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The Use of Artificial Intelligence in the Practice of Law
August 4, 2023

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THE USE OF ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

August 4, 2023

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THE USE OF ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

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August 4, 2023

Samuel D. Hodge, Jr., Litigator and Professor of Legal Studies, Temple University

Sam Hodge is a professor at Temple University where he teaches both law and anatomy. He also serves as a mediator/arbitrator for the Dispute Resolution Institute in Philadelphia and as a judge pro temp.

Sam has been named one of the most popular continuing legal education instructors in the country and has received multiple teaching awards including the Temple University Great Teacher Award and his Anatomy for Lawyers course was the recipient of the ACLEA Award for Outstanding Achievement in Continuing Legal Education. His interactive teaching style has received national attention including stories in the New York Times, the Chronicle of Higher Education, the Philadelphia Inquirer, National Public Radio and television.

Sam is also a seasoned litigator who enjoys an AV preeminent rating and has been named a Top Lawyer in Pennsylvania on multiple occasions.

He is a prolific author whose research has been cited in court opinions, legislation, law reviews and legal or medical journals. He has authored more than 145 referred articles, over 500 non-referral publications and 10 books including Anatomy and Physiology for Legal Professionals, PBI; Head Trauma and Brain Injuries for Lawyers, ABA; The Spine, ABA; The Forensic Autopsy, ABA; Clinical Anatomy for Attorneys, ABA; the award winning book, Anatomy for Litigators, ALI ABA; and Thermography and Personal Injury Litigation, John Wiley and Sons.

Hodge is a graduate of Temple University School of Law and the Graduate Legal Studies Division of the Law School and has received mediation training at the Strauss Institute for Dispute Resolution and anatomy training at Temple University School of Medicine.

Hon. Andrew R. Bloch, Magistrate, Hamilton County Superior Court, Noblesville

Andrew R. Bloch serves as Magistrate for the Hamilton Superior Court, where he hears a variety of family, civil, and criminal matters. He is a Certified Family Law Specialist (Family Law Certification Board) and serves as the District 19 Representative to the Indiana Judge's Association where he represents Magistrates from Carroll, Tippecanoe, Benton, Fountain, Montgomery Warren, Clinton, Grant, Madison, Hancock, Henry, Rush, Boone, Hamilton, Hendricks, Morgan, Johnson, Shelby, Bartholomew, Brown, Jackson, Lawrence, Monroe, Daviess, Martin, Pike, Dubois, Spencer, Knox, Gibson, Posey, Vanderburgh, and Warrick counties.

Prior to his appointment to the bench, he was a Registered Family Law Mediator, Trained Family Law Arbitrator, Trained Guardian Ad Litem, and Trained in Collaborative Family Law (CIACP). He received his B.S.B.A. in Information Systems from Xavier University and his J.D. from the Indiana School of Law – Indianapolis (n/k/a Robert McKinney School of Law), where he was also awarded the Norman Lefstein Award of Excellence. Drew was named a "Super Lawyer" for 2019 as well as a "Rising Star" in Family Law in 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018, as published in Indianapolis Monthly.

He is a member of the Domestic Relations Committee, as appointed by the Indiana Supreme Court; the Domestic Relations Bench Book Committee, as appointed by the Indiana Supreme Court; Hamilton County Bar Association; Indianapolis Bar Association; and State Bar Association (Family Law Executive Committee). Drew was a Co-Chair of the Indiana State Bar Summer Study Committee of Presumptive Joint Physical Custody (2021). He previously served as the Chair of the Bankruptcy Committee - Family Law Section of the American Bar Association. As well as a member of the Muncie Bar Association (Executive Committee). He is a member of the Sagamore Inns of Court and a former member of the Ratliff-Cox Inns of Court.

Drew serves as Vice President on the Board of the Indiana Continuing Legal Education Forum (ICLEF) and is a four-time chair of the Advanced Family Law (South) Program

Drew is a sought-after presenter for several organizations and a featured speaker on a variety of Family Law topics across the state of Indiana.

Formerly, as a Partner at Cross, Pennamped, Woolsey & Glazier, P.C., he devoted 100% of his practice to family law matters including mediation, arbitration, trial work, and appeals. Before joining Cross, Pennamped, Woolsey & Glazier, P.C. Drew served as a Commissioner in the Marion Circuit Court – Paternity Division, hearing custody,

visitation, and child support cases. He also served as Judge Pro Tem in Hamilton, Delaware, and Marion County in a variety of family law, civil, and criminal matters.

In addition to his service on the Board at ICLEF, Drew served as the Indianapolis Alumni Chapter President for Xavier University for six years. He is a member of the Lew Hirt Society at Xavier University. He also served as a Board Member on multiple charter school board across the state of Indiana and has lectured on Open Door Law in Indiana with respect to charter schools.

Seth R. Wilson, Adler Attorneys, Noblesville

Seth Wilson's legal practice includes civil litigation, personal injury (automobile accidents, slip and falls, worker's compensation, etc), estate planning and probate services. He also provides legal technology and marketing consulting for individual lawyers and law firms.

Seth has taught as an Adjunct Professor with the IU School of Informatics and Computing at IUPUI since 2014.

Mr. Wilson has spoken for many continuing legal education seminars and conferences and writes a regular column in *TheIndiana Lawyer*, called Start Page.

He earned his undergraduate degree in Mass Communications and Journalism, with a Pre-Law minor, from Taylor University and went on to earn his law degree from Regent University, serving as Editor-in-Chief of Law Review.

Mr. Wilson has been awarded a Rising Star ranking for Indiana Super Lawyers every year since 2013. He lives in Noblesville with his wife and children and serves on the Board of Legacy Christian School and Hamilton Hills Church in Fishers, Indiana.

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Indiana Lawyer: https://www.theindianalawyer.com/

A PRIMER ON THE USE OF ARTIFICIAL INTELLIGENCE IN
the PRACTICE OF LAW

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Temple University

Samuel D. Hodge, Jr. is a mediator/arbitrator with the Dispute Resolution Institute and a professor at Temple University where he teaches both law and anatomy. As a seasoned litigator he enjoyed an AV preeminent rating and has been named a Top Lawyer in Pennsylvania on multiple occasions.

He is one of the most popular continuing legal education instructors in the country and has received multiple teaching awards including the **Temple University Great Teacher Award** and his Anatomy for Lawyers course was the recipient of the ACLEA **Award for Outstanding Achievement in Continuing Legal Education.** His interactive teaching style has received national attention including stories in the *New York Times*, the *Chronicle of Higher Education,* the *Philadelphia Inquirer*, National Public Radio and television.

Mr. Hodge is the most published author on medical/legal matters in the country and his research has been cited in court opinions, legislation, law reviews and legal or medical journals. He is the author of more than 700 publications including his books, *Anatomy and Physiology for Legal Professionals*, PBI Press, *Head Trauma and Brain Injuries for Lawyers,* ABA; *The Spine*, ABA; *The Forensic Autopsy*, ABA; *Clinical Anatomy for Attorneys*, ABA; the award-winning book, *Anatomy for Litigators,* ALI ABA; *Law and Society* McGraw Hill; *The Legal Environment of Business*, McGraw Hill and *Thermography and Personal Injury Litigation,* John Wiley and Sons.

He is a graduate of Temple University School of Law and the Graduate Legal Studies Division of the Law School. He has also received mediation training at the Strauss Institute for Dispute Resolution.

Curriculum

- *Anatomy for Lawyers* (6 hours)
- *Mastering Medical Records* (6 hours)
- *Into the Anatomy Lab* (6 hours)
- *Systems of the Body* (6 hours)
- *Facial Recognition Technology* (3 hours)
- *Artificial Intelligence in the Practice of Law* (3 hours)

The Professional
Education Group

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A Primer on the Use of Artificial Intelligence in the Practice of Law

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A Primer on the Use of Artificial Intelligence in the Practice of Law

By: Samuel D. Hodge, Jr.

I. Artificial Intelligence

1. Artificial Intelligence has impacted most aspects of daily life.

2. Today, AI is used regularly in law enforcement, medicine, and business. The legal profession is the next venue.

II. Use in the Legal Profession

1. ChatGPT and related technologies are one of the most exciting developments to hit the legal profession in many years.

2. The practice of law is changing, and most lawyers are unprepared for this change.

3. Artificial intelligence has altered the way lawyers do business.

4. Instead of having a battle of forms, attorneys will now have a battle of computers.

5. Linking artificial intelligence and the law is a natural progression.

6. Both operate is similar fashions; each examines and applies "historical examples in order to infer rules to apply to new situations."

    a. AI calls it "machine learning algorithms."

    b. Lawyers call it precedent.

7. This new technology is changing every day with additional companies offering products for the legal field.

8. How AI will affect the practice of law in the long term is anyone's guess.

    a. Predictions range from massive layoffs to a minimal disruption that frees lawyers from tedious tasks and paves the way for creative thinking.

    b. It will take years to find out who is right.

    c. As a caveat, many of the products you see advertised are not yet available. They are still being beta tested.

d.   Consumers are frequently put on a wait list.

9.   Building Principles

a.   If you don't learn about the technology now, it will

be very hard to catch up later.

b.   Never blindly rely on AI output. It must be

checked because it makes things up or makes

mistakes.

III. Introduction to the Technology

1.   The Pew Foundation recently concluded that more than

half of the adults surveyed believed that robots and

computers will take over their jobs within the next few

decades.

a.   Lawyers are among those who share this belief.

2.   Definitions

a.   Artificial intelligence deals with technology that

uses tools that involve a human-like thought

process to produce innovative concepts.

i.   Grammarly is a sophisticated artificial

intelligence system built to analyze sentences.

      ii.   When you submit your writing to Grammarly, AI analyzes each sentence and looks for ways to improve it or offer a clearer sentence structure.

    b.   Machine Learning is a form of AI that deals with the use of data and algorithms to mimic the way humans learn without specific directions.

      i.   Facial recognition technology is an example.

    c.   An algorithm is step by step instructions that describe how to perform a task.

    d.   A chatbot is a software application that mimics human conversation through text or voice interactions.

IV. Use of Technology in the Practice of Law

1.   In the 1970s two people authored an article predicting that a research tool could be developed that could retrieve laws, cases, and other material to converse with lawyers in a natural manner.

    a.   A few years later, two entities were formed to retrieve legal documents using "keyword" searches.

2.   In the 1990s, the first online electronic filing system was made available eliminating the need to file court documents in person.

3.   In the 1990's, chatbots were created.

    a.   A chatbot's key task is to answer questions with instant messages.

4.   In 2014, two law school professors developed an algorithm to predict the outcome of cases before the Supreme Court. They achieved a 70% accuracy rate with over 7,700 cases.

5.   In 2015, the computer app, DoNotPay, came into existence to fight traffic tickets without a lawyer with a success rate of 64%.

    a.   It coined the term Robot Lawyer.

    b.   It now offers advice on a host of legal issues ranging from preparing petitions for flight delays,

annulment of marriages and drafting demand

letters for overdue bills.

V.   **ChatGPT**

1.   GPT stands for generative pre-trained transformer.

2.   It provides human-like responses to most questions.

3.   It is revolutionary because it can understand and

answer questions, and offer an almost immediate reply,

with the ability to create documents.

4.   The system digests the user's prompt and then

provides a host of words that it believes will best

respond to the question, based upon the data it was

trained on.

5.   ChatGPT works because its database is filled with

books, articles, and other documents on many

subjects.

a.   "It was allowed to crunch through the sum total of

human knowledge."

6. It is trained on "tokens" which allow its language models to assign meaning and predict plausible follow-up text.

   a. It turns these tokens into mathematical formulas to find out what to say.

7. When you pose a question, you must provide sufficient detail to narrow the focus of the search.

8. Sample tasks it can do:

   a. Text generation - The technology can recite text in a variety of ways such as writing articles, novels, or poems.

   b. Finishing text - It can complete a thought premised on the rest of the written words.

   c. Generate dialogue - ChaptGPT can create dialogue answers. If you are struggling with what to say, ChatGPT can provide you with a draft of a paper in seconds.

   d. Language translation - It can translate between several languages.

e. Summarize text - The product can condense lengthy texts into summaries.

f. Chatbot - It can generate responses that appear to be written by a real person.

9. Limitations

a. Its database is only current until September 2021. If you ask it a question that requires information past that date, it may not be able to give you an answer. Because the system has not been updated, this can cause mistakes or misinterpretations which may trigger significant repercussions in a legal framework.

b. If ChatGPT does not know an answer, it "*hallucinates*." This means that it just makes up an answer.

    i. ChatGPT has a warning on its site that it may "occasionally generate incorrect information" or "produce harmful instructions or biased content."

    c.   It will not answer sensitive questions.

10.   Developments with ChatGPT

    a.   ChatGPT has created a new version as of April 2023. It is GPT-4. It is said to be more functional, reactive, and safer than prior versions.

    b.   IT can use multiple mediums like text, images, and sound.

11.   Test the System

    a.   Open a browser and go to Open AI.

    b.   Create an account with your email.

    c.   You need to provide a phone number and a code will be sent to that number.

    d.   Inset the code and you will be redirected to ChatGPT.

    e.   At the bottom of the page will be the chatline for you to insert your question.

12.   You may choose GPT Plus, which is OpenAI's updated version. It has a larger language model but costs $20 a month plus tax.

VI. Other Products

1. Vendors offer products with different features and pricing.

2. Microsoft released Bing Chat in February 2023. It can author poems, examine data, play games, and do everything a digital assistant would do.

VII. Plugins

1. Plugins are tools to help ChatGPT access up-to-date information, run computations, or use third-party services.

2. These plugins extend the functionality of the AI chatbot by providing it with internet access, and a direct link to specific services.

3. As of May 2023, around 85 ChatGPT Plugins are available on the ChatGPT Plugin store.

4. Installing a ChatGPT plugin just takes a few clicks, but you need a ChatGPT Plus subscription. This is the premium subscription.

5.   You may also be able to access a plugin by going

directly to that vendor's site.

a.   For example, you could use Kayak and Expedia

Plugins when you want ChatGPT to create a trip

itinerary.

b.   Go to the Expedia website and you will see a link

to "Explore trip ideas with ChatGPT" and click on

that link.

6.   You can now install ChatGPT on your iPhone. Just go to

the app store.

VIII.   Use of AI in the Legal Arena

1.   It is estimated that about 44% of legal tasks can be

easily automated making lawyers much more

productive and cost-efficient.

2.   Nevertheless, Thomson Reuters revealed that AI or

ChatGPT for law firm use is infrequent.

a.   Of those surveyed, only 3% use it at their law

office while another 33% contemplate its use.

b.   60% reported that their firms have no interest in using generative AI. As you will see when I talk about ethics, this position may be a BIG mistake.

c.   Skeptics expressed apprehension about the system's accuracy and security, with concerns over how privacy and client confidentiality issues would be resolved.

3.   Despite these reservations, the recent interest in generative AI has soared primarily because of the publicity surrounding ChatGPT and its potential applications.

a.   Reuters reported that OpenAI users had reached 100 million monthly customers just two months after its launch making it "the fastest consumer application in history.

IX.   Will Lawyers Lose Jobs

1.   The technology does not alter the tasks of lawyers but allows them to be more productive and better leverage their specialized knowledge.

2. Lawyers will be able to do a job in a fraction of the time and at a fraction of the cost. Clients will expect this change in billing.

3. It is predicted that law offices that do not take advantage of this technology will be unable to remain competitive, losing clients and damaging their capacity to entice and keep talent.

X. Sample Products for Lawyers

1. Ironclad has created a tool known as "AI Assist." It uses ChatGPT technology to create redlined suggestions with proposed changes for contracts using words gleaned from preapproved clauses.

2. Lawdroid has an application called Copilot that ranks cases on a topic by relevancy. It will also read a case and give its understanding of the holding.

    a. LawDroid Copilot acts like a lawyer's virtual legal assistant, and helps with researching legal issues, drafting emails and letters, summarizing

documents, brainstorming blog ideas, and even just conversational chatting.

b. The owner of the product said that privacy and security is improved with this application, and data is not used for training purposes.

c. He also said that they solved the hallucination problem, and his system has over 1 million cases stored including decisions after 2021.

d   You can even ask follow up questions like who is he judge that authored the opinion.

3. Lexion is a Microsoft Word product that offers a plug-in that helps operators draft, negotiate, and summarize contract terms.

XI. Applications

1. Predictive coding uses a human informed algorithm to review documents in a legal case.

a. The first step is for the computer to learn the coding decisions. It will then apply that coding to the rest of the documents.

     i.   This is an e-discovery tool that can classify

records by categories such as relevant or

irrelevant, among other identifiers.

    ii.   For example, the system can be told to

identify all materials containing the name

"John Jones" over a particular time frame. This

predictive coding will then find similar

materials regardless of the size of the

documents.

2.   A legal judgment prediction is an AI tool that forecasts

the outcome of a lawsuit premised upon the facts and

other relevant information such as anticipated

arguments and claims.

   a.   LexisNexis is behind "Lex Machina." This tool

predicts the future behavior of the courts,

opposing counsel, and parties.

   b.   The system also allows counsel to ascertain the

damages awarded by a particular judge on an

issue over a time span, the chances that a judge

will grant or deny a motion, or the anticipated trial
schedule that a court will impose on the litigants.

c. A perceived flaw with this prediction capability is
that it may not account for a change in precedent
due to political, social, or economic influences.
Also, a change in the composition of the court
could render precedent suspect.

3. Legal Research

a. Attorneys spend about 16.3 percent of their time
performing legal research. Existing technology
allows counsel to access records from a computer
instead of spending hours in a law library.

b. Services like Westlaw and LexisNexis have made
this transition possible by using artificial
intelligence to retrieve cases, statutes, and
articles. This retrieval system is premised upon
creative "keyword" searches.

c. A common complaint is that this type of search
engine will retrieve many cases that must be

reviewed to see if they have any relevance to the

issue at hand.

d.   These new tools no longer merely match words

but offer characteristics on how various opinions

relate to one another.

e.   Casetext is an online legal research instrument

that uses AI to create legal documents, conduct

sentence-based parallel investigations, add

citations to a brief or motion, and organize case

materials on a centralized portal.

4.   Contract Analysis

a.   The benefit of such a system is that it can "read

contracts accurately in any format, provide

analytics about data extracted from contracts, and

extract contract data much faster than would be

possible with a team of lawyers."

b.   Kira Systems automatically translates documents

into a machine-readable context, and employs

artificial intelligence to identify common clauses,

provisions, and data points.

5.   Court Use

a.   About 60 assessment tools are being used in the

criminal justice system ranging from assessing the

risk of a defendant harming society to determining

whether a person should be released on bail.

b.   Advocates assert that these tools can decrease

bias in decision-making.

c.   Critics argue that there is a built-in bias in the

tools used to create these systems.

d.   In any event, some courts are using algorithms to

predict the risk of recidivism with a criminal

defendant at the time of sentencing.

e.   The system, known as COMPASS, is a risk

assessment algorithm to offer advice for the

Department of Corrections when formulating

placement decisions, managing convicts, and

planning treatment.

i. The tool is premised upon data collected from the defendant's criminal file and talking to the defendant.

XII. How to Determine if AI Created the Text

1. GPTZero checks for plagiarism by distinguishing between text written by humans or generated by a ChatGPT-like platform.

XIII. Critics

1. Not everyone is enamored with the rapid full-scale implementation of artificial intelligence.

2. Elon Musk cautions that artificial intelligence could foster the destruction of civilization.

3. Apple, Goldman Sachs, and Samsung are among a growing list of companies banning employees from using ChatGPT at work.

XIV. Disadvantages of the Technology

1. Disclosure of confidential information

a. The system must use data accumulated from many sources. This is the only way to formulate a knowledge foundation to answer an inquiry.

b. One problem is that this data may involve copyrighted and other intellectually protected material.

c. The system will also retain whatever information the user enters to fabricate its knowledge base.

d. These materials include sensitive information that may be employed as part of an answer given to another customer creating the risk of revealing confidential information to third parties.

2. Misuse of information

a. AI allows the user to complete tasks in a fraction of the time. However, this efficiency provides a powerful incentive for misuse.

      i.   For instance, workers use these systems to claim the computer's output is their own work product.

    b.   Academics express apprehension that students may use artificial intelligence to pen answers to their assignments.

3.   Inaccurate results

    a.   AI technology learns as it goes along and constantly needs updated information. This means that a computer-generated answer may contain inaccurate or outdated data.

      i.   Remember ChatGPT has not updated its database since September 2021.

      ii.   These types of inaccuracies could result in the production of misinformation that could affect business advice or subject the user to liability concerns.

      iii.   For instance, Galactica was said to be able to "summarize academic papers, solve math

problems, generate Wiki articles, write

scientific code, and more." It lasted three days

on the market because it could not tell the

difference between accurate and false

information. This is a prerequisite for a

language model intended to create scientific

copy.

4.   External risks

a.   Third parties can also create issues with the

technology. The system can create a deep fake

image or video that seems real but has been

fabricated by AI intelligence.

i.   The image appears so authentic that it is

impossible to detect that it is fake.

b.   The technology can also be used to submit a

fraudulent insurance claim by generating fictitious

images of a casualty loss.

5.   Loss of jobs

a. A significant drawback across most fields is the potential loss of jobs. AI tools can create less of a demand for a person to manually sift through materials.

b. In this regard, Deloitte projects that approximately 100,000 law-associated jobs can be automated by 2036.

XV. Robo Ethics

1. Lawyers are bound to follow the Code of Professional Responsibility.

2. The Model Rules of Professional Conduct were crafted by the American Bar Association in 1983. This was before sophisticated AI tools existed.

3. Therefore, the application of AI to writing briefs, contracts and performing other legal tasks is uncertain.

4. This lack of clarity makes it necessary to explore the interplay between ethics and AI technology.

5. The full implementation of AI in the law is far away.
    Nevertheless, accounts have emerged of ethical
    problems with the utilization of the technology.

6. The first formal attempt to address the lack of AI
    guidance occurred at the 2023 Midyear Meeting of the
    American Bar Association when it passed Resolution
    604.

    a. This pronouncement deals with how "lawyers,
        regulators, and other stakeholders should assess
        issues of accountability, transparency, and
        traceability in artificial intelligence."

    b. Developers, integrators, suppliers, and operators
        of AI systems should ensure that their products,
        services, systems, and capabilities are subject to
        human authority, oversight, and control.

    c. Responsible individuals and organizations should
        be accountable for the consequences by their use
        of AI products, including any legally cognizable
        injury or harm caused by their actions or use of AI

systems or capabilities, unless they have taken reasonable measures to mitigate against that harm or injury.

d.   Developers should ensure the transparency and traceability of their AI products, while protecting associated intellectual property.

e.   Resolution 604 is not binding, nor does it appear that any state bar association has issued formal ethics decisions dealing with the utilization by attorneys of artificial intelligence.

7.   Rules of Ethics

a.   Nevertheless, several ethics rules have potential application: 1) competence, 2) communication, 3) confidentiality, and 4) supervision.

8.   Ethics Rule 1.1 Competence - "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

a.   While nothing is said about maintaining

competence in technology, that element was

added by Comment 8 to this Rule.

"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."

b.   This principle suggests that lawyers are tasked

with two ethical obligations.

i.   They must possess a basic comprehension of

the AI tools they use in their practice.

ii.   This means that attorneys can no longer turn

a blind eye to this technology and say they are

not going to use it.

iii. A competent lawyer should not automatically

accept AI output as being accurate.

iv.   This requires an attorney to check the AI-

generated materials to make sure the software

is working correctly and to assess the results

to provide competent representation.

9. Ethics Rule 1.4 (A)(2) – Duty to Communicate

a. The duty to communicate with clients, includes the

obligation to "reasonably consult with the client

about the means by which the client's objectives

are to be accomplished."

b. This obligation suggests that the attorney should

discuss with clients the decision to use AI in their

representation.

c. An attorney must make reasonable efforts to avoid

the unintentional or unauthorized disclosure of

materials involving the representation of a client.

i. The problem with AI is that the tool may

require client information to be provided to

third party providers.

ii. This risk means that lawyers must take the

necessary steps to make sure that their

client's data is properly shielded.

    iii. Remember that AI retains what you ask for, and it becomes part of the database. This could cause the software to disclose the information as part of another answer.

10. Ethics Rule 5.5 – Duty of Supervision

    a. Ethics Rule 5.5 imposes upon a lawyer "an obligation to supervise nonlawyers within their employee and non-employees outside the organization for whom they are responsible."

    b. A comment on the Rule references technology vendors as a nonlawyer under this section.

    c. While this note does not discuss what constitutes reasonable steps an attorney must take, counsel should undertake *due diligence* to appreciate the product's limitations and abilities.

11. Unauthorized Practice of Law

    a. One of the more intriguing ethics questions deals with whether work performed by a computer

constitutes the unauthorized practice of law under

Rule 5.5(b).

b.   Lawsuits have been instituted against AI program

developers, averring that they are engaged in the

unauthorized practice of law.

c.   The primary principle gleaned from the reported

decisions is that many jurisdictions require the use

of some *legal judgment* as a critical requirement

for the practice of law.

d.   In *Lola v. Skadeen,* 620 Fed. App. 37 (2nd Cir.

2015), the Second Circuit Court of Appeals

"implied that machines could not engage in the

practice of law."

i.   The *Lola* decision involved a contract lawyer

who conducted a document review for a law

firm but used no independent legal judgment

in performing the work. Therefore, the court

determined that he was not engaging in the

practice of law for an overtime wage claim.

ii. Applying the lesson learned from this decision, software that fails to exercise any independent judgment in the performance of its work is not engaged in the practice of law.

e. DoNotPay Controversy

i. DoNotPay, the self-help company, which started its business by helping people fight parking tickets, became embroiled in a controversy when it announced that it was taking its AI-powered "robot lawyer" into court to litigate a matter.

ii. Following a host of complaints from the legal community, the company did not proceed with its plans.

iii. Nevertheless, a class action lawsuit was filed claiming that it misrepresented its software. The complaint averred that the "Robot Lawyer" was practicing law without a license.

iv. LegalZoom is an online do-it-yourself service provider that allows users to generate legal documents without needing to hire an attorney. The firm has been very successful in fighting off these attacks.

XVI. Legal Issues

1. Copyright Infringement

a. Does Open AI collection of material for training infringe on the original owner's rights?

b. US copyright law is governed by the *Copyright Act of 1976*.

c. This law grants authors of original works exclusive right to reproduce, distribute, and display their work.

d. Most of the text used to train ChatGPT is subject to copyright protection except for text that is in the public domain.

e. To answer whether the ChatGPT's training process violates the copyright law, one must determine if

during the training process OpenAI copied the

work, or is the output of ChatGPT a *"derivative*

work" within the fair use doctrine?

f.   ChatGPT was asked this very question

and it replied: "During the training process, text

from various sources is used to train the ChatGPT

model… [and that] text…is not stored in a

database. The model uses the text to learn

patterns and structure of the language, and once

the training is done, it doesn't require the text

anymore."

g.   An intellectual property professor said the

definition of a derivative work is "based upon" a

dataset consisting of preexisting works. Therefore,

it seems that ChatGPT output is a *derivative work*

under copyright law.

h.   If it is a derivative work, is use of the material a

fair use?

     i.   As a generalization, the fact that ChatGPT has been trained on millions of underlying works makes it seems likely that the output would be a *fair use*.

     ii.   Also, OpenAI is a non-profit entity who is classified as an "AI research and deployment company."

     iii.   Thus, it seems likely that ChatGPT is the type of research project that would have a strong argument for fair use.

2.   Can the end user copyright the material?

    a.   ChatGPT's Terms of Use Agreement provides in

     Clause 3(A):
     As between the parties and to the extent permitted by applicable law, you own all Input. Subject to your compliance with these Terms, OpenAI hereby assigns to you all its rights, title, and interest in and to Output.

3.   Generally, the content generated by this technology can't be copyrighted.

    a.   According to the U.S. Copyright Office, a copyright is a type of intellectual property that protects

original works of authorship that are

independently created by a human author and

have a minimal degree of creativity.

b.   This means that for copyright protection to apply

to a work, it must be created by a human. This

issue was litigated in the monkey case.

    i.   Naruto, a 7-year-old monkey, snapped several

photos of himself with a camera belonging to

photographer David Slater.

    ii.   People for the Ethical Treatment of Animals

(PETA) sued Slater and the self-publishing

company Blurb on Naruto's behalf.

    iii.   The group argued that publishing and selling

the photographs that the monkey took

infringed on Naruto's rights under the

Copyright Act.

    iv.   The photographer maintained that he set up

the equipment so he should be given the

copyright to the pictures. The Copyright Office

disagreed asserting that the animal took the

picture, so no copyright was available.

v.   The 9th Circuit Court of Appeals said: "We

conclude that this monkey – and all animals,

since they are not human – lacks statutory

standing under the Copyright Act.

vi. If a person adds a story line and directs

ChatGPT to change the color of the bike, alter

the plot, etc.— then it seems that there may

be sufficient human involvement so that the

output could be copyrighted.

(a).   How much human involvement is

needed to qualify a work as "protectable" is

uncertain.

(b).   Increasing the level of human

involvement will improve the chance that the

output is subject to

copyright protection.

4.   ChatGPT and confidentiality

a. The company's FAQ page states that it will use your conversations to improve its AI language models, and your chats may be reviewed by human AI trainers.

b. It also states that OpenAI can't delete specific prompts from your history, so don't share personal or sensitive information with Chat GPT.

c. How can you reduce your risk?

   i. Choose the conversation you want to delete from your chat log and click on the icon to delete it.

   ii. To bulk delete your conversations, click on the three dots next to your email address in the bottom-left corner and pick "Clear conversations" from the menu.

d. Steps to take to stop ChatGPT from saving your work

i. Open the settings menu on ChatGPT by clicking on the three dots next to your email address.

ii. Under Data Controls, turn off the toggle for "Chat History & Training"

iii. Once unchecked, ChatGPT will no longer save chats to your history, and it won't use them for model training. Unsaved conversations will be deleted from the system within a month.

e. What are the potential risks of using ChatGPT?

i. Data breaches are a potential risk when using any online service, including ChatGPT.

ii. You can't download Chat GPT, so you must access it through web browsers.

iii. In that context, a data breach could occur if an unauthorized party gains access to your conversation logs, user information, or other sensitive data.

iv. If a data breach occurs, your private
    conversations, and personal information could
    be exposed to unauthorized entities
    compromising your privacy.

v. In a data breach, user data could be sold or
   shared with parties who might use the
   information for targeted advertising,
   disinformation campaigns, or other nefarious
   purposes.

5. Biased and inaccurate information

   a. Due to the vast amount of data, it has been
      trained on, the AI might inadvertently generate
      responses that contain false information or reflect
      existing biases within the data.

   b. There are currently no specific regulations that
      directly govern ChatGPT or other artificial
      intelligence systems.

     c.   However, AI technologies are subject to existing data protection and privacy regulations in various jurisdictions.

          i.   For example, the California Consumer Privacy Act requires businesses to disclose their data collection and sharing practices and allows consumers to opt out of the sale of their personal information.

6.   Legal Liability

     a.   It was once noted, "[n]o complex computer program has ever been marketed that did not have some defect, somewhere." Therefore, when something goes wrong with the use of AI, who is responsible and what theories of liability will be asserted?

     b.   A mistake made by AI presents various questions that are problematic through current principles of responsibility.

     c.   Duty of care

i.   It is hard to ascertain breaches of the duty of care because it is not possible to discover the cognitive thought process used by the algorithm.

ii. The question of a lawyer's responsibility when an AI tool makes a mistake is easy to answer.

iii. The device is only one instrument in counsel's toolbox, and the attorney has the ultimate responsibility to make sure that advice is accurate.

iv. Even if the algorithm is viewed as an employee of the firm, the rules of ethics demonstrate that counsel must accept responsibility for the computer under the obligation of supervision.

v.   *Symbionics v. Orlieb,* 432 F. App'x 216 (4th Cir. 2011)

(a).   The plaintiff filed an untimely appeal, and claimed the mistake was caused by a

"quirk" in counsel's use of a Microsoft

Window's calendar to calculate the deadline.

(b).   The court said that a lawyer who fails to

check the work generated by an artificial

intelligence program will bear the ultimate

responsibility for the error. Such a mistake is

not excusable negligence.

d.   Product Liability

i.   In a product liability context, a key question is

whether AI technology is a product or a

service, or a combination of both.

ii.   AI technology that is a product, or a

combination of both, may be held to the same

strict liability criteria as other products.

iii.   This includes the ability to sue the

manufacturer for damages generated by a

defect in the technology.

iv. If AI software is classified as a service, it is uncertain if the court would subject the AI to the same legal standards.

v.   Generally, a contract for an AI system will be governed by Article 2 of the Uniform Commercial Code.

vi. An attorney who is harmed by AI technology will immediately think of suing the vendor. That, however, might

be a challenging task.

vii. An attorney who is harmed by AI technology will immediately think of suing the vendor. That, however, might

be a challenging task.

viii. It is common for AI system developers to include contract language with the sale that waives all warranties or sells the product "as is."

ix. For example, Open AI's Terms of Use contains

the following language:

> You will defend, indemnify, and hold harmless us, our
> affiliates, and our personnel from and against any
> claims, losses, and expenses (including attorney's
> fees) arising from or relating to your us of the
> Services, including your content, products, or services
> you developed or offer in connection with the
> Services, and your breach of these Terms or violation
> of applicable law.

x. Vendors even include an indemnification

clause.

e. Can this generative technology defame someone?

i. A man has sued alleging the chatbot created a

fake legal summary accusing him of fraud and

embezzlement.

ii. The suit was filed in Georgia by radio

personality Mark Walters, who alleges ChatGPT

provided details of a fake complaint to a

journalist who had sought details about a real,

ongoing case.

iii. Walters alleges the ChatGPT answered an

inquiry about the real court case with details

of a fictional case claiming Walters was being

sued for "defrauding and embezzling funds"

from an organization.

iv. No court has yet to discuss whether an answer

from an AI chatbot would be covered by the

Communications Decency Act.

v. There is a case before the Supreme Court that

could jeopardize the immunity afforded AI and

ChatGPT under Section 230 of the

Communications Decency Act.

(a.) The case deals with a college student

who was shot and killed in a rampage by

Islamist militants in Paris.

(b.) The lawsuit alleged that YouTube gave

material support for terrorism through its

video-sharing algorithms by unlawfully

recommending videos posted by the militant

group.

(c.)   The issue is whether the information

available from the Internet through

recommendation engines can trigger liability.

(d.)   The lower court dismissed the lawsuit

against YouTube based on the Act.