

# Harnessing (or Wielding) the Power of Artificial Intelligence to Gain a Tactical Advantage

## Presenters

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## Introduction

By now, we have all heard the stories – both good and bad – regarding the impact of artificial intelligence (AI) on the practice of law. Indeed, this past year, AI was touted as having taken and passed the Uniform Bar Exam, passing both the multiple choice and written portions while scoring in the 90th percentile. As a result of this “watershed moment” and others like it, the legal industry has been identified as one of the most susceptible to change as a result of AI – and will undoubtedly disrupt the *status quo*. So it is now time to look to the future and get ahead of the curve, identify the advantages of new technology, and capitalize on the value these tools offer to gain a competitive edge in the industry.

This panel will discuss what tools are available now, how we can best utilize this technology, and how we can prepare for the continued evolution of AI and its increasing integration into the legal profession. It will focus on the positives of AI, how it will be used to revolutionize our profession, and what the legal profession should consider in the weeks, months, and years to come.

## What is AI?

AI refers to the development of computer systems that can perform tasks that typically require human intelligence. These tasks include learning, reasoning, problem-solving, understanding natural language, perception, and even speech recognition. AI systems are designed to analyze data, adapt to changing inputs, and improve their performance over time without explicit programming. Key definitions in this space are as follows:

1. Generative AI: Refers to a category of artificial intelligence that involves systems capable of generating new, original content. These systems use models trained on large datasets to produce outputs such as text, images, audio, or other forms of data. Unlike traditional AI systems that may follow explicit rules or patterns,

generative AI is often capable of creating content that wasn't explicitly present in its training data.

2. Machine Learning: A subset of AI, where algorithms enable systems to learn from natural language processing, allowing machines to understand and generate human language. AI is the overarching field dedicated to creating intelligent machines, while machine learning is a specialized technique within AI that enables machines to learn from data.

## **Overview of AI in the Practice of Law**

The legal industry continues to evolve as technology advances, with AI playing a pivotal role in enhancing efficiency, reducing costs, and providing valuable insights to legal professionals.

AI has various applications in the practice of law. It is utilized for legal research, contract review, due diligence, and streamlining tasks that traditionally required extensive time and manual effort. Predictive analytics help lawyers assess case outcomes, while natural language processing aids in document analysis. AI can also play a role in e-discovery by extracting relevant information from large datasets. Additionally, AI powered virtual legal assistants assist in managing administrative tasks, allowing lawyers to focus on more complex aspects of their work. Ongoing developments will further refine and expand the application of AI in the practice of law.

While the integration of AI in law brings numerous benefits, challenges like data privacy, ethical considerations, and the need for ongoing human oversight underscore the importance of a balanced and thoughtful approach to its implementation.

## **AI Trends and Tools in the Legal Industry**

1. Legal Research and Document Analysis:
  - a. Natural Language Processing (NLP) is a fundamental component in various AI tools, enabling machines to understand and process human language, facilitating tasks such as document analysis, contract review, and legal research.
  - b. AI-driven legal research tools, like Westlaw, use natural language processing to analyze vast legal databases and provide relevant case law, statutes, and precedents.
2. Predictive Analytics and Case Outcome Prediction:

- a. Predictive modeling enhances decision-making by providing insights into the likely success of legal arguments.
  - b. AI algorithms, such as those developed by companies like Lex Machina and Ravel Law, analyze historical case data to predict likely outcomes and trends, which can assist lawyers in formulating effective strategies.
3. Contract Review and Automation:
  - a. AI-powered contract review tools, including Kira Systems and Luminance, use machine learning to extract key information, identify risks, and automate the review of large volumes of contracts.
  - b. AI-driven document automation tools, such as Contract Express and HotDocs, enable the creation of standardized legal documents efficiently, reducing manual labor and minimizing errors.
  - c. “Smart contracts” can execute predefined actions when specific conditions are met, adding a layer of automation to contractual relationships.
  - d. The use of blockchain technology, often combined with smart contracts, enhances the security and transparency of legal transactions. This technology is employed in areas such as property law, intellectual property, and contracts.
4. E-Discovery Solutions:
  - a. Machine learning algorithms identify relevant information and patterns within documents.
  - b. E-discovery tools like Relativity and Everlaw, use machine learning to streamline e-discovery by quickly sifting through massive amounts of electronic data.
5. Virtual Legal Assistants and Chatbots:
  - a. AI-driven virtual assistants, like LawGeex and chatbots, are equipped with natural language processing that can handle routine administrative tasks, scheduling, and basic client interactions.
6. Compliance Monitoring and Regulatory Change Detection:
  - a. Automated compliance tools can help organizations adhere to legal requirements and avoid regulatory issues and can monitor regulatory changes to help ensure compliance with evolving legal landscapes. Companies like ComplyAdvantage leverage AI for real-time regulatory updates and risk detection.
7. Mediation and Dispute Resolution:

- a. AI tools are emerging in mediation and dispute resolution to provide alternative means for resolving legal conflicts efficiently.

## **Advantages**

1. Efficient Legal Research: Streamlines the process of searching and analyzing vast legal databases, saving time for lawyers and researchers.
2. Time-Saving Contract Review: Automates the review of contracts, extracting key information and identifying potential risks quickly, allowing legal professionals to focus on strategic aspects of their work.
3. Predictive Analytics for Case Outcomes: AI algorithms analyze historical legal data to predict case outcomes, assisting lawyers in formulating effective strategies and making informed decisions.
4. E-Discovery Automation: Efficiently sorts through large volumes of electronic data, reducing the time and cost associated with the discovery process.
5. Document Automation: Streamlines the creation of legal documents, minimizing errors and ensuring consistency in drafting.
6. Virtual Legal Assistants: Can handle routine administrative tasks, improving workflow efficiency and allowing legal professionals to focus on more complex matters.
7. Cost Reduction: Automation of routine tasks and increased efficiency lead to cost savings.
8. Improved Compliance Monitoring: Helps lawyers stay informed and better ensure compliance with evolving legal requirements.
9. Enhanced Due Diligence: Automating the analysis of financial and legal data can expedite due diligence processes in business transactions.
10. 24/7 Accessibility without fatigue.
11. Data-Driven Decision-Making: Data-driven insights can help lawyers make informed decisions based on patterns and trends identified through the analysis of large datasets.

12. Improved Case Management: Can organize and analyze case-related information, enhancing overall efficiency in legal practices.
13. Reduction of Human Error: Automation of repetitive tasks reduces the likelihood of human errors, ensuring accuracy and consistency in legal processes.

### **Disadvantages and Challenges**

While the advantages of AI in the legal industry are notable, there are also several disadvantages and challenges that need to be considered. Additionally, it is important to address ethical considerations, ensure transparency, and maintain human oversight to mitigate potential biases.

1. Lack of Legal Expertise: AI lacks the nuanced understanding of legal concepts that human lawyers possess, limiting its ability to provide context-specific insights.
2. Data Privacy and Security:
  - a. The use of AI involves handling sensitive legal information, raising concerns about data privacy and the security of confidential client data.
  - b. Implementing robust security measures is crucial.
3. Cost of Implementation: Integrating AI systems can require significant upfront costs for law firms. Smaller practices may find it challenging to invest in and adopt advanced AI technologies.
4. Complexity and Lack of Understanding: The complex nature of AI systems may lead to a lack of understanding among legal professionals, potentially causing resistance to adoption or reliance on AI-generated insights.
5. Overreliance and Loss of Skills: Overreliance on AI tools may lead to a decline in certain skills among legal professionals, as reliance on automation might reduce engagement in critical thinking and analytical tasks.
6. Limited Creativity and Judgment: AI lacks the creative and judgment capabilities inherent in human lawyers, making it challenging for machines to handle unique or novel legal situations effectively.

7. Interpretation Challenges: Legal documents often require nuanced interpretation, and AI may struggle with contextual understanding and the interpretation of ambiguous language.
8. Ongoing Maintenance and Updates: AI systems require regular updates to stay effective and secure. Ensuring ongoing maintenance and updates can be resource-intensive for law firms.
9. Resistance to Change: The legal industry, known for its tradition and precedence, might face resistance to embracing AI-driven changes, hindering the adoption of innovative technologies.
10. Loss of Human Touch in Client Interactions: While virtual legal assistants and chatbots enhance efficiency, there is a risk of losing the personalized human touch that clients may expect in legal services.
11. Legal Liability:
  - a. In cases of errors or unintended consequences, assigning responsibility becomes a complex issue.
  - b. Ultimately, lawyers are responsible to their clients.
12. Ethical and Bias Considerations:
  - a. AI algorithms can inadvertently perpetuate biases present in training data, raising ethical concerns and potentially leading to unjust outcomes.
  - b. Lawyers need to be vigilant in understanding and mitigating potential biases within AI systems to maintain the integrity of the legal system.
  - c. Cautionary Tale: Mata v. Avianca, Inc., Case No. 1:2022cv01461 (SDNY 2023)

*Robert Mata sued Avianca, Inc., claiming he was injured when a metal serving cart struck his left knee during a flight from El Salvador to New York. Avianca filed a motion to dismiss, arguing Mata's claims were time-barred under the Montreal Convention. Plaintiff's attorneys filed an "Affirmation in Opposition" to the motion to dismiss, which cited to and quoted from judicial decisions purportedly published in the Federal Reporter, the Federal Supplement and Westlaw. Avianca's attorneys filed a reply brief, which contended they had been "unable to locate" many of the authorities cited in Plaintiff's "Affirmation of Opposition".*

*After the Court also could not locate multiple authorities cited in Plaintiff's "Affirmation of Opposition", it ordered Plaintiff's attorney to file an affidavit attaching copies of the cited cases. Plaintiff's attorney filed an affidavit that annexed what were purported to be copies or excerpts of all but one of the decisions required by the Orders. Ultimately, it was revealed Plaintiff's attorneys submitted non-existent judicial opinions with fake quotes and citations created by ChatGPT. To make matters worse, they continued to stand by the fake opinions after judicial orders called their existence into question, even though one of the cited fabricated cases contained "gibberish" legal analysis and specifically stated at the top of the opinion, **"DO NOT CITE OR QUOTE AS LEGAL AUTHORITY."** Plaintiff's attorneys were sanctioned for their conduct.*

# Artificial Intelligence — From Risk to Reward: Key Questions to Address When Crafting Generative AI Usage Policies

Generative artificial intelligence (AI) has seemingly infiltrated every aspect of corporate America, and organizations' legal, compliance, and human resources departments are understandably struggling to keep pace with its proliferation. Forward-thinking companies are beginning to implement policies governing the use of these tools, but an off-the-shelf policy not tailored to your unique circumstances could do more harm than good. As an early adopter of generative AI in the law firm community, Troutman Pepper faced these same challenges when crafting the firm's first generative AI policy, and we quickly realized that our clients could benefit from reviewing some of the key questions we asked ourselves during that process.

## Policy Scope and Contours

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- Should your organization adopt a policy specific to generative AI, or should it cover all forms of AI? While generative AI is the new kid on the block, AI has been around for decades, and many of the same components of a generative AI policy would apply equally to traditional AI tools.
- Should your company distribute an entirely new policy, or can existing policies (e.g., those defining acceptable uses of core IT systems), be amended to adequately address generative AI? As with most of these questions, there is no single right answer; the best approach for your company depends in large part on the nature of your current policies. Some organizations have enacted ethical AI charters alongside or as a precursor to a formal policy.
- What other corporate policies and procedures warrant potential amendment due to generative AI use? In addition to the acceptable use policies already mentioned, policies regarding data privacy, information security, bring-your-own-device (BYOD) programs, work-from-home programs, and records retention may also be overdue for a refresh. The same may apply to employee manuals and handbooks.

## Current Organizational Usage of, and Comfort With, Generative AI

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- To what extent are segments of your organization already using AI, and for what purposes? We suspect that many of your employees are already using generative AI, perhaps without the company's knowledge and authorization. It is nearly impossible to conceive of a company entirely devoid of AI use.
- Setting aside legal requirements, what uses of generative AI does your organization want to encourage/accept/discourage/prohibit to align with its culture and business objectives? You may deem some uses benign and others verboten based on your company culture and risk tolerance, even if no specific law, regulation, or contractual term prohibits them.
- Does your organization offer any products or services that leverage generative AI? If so, your policy will need to be drafted with those preexisting products and services in mind, and your license agreements and customer-facing "terms of use" may need to be updated accordingly.



- Are safeguards needed to prevent operational dependencies on generative AI that could impact business continuity if the technology becomes unavailable or too costly? The velocity of change in this space is such that what is hot today may be gone tomorrow, and businesses should anticipate and plan for that very real possibility.

## Governing Legal Environment

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- Do any of your vendors/partners use generative AI to perform functions relating to your business and, if so, should your contracts be amended to address such use? If you don't know whether your counterparties use generative AI to deliver core services, you should ask. We encourage you to check whether you have unwittingly agreed to terms specifying authorized and unauthorized uses of AI; if so, make sure you have systems in place to track those obligations and ensure compliance. If you have not yet encountered those terms, you likely will soon.
- Are you following all current laws and government agency guidance regarding your use of AI tools? Please see the [video recording](#) of our Hiring to Firing podcast for a discussion about the risks and benefits of generative AI in the workplace, including the recent New York City ordinance concerning the use of AI in recruiting and hiring. Additionally, check out our [Hiring to Firing blog post](#) describing recent EEOC guidance on employers' use of AI tools in ways that may run afoul of the Americans with Disabilities Act.
- How can your organization make use of generative AI while simultaneously protecting its own intellectual property and guarding against inadvertent infringement of others' intellectual property? Please see [The Intersection of Generative AI and Copyright Law](#) for more on this topic.
- What are the implications of generative AI use on your organization's privacy and cybersecurity programs, particularly as it relates to sensitive data collection, use, and sharing? Watch [Navigating the AI Landscape: Privacy, IP, Policies and More – An Industry Expert Roundtable](#) for an engaging discussion of these and related issues.
- Is your organization subject to industry/regulatory oversight or jurisdiction-specific limitations on whether/how generative AI tools can be used, and the extent to which uses must be disclosed? We recommend conferring with counsel on these questions given their complexity and the pace of change we are seeing in the regulatory environment around AI.
- How will consumer and employee concerns/complaints regarding generative AI use be handled? How much transparency is required? Will employees and consumers have any opt-out or notice and consent rights with respect to certain uses of generative AI? As usual, the law has not yet caught up with the technology, so companies may want to consider what voluntary safeguards and protections they want to extend to those individuals who could be most directly impacted by the use of AI.
- Are you prepared to preserve and collect all records of generative AI use in the event of litigation or an investigation implicating the use of AI? As mentioned in a recent [Hiring to Firing blog post](#), maintaining, exporting, reviewing, and producing a full audit trail of generative AI prompts and outputs may not be possible, nor do most generative AI tools expose the internal algorithms and underlying training data that informed those outputs.
- Do you have adequate insurance coverage in the event of generative AI-related litigation? It may be prudent to check your policy/endorsement language and consult with your insurance broker to avoid future surprises.

## Practical Issues With Implementation and Enforcement

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- Which stakeholders within your organization should have a voice in the development, implementation, and enforcement of a generative AI policy? Ideally, at least one person in each department or business unit should be designated to represent the interests of their group.
- Does your organization have the resources to build or license enterprise/private generative AI tools to better safeguard your confidential information and intellectual property? As the saying goes, if you are not paying for the product, you *are* the product. Rather than using free generative AI tools like ChatGPT, some companies are mandating that employees only use enterprise generative AI services that are subject to more client-friendly terms and/or are developing their own solutions using Microsoft Azure's OpenAI Service and similar application programming interfaces (APIs).
- Are your organization's legal, compliance, and HR departments equipped to roll out, enforce, and audit a generative AI policy? How will you know if the policy has been violated, and what consequences for policy violations will be enforced? A policy that is not consistently followed is arguably worse than no policy at all, and regulators undoubtedly will be looking at how companies approach enforcement of these policies, deter would-be violators, and punish those who intentionally circumvent generative AI guardrails.
- What level of human oversight/validation of generative AI output is required? As with most things, it depends on myriad factors, but organizations cannot blindly assume that generative AI output is accurate and free of bias.
- What forms of training does your organization require to educate employees, contractors, and others (including third parties) on the risks and benefits of generative AI as well as the new skills essential to extracting maximum value from the technology? Whether you build or buy such training, someone well-versed in generative AI should be involved in preparing and delivering tailored training to different constituencies at your company.
- How will the policy be revised over time to ensure it keeps pace with the rapidly changing technical and legal landscape? Part of enacting a successful policy is contemplating and scheduling periodic review and amendment procedures.

We hope this guidance helps to reduce, rather than amplify, the anxiety rightfully felt by many seeking to gain better control over unfettered use of generative AI. If you need assistance devising and executing on your generative AI strategy, Troutman Pepper has a [task force of attorneys and technologists](#) on the front lines of generative AI across all major industries and practice areas. Click [here](#) to learn more.

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