used AI to prepare any filing. *Id.* The penalty for violating this provision includes, *inter alia*, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. *Id.*[28]

Judge Brantley Star of the Northern District of Texas has issued an order[29] requiring lawyers to certify that they either have not used generative AI or, if they have, that they have checked the output for accuracy.[30] Other judges have followed suit.[31] Magistrate Judge Gabriel Fuentes of the Northern District of Illinois has included generative AI language in a standing order that provides:

> Any party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used.[32]

> from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.

(effective as of July 14, 2023).

[28] *Whaley v. Experian Info. Sols., Inc.,* No. 3:22-CV-356, 2023 WL 7926455, at *1 (S.D. Ohio Nov. 16, 2023)

[29] Judge Brantley Starr, United States District Court, Northern District of Texas, Judge Specific Requirements, Mandatory Certification Regarding Generative Artificial Intelligence, https://www.txnd.uscourts.gov/judge/judge-brantley-starr (last visited, November 26, 2023).

[30] Certificate Regarding Judge-Specific Requirements.

[31] *See*, Michael M. Baylson, Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (June 6, 2023);

[32] Magistrate Judge Gabriel Fuentes, Standing Order for Civil Cases Before Magistrate Judge Fuentes (May 31, 2023) (Judge Fuentes further notes that use of generative AI will not excuse otherwise sanctionable behavior:

> Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that .... This mission is too important for me to allow you to jeopardize it." 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes "bogus judicial decisions" cited for substantive propositions of law. *See Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), Order to Show Cause (S.D.N.Y. May 4,

As a final note, the U.S. Court of Appeals for the Fifth Circuit is currently seeking comments on a proposal to include generative AI in its Certificate of Compliance:

> 32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R. App. P. Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.[33]

Much of the response to generative AI, especially when considering the ways in which judges have instituted orders relating to it, from Judge Newman's stark "you may not use it" prohibition to the more moderate "use it correctly" language adopted by other courts, reflects a technology-centric approach that is narrower and more limited than may, at first, appear. Artificial intelligence regulation by the courts is likely to be both too broad and too narrow at the same time. We tend to see things through the technologies that are being released at the moment, but in so doing often miss the bigger picture. In relation to AI, especially if a court does not limit its directions to generative AI, this means bringing the use of many of today's regularly utilized legal and non-legal technologies into question.

Grammar checks in Microsoft Word use AI, as does Google in conducting searches. Should lawyers have to disclose that they've used Google or Microsoft Word and checked that what they've found or written is correct? This "checking" is an essential part of a lawyer's duty. Are there technologies that lawyers can use where they should not be responsible for the output that they submit to a court or a client? That is likely to be a failing position no matter the technology in question.

Regulations or orders aimed only at generative AI thus may miss other ways in which lawyers may, in an attempt to streamline aspects of law practice, may not meet their professional obligations. It may be better, and more sustainable in the long term, to avoid the temptation to focus on a particular technology or type of technology—such as generative AI—and to instead focus on the behavior that courts want to incentivize or disincentivize. In the context of generative AI, that is making certain that submitted papers are accurate and not misleading. It seems that reaffirming this responsibility, rather than building in a requirement of additional certifications or prohibitions on the use of particular technologies, is more sustainable in the long term.[34]

2023) (issuing rule to show cause where "[a] submission filed by plaintiff's counsel in opposition to a motion to dismiss is replete with citations to nonexistent cases.").
Id. at page 2.

[33] Notice of Proposed Amendment to 5TH CIR. R. 32.3, United States Court of Appeals for the Fifth Circuit (comments are due by Jan. 4, 2024).

[34] An excellent resource for following developments in relation to court orders concerning AI use is available from the organization "Responsible AI in Legal Services" (RAILS): https://rails.legal/resource-ai-orders/