

## The Art and Science of Generative AI: An Ethical Journey for In-House Counsel

### Guest and Dorsey Panelists

**Gulzar Babaeva**, Vice President, Deputy General Counsel, Shipt, Inc.

**Tom Corbett**, Head of Product & Privacy Counsel, Eightfold AI

**Gina Cornelio**, Partner, Dorsey & Whitney LLP

### Program Materials

PowerPoint Presentation

### Dorsey Publications

**Dorsey Blog:** *Not Human Enough – District Court Rejects Copyright For AI Artwork*, Kaleb Mcneely (September 11, 2023)

<https://www.thetmca.com/not-human-enough-district-court-rejects-copyright-for-ai-artwork/>

**Dorsey eUpdate:** *SEC Proposes Rules to Address Conflicts of Interests Associated with the Use of Predictive Data Analytics*, David Tang & Michael Schmieder (August 17, 2023)

<https://www.dorsey.com/newsresources/publications/client-alerts/2023/8/sec-proposes-rules>

**Dorsey Webinar Playback:** *Generative AI – Basics, Pitfalls, and Best Practices*, Gina Cornelio, Amy Deveraux & Charlene Krogh (July 27, 2023)

<https://www.dorsey.com/newsresources/events/videos/2023/7/webinar-playback-generative-ai>

Session materials are available for download on  
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# The Art and Science of Generative AI: An Ethical Journey for In-House Counsel

Gulzar Babaeva, Shipt, Inc.

Tom Corbett, Eightfold AI Inc.

Gina Cornelio, Dorsey & Whitney LLP

November 14, 2023

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## Guest and Dorsey Speakers



**Gulzar Babaeva**  
Vice President, Deputy General  
Counsel  
Shipt, Inc.



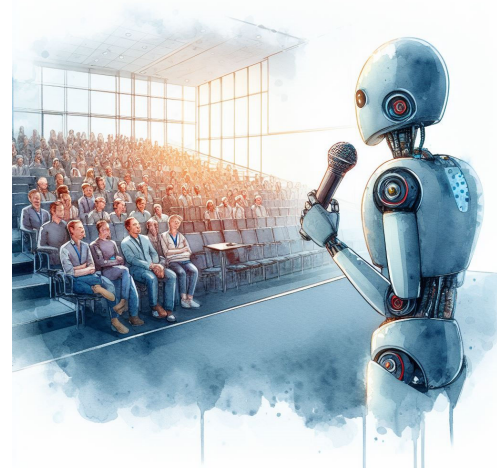
**Tom Corbett**  
Head of Product & Privacy  
Counsel  
Eightfold AI Inc.



**Gina Cornelio**  
Partner  
Dorsey & Whitney LLP

## Agenda

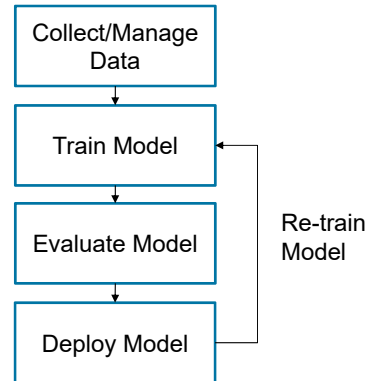
- **Generative AI Overview**
- **Use Cases of Generative AI in Legal Practice**
- **Ethical Risks with the Use of Generative AI**



Source: Created with Bing Image Creator ([www.bing.com/images/create](http://www.bing.com/images/create)). Generated on 10/13/2023. Prompt: "Presentation about AI, watercolor"

## Machine Learning

- **Artificial Intelligence sub-field which trains algorithmic models on data within a specified domain**
- **Models then analyze user input and draw statistical inferences from patterns in the data in order to produce output**



## Generative AI (GAI)

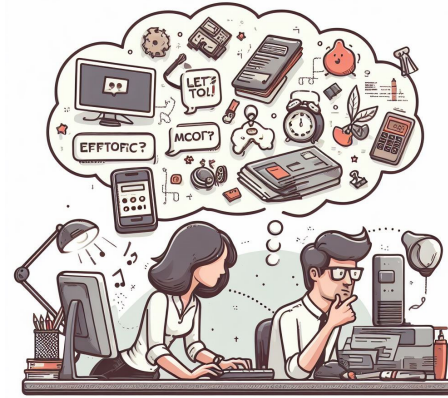
- **Machine learning algorithms which generate content as output**
- **Differentiated from non-generative AI which classifies input or makes predictive output**



Source: Created with DALL-E, an AI system by OpenAI (<https://labs.openai.com>). Prompt: "a very poorly drawn picture of a cat"

## Benefits of GAI

- **Accelerate work product**
  - Summarize long texts
  - Kickstart the creative process
- **Automate repetitive tasks**
- **Improvements on existing AI based solutions**
  - Chatbots
  - Predictive text
- **Improved predictions, pattern identification**
- **Generation of synthetic data**



Source: Created with Bing Image Creator ([www.bing.com/images/create](http://www.bing.com/images/create)). Generated on 10/12/2023. Prompt: "Improved work efficiency"

## GAI In Legal Practice

- **Law practice specific GAI programs**
  - CaseText's CoCounsel – Legal research GAI
  - Harvey – Legal Document Drafting GAI
  - Pincites – Contract negotiation GAI
  - vLex/Fastcase – Legal research GAI
  - Westlaw and LexisNexis integrating GAI
- **Law firms have already begun adoption of such tools to automate and assist in document drafting and research**
- **Other law firms are developing in-house GAI tools on a firm-wide or client-by-client basis**

## Ethical Risks of GAI Usage in Legal Practice

## Model Rules of Professional Conduct

### Rule 1.1: Competence - *Client-Lawyer Relationship*

**A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

## Rule 1.1 - Comment 2

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

## Rule 1.1 - Comment 8

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

## Competency: Citation of Non-Existent Cases

- **Mata v. Avianca, Inc. (S.D.N.Y. 2023) – Lawyers for Mata relied on ChatGPT to write a legal brief without conducting further research to verify the veracity of the ChatGPT outputs**
- **As a result, their legal brief contained citations to six judicial opinions that did not exist**
- **Judge ordered rule 11 sanctions, including a \$5000 fine**

## Rule 1.4 Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) 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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



## Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

## Rule 1.6: Confidentiality of Information cont'd

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

## Rule 1.6 - Comment 18

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

## OpenAI Data Usage FAQ

### Does OpenAI use my content to improve model performance?

We may use content submitted to ChatGPT, DALL-E, and our other services for individuals to improve model performance. For example, depending on a user's settings, we may use the user's prompts, the model's responses, and other content such as images and files to improve model performance.

Source: OpenAI Data Usage FAQ (<https://help.openai.com/en/articles/7039943-data-usage-for-consumer-services-faq>)

### Consider B2B plans that may have different terms:

(c) **Use of Content to Improve Services.** We do not use Content that you provide to or receive from our API ("API Content") to develop or improve our Services. We may use Content from Services other than our API ("Non-API Content") to help develop and improve our Services. You can read more here about how Non-API Content may be used to improve model performance. **If you do not want your Non-API Content used to improve Services, you can opt out by filling out this form.**

Please note that in some cases this may limit the ability of our Services to better address your specific use case.

Source: OpenAI Data <https://openai.com/policies/terms-of-use>

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Tip: The CLE code is different than the event code assigned by states.*

## Confidentiality

- **GAs often utilize user prompts and responses to further train models**
  - Sensitive information that users input into GAs may be disclosed without affirmative prompts asking for authorization
- **By default, ChatGPT does not protect confidential or sensitive information that users input into the chat**
  - Such information may also be shared with third party service providers
- **Risk: User inputs that contain client specific information may break client-lawyer confidentiality**

## Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law *Comment: Law Firms and Associations*

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

## Unauthorized Practice of Law

- **LLMs are not admitted to practice law in any jurisdiction**
- **Risk: Employing GAI to directly exercise legal judgment or advise clients may be assisting in the unauthorized practice of law**



Source: Created with Bing Image Creator ([www.bing.com/images/create](http://www.bing.com/images/create)). Generated on 10/12/2023. Prompt: "AI practicing law"

### Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### Supervision of Nonlawyer Assistance

- **Lawyers must supervise any nonlawyer assistance to ensure that they comply with the rules of professional conduct**
- **This includes non-human assistance**
- **Risk: Employing GAI without adequate supervision and research of the output may violate the duty to supervise nonlawyer assistance**



Source: Created with Bing Image Creator ([www.bing.com/images/create](http://www.bing.com/images/create)). Generated on 10/12/2023. Prompt: "AI practicing law"

## Model Rules of Professional Conduct

### Rule 8.4: Misconduct – *Maintaining The Integrity Of The Profession*

It is professional misconduct for a lawyer to:

...

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

...

## Attribution: Incorrect/Insufficient Citation

- LLM citations are generated in the same way that LLMs generate all other text, by finding which character or word is most statistically likely to follow the preceding text
- Risks:
  - Works that are quoted or paraphrased by GAI may not receive adequate attribution
  - Sources may not be cited according to the proper citation format

## Federal Rules of Civil Procedure

### Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

**(b) REPRESENTATIONS TO THE COURT.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

## Rule 11 Signatures

- Rule 11 places an affirmative duty on lawyers to conduct reasonable inquiries into any filings which they sign
- LLM outputs must be researched with due diligence before incorporated into work product
- The lawyers in *Mata v. Avianca, Inc.* were subject to sanctions under Rule 11 for citing fake case law and failing to conduct reasonable inquiry to the veracity of the ChatGPT output
  - “The filing of papers ‘without taking the necessary care in their preparation’ is an ‘abuse of the judicial system’ that is subject to Rule 11 sanctions.” *Mata v. Avianca, Inc.*, No. 1:2022cv01461 - Document 54 (S.D.N.Y. 2023)
  - “Rule 11 ‘explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed.’” *Id.*

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## Appendix



## Large Language Models (LLM)

- **GAI models that have been trained on text data to perform language-related tasks**
- **Operates by statistically inferring which output is most likely to follow the user input or previous outputs**
- **Most pertinent form of AI for usage in legal practice**

BL write a short 3 sentence story at 5th grade level

Once upon a time, in a magical forest, there lived a curious young squirrel named Sammy. Sammy loved to explore and make new friends with the creatures of the forest. One day, while hopping from tree to tree, Sammy discovered a hidden treasure that brought joy to all the animals and taught them the value of sharing and friendship.

BL write the same story but in a college graduate level

In an enchanted woodland, resided an inquisitive and adventurous young squirrel named Sammy. Renowned for exploring the forest's depths, Sammy forged profound connections with its inhabitants. During one such exploration, Sammy stumbled upon a concealed treasure that bestowed abundant happiness upon the creatures, imparting invaluable lessons on camaraderie and the significance of sharing.

Source: ChatGPT (chat.openai.com). Prompt of "write a short 3 sentence story at a 5<sup>th</sup> grade level"

## Competency: Non-Linear Logic

- **Generative AI may struggle with employing logic or common sense that requires a holistic understanding of the world**
- **Risk: Arguments output by GAI may lack common sense logic**

Default (GPT-3.5)

J It took me 3 hours to dry three shirts on my clothesline. How long will it take me to dry nine shirts?

Drying shirts on a clothesline can be affected by various factors, such as weather conditions, humidity, and the size of the shirts. However, if we assume that the drying time is directly proportional to the number of shirts (which may not always be the case due to factors like wind and sun intensity), you can use a simple ratio to estimate the time it would take to dry nine shirts:

3 shirts in 3 hours

So, for 9 shirts:  
 $(9 \text{ shirts}) / (3 \text{ shirts}) = 3$

You can use this ratio to estimate the time:

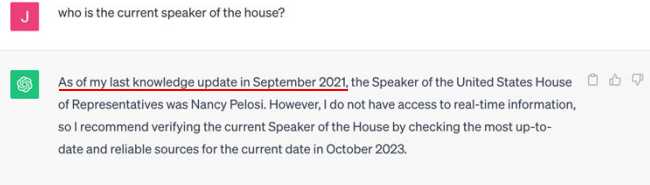
$3 \text{ hours} \times 3 = 9 \text{ hours}$

So, if it took you 3 hours to dry three shirts, it might take you approximately 9 hours to dry nine shirts under similar conditions. Keep in mind that this is a rough estimate, and actual drying times may vary. Factors like weather and shirt size can have a significant impact on the drying time.

Source: ChatGPT-3.5 (chat.openai.com). Generated on 10/10/2023.

## Competency: Non-Iterative Learning

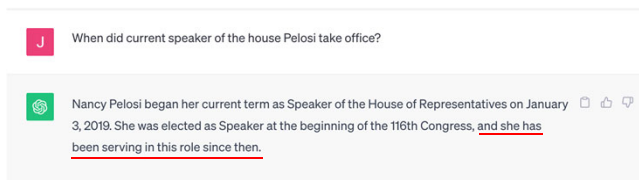
- Non-Iterative AI is built on static training data and does not incorporate new data from events which occur after its established knowledge base
- Risk: Outputs from GAI may be based on outdated information



Source: ChatGPT-3.5 (chat.openai.com), Generated on 10/10/2023.

## Competency: Assumption of Provided Facts


- LLMs aim to provide outputs which statistically correlate with the user inputted prompts. Thus, the AI will often assume false information included in the user prompts
- Risk: GAI may not catch mistakes in user input




Source: ChatGPT-3.5 (chat.openai.com), Generated on 10/10/2023.

## Competency: Assertion of False Facts

- LLMs may assert false legal facts or conclusions with formal or technical language
- Risk: Formal language may create a false illusion of reliability

 What is the statute of limitations for patent infringement?


 As of my last knowledge update in September 2021, there is no specific federal statute of limitations for patent infringement in the United States. Patent infringement cases are governed by federal patent laws, and the timeliness of bringing a patent infringement claim is typically determined by principles of laches, equitable estoppel, and the doctrine of unreasonable delay rather than a fixed statutory time limit.


Laches is an equitable defense that can be raised by the defendant in a patent infringement case if the plaintiff unreasonably delays in asserting their rights and the defendant is prejudiced by this delay. Equitable estoppel can also come into play if the patent holder's conduct leads the alleged infringer to believe they will not be sued for infringement.

It's important to note that the legal landscape can change over time, and the absence of a specific statute of limitations doesn't mean there are no time constraints for filing a patent infringement claim. It's advisable to consult with an attorney who specializes in intellectual property law for the most current information and guidance on pursuing a patent infringement case.

## Competency: Output Consistency

- Within the same output, an LLM may take inconsistent or controverting positions.
- This following example was generated in the same thread immediately after the ChatGPT answer provided in the preceding slide.
- Risk: GAI output may be self-controverting

 Summarize 35 USC 286

 35 USC 286 is a section of the United States Code that relates to the recovery of damages in patent infringement cases. It states that no recovery can be had for patent infringement damages that occurred more than six years prior to the filing of the lawsuit. In other words, it sets a six-year limit on the recovery of damages for past acts of patent infringement, ensuring that patent holders must bring their claims within this timeframe to seek damages for infringement that occurred in the past.

## Model Rules of Professional Conduct (cont.)

### Rule 5.5: Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

#### **Comment: Law Firms and Associations**

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

## Model Rules of Professional Conduct (cont.)

### Rule 5.5: Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

#### **Comment: Law Firms and Associations**

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

## Attribution: Incorrect/Insufficient Citation

### Correct Citation:

Steve Lohr, *The A.I. Revolution Is Coming. But Not as Fast as Some People Think*, N.Y. TIMES (Aug. 29, 2023), <https://www.nytimes.com/2023/08/29/technology/ai-revolution-time.html>.

### Substantive Errors:

- Incorrect author name
- Incorrect article title

### Citation Formatting Errors:

- Incorrect title and journal name formatting
- “August” remains unabbreviated

Default (GPT-3.5)

Can you also cite this article using bluebook format?  
<https://www.nytimes.com/2023/08/29/technology/ai-revolution-time.html>

Certainly, here is a Bluebook citation for the article "The Next Big A.I. Revolution Is Here, and It Could Change Everything" published on the New York Times website:

Author's Name, "Article Title," N.Y. Times (Month Day, Year), URL.

For the provided article:

**Cade Metz, "The Next Big A.I. Revolution Is Here, and It Could Change Everything," N.Y. Times (August 29, 2023), <https://www.nytimes.com/2023/08/29/technology/ai-revolution-time.html>.**

In this citation:

- "Cade Metz" is the author's name.
- "The Next Big A.I. Revolution Is Here, and It Could Change Everything" is the article title.
- "N.Y. Times" indicates the source (New York Times).
- "August 29, 2023" is the publication date of the article.
- "<https://www.nytimes.com/2023/08/29/technology/ai-revolution-time.html>" is the URL of the article.

Source: ChatGPT-3.5 (chat.openai.com). Generated on 10/10/2023.

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