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**TORT LAW IN THE DIGITAL AGE – LEVERAGING TECHNOLOGY FOR CASE  
SUCCESS**

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**I. Introduction – A Foundation of Generative Artificial Intelligence (AI) and Large Language Models (LLMs)**

Generative artificial intelligence (AI) is a type of AI that generates new content or data in response to a prompt, or question, by a user. Large language models (LLMs) are an advanced form of generative AI that are the basis for generative pre-trained transformer (GPT) platforms, such as ChatGPT. LLMs can process and generate natural language text in a seemingly human manner. To use ChatGPT (and similar platforms), a user types in a research question or requests information, sometimes based on documents, images, or other information the user provides, and ChatGPT provides a response written in natural language as if a human had written it.

LLMs are trained by using vast amounts of data from a range of sources, including books, blogs, news articles, Wikipedia information, social media posts, and other website content. LLMs are general purpose models that “understand” a wide variety of domains and language constructs because of the diversity of the data on which they are trained. LLMs are capable of a multitude of functions, including searching and retrieving information, drafting and summarizing content, and answering both broad and narrow questions. It is important to recognize that when generative AI is producing a response to a prompt, it is predicting (based on its knowledge of language patterns) what words are most likely to come next in response to the prompt. It is a tool optimized to synthesize content, not necessarily to recall facts. This is what distinguishes it from popular and commonly used search engines.

**II. Common Uses of LLMs in the Litigation Context**

Litigators should think of LLMs as tools to enhance their delivery of legal services, rather than tools that can replace them by delivering legal work product without any attorney involvement. Currently, LLMs are an emerging technology that hold incredible promise for the enhanced delivery of legal services in both the near and distant future. Although not without risks, LLMs may be particularly helpful to litigators and in-house counsel overseeing litigation because of their ability to: Summarize transcripts, legislation, and other documents. Currently, with the right set of prompts, LLMs can often summarize content on par with a human's ability to summarize. However, most existing LLMs are generalists, with broad training on many topics but not in a specific area of expertise. As legal-specific LLMs emerge, they are likely to perform increasingly well when summarizing legal documents, such as pleadings, deposition transcripts, court transcripts, proposed legislation, statutes, regulations, and other dense or lengthy legal documents. For example, litigators who want a simpler explanation of a complex expert opinion or statute could use an LLM application to summarize it in natural language.

A less obvious but potentially critical use for litigators is employing LLMs to summarize and then essentially analyze information. Law firms and companies that license the right to use legal-specific LLM platforms may be able to create their own interface, where they can upload documents and instruct the application to search for key people or events. For example, a litigator could upload a set of deposition transcripts and instruct their LLM platform to read and summarize them while paying special attention to certain key events the deponents mention, based on which the LLM, if properly trained and given examples to imitate, could then: identify topics that lack sufficient testimony and need further development. Highlight discrepancies in how witnesses describe an event. Return its results in a table that identifies the witness, the timestamps for the testimony, the statements they made, and how those statements varied from other witnesses' testimony. Assist in document review and electronic discovery (e-discovery). In addition to answering questions about public data, LLMs are capable of extracting information from private data that users input and upload.

1. **Drafting documents.** One of generative AI's core capabilities is generating new content or data in response to a prompt. ChatGPT and other LLM platforms are adept at drafting content that appears to be written by a human with general knowledge of the subject at hand. However, when specialized knowledge is needed, such as in legal drafting, these platforms do not yet appear ready to perform these kinds of tasks. This is because these platforms are known to "hallucinate," meaning they provide made-up or factually incorrect answers with a high degree of confidence. Although the results may appear to include accurate information, on a close reading and further research, counsel may find that procedural tools, legal theories, and even citations contained in the response do not actually exist. Additionally, litigators often need to adapt their style of writing based on the type of document they are drafting (for example, a litigator may take a more adversarial tone in a motion to dismiss than in a letter to a judge requesting continuance of a hearing). ChatGPT and similar platforms do not yet appear fully capable of capturing these types of nuances on their own, but if given examples of the style or tone desired, the AI can imitate the example.

2. **Performing legal research.** LLMs can sometimes produce acceptable results when asked a simple legal research question, such as a request to identify the elements of a tort. However, litigators must keep in mind the current tendency of the technology to hallucinate and provide incorrect answers. LLMs are known to pull inaccurate information even for basic questions. For example, they may pull information from the wrong jurisdiction or from a case that is no longer good law. For these reasons, litigators should exercise extreme caution when using general LLMs for legal research and should use their expertise to review and analyze the results to determine their accuracy. Again, as legally trained LLMs enter the market, meaning LLMs that are trained to perform legal research and have access to mature legal content sets, litigators should expect to benefit from the efficiency and time savings these tools provide.
3. **Identifying patterns and predict litigation outcomes.** Litigators considering whether to file in a particular court, remove a case to federal court, make a particular motion, or settle a case may find LLMs' capabilities to be especially useful. Generative AI has strong predictive capabilities. Using generative AI to help derive insights from large sets of legal data could advance litigation analytics well beyond existing capacities. Litigators can use the technology to identify patterns in how cases are settled or decided. LLMs can analyze patterns in past cases and predict outcomes of future cases, including the likelihood of success of a particular argument before a particular judge.
4. **Improve access to justice.** Over time, as generative AI becomes better trained on performing legal tasks, it could create tremendous improvements in access to justice. Generative AI can help to mitigate some of the barriers to access to justice, including a lack of knowledge about one's rights or the law, unequal access to trained legal professionals, including for financial reasons, and limited availability of pro bono services from attorneys with insufficient time or resources.

*Expert Q&A on ChatGPT, Generative AI, and LLMs for Litigators.* (n.d.).  
[https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/tortsource/2023/spring/expert-qa-chatgpt-generative-ai-and-llms-litigators/](https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/tortsource/2023/spring/expert-qa-chatgpt-generative-ai-and-llms-litigators/)

### **III. Digital Transformation and Its Impact on Tort Law – Overview of the digital age: emergence of technology, its pervasive influence and ethical use.**

#### **a. Ethical Use of Artificial Intelligence**

In a presentation at the TIPS Cybersecurity and Data Privacy Conference, panelists discussed the ethics of using AI. The panelists, Alyssa Johnson (Barron & Newberger), John Stephens, and John Hendricks (both from Hendricks Law) analyzed how generative AI tools implicate key ethical duties: duty of confidentiality, duty of competency, and duty of diligence. (“Generative AI,” as used here, is a program that generates texts, images, and other data using models from learned data, patterns, or structure, e.g., ChatGPT, which responds to requests from users to generate its own text based on content provided.) The panel highlighted some real-world examples where courts are now insisting that lawyers disclose their use of AI (the scope and

specifics of such disclosures are to be determined in many jurisdictions). In addition, the panel stressed other essential considerations: disclosures to clients regarding the use of AI, plus any related costs or potential fee adjustments; eliminating bias; validation and correction of results; compliance with relevant jurisdictions; oversight and understanding of who is using AI and how it is being used. To that last consideration, it is becoming clear that firms likely will need to supplement or create guidelines that address how their lawyers are to use and benefit from generative AI. *AI Policies for Lawyers and Firms*. (n.d.). [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/tortsource/2024/spring/ai-policies-lawyers-firms/](https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/tortsource/2024/spring/ai-policies-lawyers-firms/)

## **b. Need for New Guidance**

Thomson Reuters, the parent entity for Westlaw, reports that while regulation is in its early stages, the focus has been on the privacy rights of individuals, particularly consumer protection issues and the right to opt-out. Thomson Reuters Institute, *Legalweek 2024: Current US AI regulation means adopting a strategic and communicative approach*. Some in-house corporate departments have ended up banning the use of ChatGPT outright as the industry awaits more definitions about appropriate controls.

Firms have well-established policies and procedures relating to conflicts checks, internet and email use, social media content, remote access, and other related HR or codes of conduct policies. These policies are informed by client obligations as well as the ethical and statutory oversight of the practice of law. Just as courts have set down electronic discovery, filing, and communications policies, so too will jurisdictions follow suit when it comes to monitoring and policing attorneys' use or potential abuse of generative AI. Apart from privacy and confidentiality, a lack of proper oversight can also lead to errors and omissions. Lawyers also may consider the risks and benefits of sharing what traditionally would have been their proprietary work product with a technology that is open to the internet.

From briefs, memoranda, or standard motions to client updates, opinions, or newsletters, firms may have years' worth of data and content that makes them stand out to their clients or an industry. It is foreseeable that pressures to produce advice or advocacy in the most efficient and effective way possible could lead to incorporating unreliable concepts or sources and meanwhile, sharing your content outside of your presumably secure environment has risks. Remember, the technology is based on the user "prompting" the program with text, and then the software follows up with a response incorporating what the user said, drawing on terabytes of data to find the next most likely series of words. Once prompted, depending upon the technology, the original content has been shared outside of a firm's confidential or secure environment, which may be especially problematic if the lawyer also shared client-generated content (even if anonymized, some fact patterns lend themselves to easy identification as some have learned in the advertising context). Not to mention that training and overseeing younger lawyers on these finer points presents an additional layer of risk management.

## **c. Updated Guidelines**

What updates or new guidelines should firms turn to in reconciling the dawn of this new era with their traditional way of operating? Just as firms and bar groups train new lawyers on confidentiality and fiduciary duties, the time has come to reframe these issues with AI in mind. Unsurprisingly, the State Bar of California weighed in with “guidelines for generative AI use.” Updated firm policies could include some “easy” fixes from those guidelines:

1. Confidentiality.
2. Lawyers must not input any confidential client information into any generative AI solution that lacks adequate confidentiality and security protections.
3. If a client consents or requests the use of generative AI, review the terms to ensure content will not be used or shared by the AI product in any manner for any purpose.
4. Competency and Diligence.
5. Before using generative AI, lawyers should understand to a reasonable degree how the technology works and its limitations.
6. Lawyers must scrutinize and critically analyze output for accuracy and bias and make any corrections where necessary.
7. Compliance with law: Lawyers must ensure compliance with relevant laws and regulations, applicable to attorneys, clients, the content, or the output.
8. Supervisory: Even if directed by a client or supervisor, subordinate lawyers may not use generative AI in a manner that violates professional obligations.
9. Client communications: Disclose to clients the novelty of the technology, risks associated with its use, and the scope of representation and address the client’s sophistication (where a client has specific knowledge of the type of AI, address where AI may complicate advocacy or present limitations, especially where the client expresses a preference for using AI).
10. Candor to the tribunal: Review and correct auto-generated citations or edits. Comply with local rules.
11. Fees: Bill for time spent, not time the lawyer would have spent absent AI. Engagement letters should address any impact on fees or costs.
12. Discrimination: Be aware of bias risks and correct and eliminate anything contradictory to firm or court practices.

Some may feel more comfortable issuing an AI ban first and modifying their use policies once the regulatory landscape has more fully developed. At the very least, lawyers and firms need to be aware that there likely will be a push to utilize such advances where clients, courts, and parties try to capture the benefits. The onus, as ever, will be on counsel to assess the risks and avoid the pitfalls.

#### **d. Risks of Generative AI and LLMs in the Context of Litigation**

Generative AI and LLMs have several known limitations and weaknesses that litigators and other legal professionals should be acutely aware of, in addition to yet uncovered limitations and weaknesses. To understand the risks, litigators should consider two categories of risk: output risk (for example, the information created may be risky to use) and input risk (for example, the information supplied to the model may be at risk.) The most prevalent output risks are:

1. **Inaccuracy.** As mentioned above, GPT models are known to hallucinate, meaning they provide incorrect answers with a high degree of confidence. Because these models are not able to reason as human beings do and are not always knowledgeable about the topic they are discussing, they are known to produce false or nonsensical answers. This may occur, for example, because the model has insufficient training data about a particular subject matter. The possibilities of hallucination, combined with the lack of legal domain knowledge in most LLMs, make it particularly risky for litigators to rely on information produced by an LLM. However, the risk of inaccuracies and hallucinations should decrease as legal-specific data is added to train LLMs, a process called fine-tuning. When LLMs are fine-tuned with legal information, they will become more familiar with legal language, concepts, and patterns, and the accuracy of the information they provide should increase substantially.
2. **Bias.** LLMs, similar to any type of AI, can be biased. If biases exist in the data used for training the AI, biases will inform the content that AI generates as well. Models trained with data that are biased toward one outcome or group will reflect that in their performance.
3. **Confidentiality.** The biggest input risk is a breach of confidentiality. A key risk in using LLMs involves the attorney-client privilege, attorney work-product doctrine, data security, and confidentiality. As an overarching principle, litigators planning to use LLMs should make sure the platform they are using does not retain or allow third parties to access the data. For example, one way to accomplish this may be by entering into a licensing agreement (with the AI provider or the platform that incorporates the AI) that contains strict confidentiality provisions and explicitly protects the information the user uploads from being retained or accessed. Unless and until these kinds of protections are in place, legal professionals should not put sensitive, confidential, or privileged information into a public model, such as ChatGPT (see also What are the primary ethical pitfalls of using generative AI and LLMs, and how can litigators avoid them?). However, platform developers are already starting to roll out new functionalities to address these kinds of privacy issues, such as by allowing users to turn off their chat histories and prevent the information they enter from being used to train the platform.

**e. Examples of digital innovations: artificial intelligence and ChatGPT.**

- Despite concerns about an over-reliance on such tools, LexisNexis and Westlaw have rolled out their “AI Powered” legal research platforms such as Lexis+AI™ and Westlaw Edge. Clients may expect their lawyers to find efficiency from those tools.

#### **IV. How digitalization has changed traditional concepts of tort law and research – A Foundation for Visual Learning in Legal Presentations**

Visual presentations have become the most effective communication tools for explaining complex stories to audiences. The heavy use of social media platforms has wired some modern viewers to become visual learners. When these individuals are seated in the jury box, information presented in simple pictorial forms can lead them to achieve high levels of understanding and retention of case information. Crucial courtroom decisions have resulted from visual presentations that effectively nudged jurors from one party’s side to the other. By using simple graphic stories to enhance your arguments, you will increase the chances of persuading visual learners to take your client’s side in a case. Below are nine tips to consider when putting together a presentation for today’s visually plugged-in jurors:

##### 1) KEEP IT SIMPLE

Break the narrative down to basics. All stories—no matter how complex—should have a simple thread introducing major players to set the scene. Setting the scene will help lay the foundation for your case story’s chapters.

##### 2) MAKE IT A GOOD ONE

Most people appreciate good storytelling, but a compelling story gets more attention, raises retention factors, and builds viewer trust. The facts, organized into relatable chapters, can pull the main points of your case into relevant scenarios for the jury. Presenting stories that have familiar themes may also help jurors form solid cognitive connections.

##### 3) SKETCH OUT IDEAS

We can all sketch ideas onto paper. The game Pictionary, during which players decipher others’ drawings, is a perfect example. While playing Pictionary, I have witnessed teammates successfully convey messages by drawing basic sketches—often those as simple as stick figures and geometric shapes. Similarly, your vision for a courtroom presentation can be prepared by drawing stick figures and geometric shapes. These rudimentary sketches will form the basis for images that will effectively convey your case messages.

##### 4) GET TO THE POINT

Here is the hard part. To ensure the jury will have a clear understanding of your messages, it is important to strip complex concepts down to basic shapes. Sketch all the relatable thoughts that

pop into your head while you are reading story chapter outlines, even if you decide to only turn some of them into computerized graphics. The most effective visuals usually result from well-thought-out concept development sessions.

#### 5) SET THE MOOD

Backgrounds, color schemes, images, and typeface decisions are major components for setting the tone of your courtroom messages. The combination of these elements can determine the mood of the entire presentation. Choose your design factors carefully since they can play an important role in how the jury will respond to your visual messages and remember to stay consistent with the spectrum of creative choices throughout the entire presentation.

#### 6) GO BACK TO BASICS

A trial is not a place to use ornate graphics. Decorative elements may distract jurors from following visual roadmaps that are intended to guide them toward making a favorable decision. Your main objectives should be to successfully convey key themes, facts, and messages.

#### 7) THINK ABOUT PLACEMENT

Control the way the jurors gaze at certain aspects of your designs by carefully positioning display elements. The conscious placement of images can lead the jurors' eyes along an invisible path from one element to the next. For example, a magazine layout with a large illustration positioned on the right side of the page will usually cause the jurors to focus on the graphic before looking at other elements. A good rule: the artwork that is the main focal point of each of your presentation displays should utilize the largest image or boldest color.

#### 8) DETERMINE YOUR COMMUNICATION STRENGTH

What type of presenter are you? Are you linear or nonlinear? If you are a linear presenter, you are probably comfortable with a PowerPoint presentation because it goes from one slide to the next without skipping slides. If you are nonlinear, you may want to go back to basics and use an overhead projector, large presentation boards, or a combination of both. Technology shouldn't matter if you are able to get your point across and connect with the viewers. You may consider using someone to navigate a trial presentation program to pull up individual slides upon your cue. Most importantly, choose a presentation medium that makes you most comfortable.

#### 9) REMEMBER LESS IS MORE

The average Gen-Xer and Gen-Yer— today's jury pool majority— has grown up using the internet, and studies show that their attention spans are limited to short sound bites and quick snippets of information. A well-thought-out presentation that relays ideas simply and poignantly may just tip the scales of justice in your client's favor and successfully convince a jury to view the story as you see it.



*(Jordan, S. (2023, August 25). Communicating to the visual learners on the jury. natlawreview.com. Retrieved April 28, 2024.*

In short, uncovering cognitive principles for effective teaching and learning is a central application of cognitive psychology. There are several notable differences between visual and verbal explanations; visual explanations map thoughts more directly than words and provide checks for completeness and coherence as well as a platform for inference, notably from structure to process. Extensions of the technique to other domains should be possible. Creating visual explanations is likely to enhance students' (or juror's) spatial thinking skills, skills that are increasingly needed in the contemporary and future world. One aspect to explore is whether visual and verbal productions contain different types of information. Learning advantages for the generation of visualizations could be attributed to learners' translating across modalities, from a verbal format into a visual format. Translating verbal information from the text into a visual explanation may promote deeper processing of the material and more complete and comprehensive mental models.

*<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5256450/> (The National Center for Biotechnology Information)*

## **V. Lawyers and ChatGPT: Best Practices (Michael A. Kaplan, Raymond S. Cooper, and Ruth Fong Zimmerman, Lowenstein Sandler LLP)**

### What Is ChatGPT?

In November 2022, OpenAI launched ChatGPT, an artificial intelligence chatbot that has since risen to fame. In fact, many experts hail the chatbot as the best artificial intelligence chatbot on the market. ChatGPT, powered by a robust database and computing techniques trained to recognize human speech patterns, "doesn't exactly know anything." Steven Shankland, Why We're Obsessed With the Mind-Blowing ChatGPT AI Chatbot, CNet (Feb. 19, 2023, 5:00 a.m.). Instead, it relies on its vast database to respond in a way that mimics human speech patterns. The product has quickly gained over 30 million users per day—a feat that other technology products have taken years to accomplish. Id. Given the rapid success of ChatGPT and its widely acclaimed capabilities, the use of ChatGPT in legal practice may become inevitable.

The "basic" version of the ChatGPT product is free to users, with a paid subscription version of the product expected to be launched soon at an expected price of \$20 per month. Fionna Agomuoh & Luke Larsen, What Is ChatGPT? Here's How To Use The AI Chatbot Everyone's Talking About (April 12, 2023 11:24 a.m.). Be aware of the potential advantages of the subscription service, which offers faster response times and access to additional features. Introducing ChatGPT Plus, OpenAI (Feb. 1, 2023).

### General Functionality

ChatGPT can engage in a conversational-style interaction with users, allowing you to ask it questions and provide it with specific directions. This means that users can provide the chatbot with narrow requirements (e.g., proofread this paragraph and make it more persuasive). Users can explain what type of "work" they want ChatGPT to do, such as:

- Drafting an email about a specific topic
- Providing background information on an issue –or–
- Proofreading a document

Given ChatGPT's broad functionality and the newness of the technology, the potential functions of the technology are still being developed.

Further, users can provide specific rules that ChatGPT has to function within. While these rules can be used in a harmful way, such as the "Do Anything Now" rules that users have created to force ChatGPT to ignore its Moderation API protocols and take biased positions on different topics, these rules could also be used in useful ways. See *Tricking ChatGPT: Do Anything Now Prompt Injection*, Medium (Feb. 15, 2023). For example, an attorney seeking to understand legal issues in a given case could instruct ChatGPT to pretend that it was a lawyer—a workaround to the moderation software that prevents ChatGPT from providing legal advice. Updates to the Moderation API protocols cause users to invent new and more elaborate prompts to overcome responses that are otherwise limited.

### Why Use ChatGPT

The potential utility of ChatGPT in legal practice is still mostly unexplored. Certainly, as explained more fully below, ChatGPT's functionality is limited, and there is a great deal of room for error. However, the potential for ChatGPT to serve as an extremely useful tool for attorneys, whether that be through administrative tasks or substantive work, is clear. Attorneys should recognize the potential of this software to save them time, create smoother processes, and better their work as practitioners. As with all technologies, ChatGPT is a tool, and not a substitute for an actual attorney. But its usefulness as a tool should not be ignored.

Perhaps more importantly than the cost- and time-saving aspects of ChatGPT, you should consider whether there is an ethical duty to become fluent in this new technology. Most states have adopted Comment 8 to Model Rule 1.1 of the Model Rules of Professional Conduct, requiring attorneys maintain competence with technology. See *Litigation Technology Competence State Law Survey*. Given this requirement, it may be wise to remain current with the technology, and work to incorporate it appropriately into legal practices—especially as the tool becomes more tested and well-recognized as a tool for attorneys.

### Limitations

While ChatGPT is bound to be a useful tool, it is important to recognize that there are several significant limitations to the product.

- **Inaccuracy.** ChatGPT has been fed robust data to allow it to smoothly answer questions and respond to inquiries in a human-like structure. The chatbot's ability to mimic speech patterns in its responses leads to responses that are either reasonably accurate, or inaccurate but reasonable sounding. While ChatGPT can be used to substantively understand issues or to draft responses, practitioners should ensure the accuracy of all ChatGPT assertions and take care not to rely on ChatGPT as producing wholly correct responses. Overreliance on ChatGPT for accuracy could cause serious issues for attorneys who fail to catch errors in ChatGPT's work product.
- **Lack of current data.** ChatGPT is not connected to the internet, and its data is limited to 2021. Matt G. Southern, OpenAI's ChatGPT Update Brings Improved Accuracy, Search Engine Journal (Jan. 10, 2023). As such, using ChatGPT for any functions that would necessitate current information would be ill-advised. It is important to remember that any research or knowledge that ChatGPT relays is inherently limited, especially in the area of law—where case law can quickly become outdated and legislation can quickly be enacted. Beware relying on ChatGPT for substantive knowledge of topics that may be outdated based on its current data set and keep track of when (and if) that data set is updated.
- **Lack of confidentiality.** The use of ChatGPT in the legal context brings about unique issues relating to confidentiality. Under both the Model Rules of Professional Conduct and the attorney-client privilege doctrine, attorneys must maintain strict confidentiality for their clients. To mitigate this risk, ensure that any data fed into the ChatGPT software has been redacted, with all identifying and privileged information removed. Prudent practitioners should treat interactions with ChatGPT as if it were a third party that should not be privy to any private client information.
- **Beware overreliance on ChatGPT,** as even its creators acknowledge that it is not able or authorized to provide legal advice, and that it frequently provides plausible, but inaccurate, responses. Users colloquially refer to these responses as "hallucinations."

## **VI. Potential Uses of ChatGPT in Legal Practice**

While attorneys have been using legal service tools that implement some forms of artificial intelligence for years, the vast disparities between ChatGPT's capabilities and prior artificial intelligence tools' capabilities creates new opportunities for attorneys to develop uses for the tool. It is important, however, to act with caution. Given the concerns over accuracy, lack of current information, the risks for bias, and the issues with confidentiality, it would be unwise to treat ChatGPT as anything more than a tool. That being said, ChatGPT could be used in legal practice in a variety of ways. Of course, you should take caution not to include any confidential information when asking ChatGPT to do any of these tasks.

## Revising and Proofreading

Many attorneys already use some form of editing software to revise and improve their writing. While ChatGPT may not be specifically designed for legal writing, using ChatGPT in reviewing and revising writing could be extremely efficient. Not only can you provide ChatGPT with simple proofreading tasks (e.g., reviewing an email for typos and grammar issues) but you can also ask ChatGPT to do more complex editing such as:

- Asking the software to rewrite and incorporate edits to increase persuasiveness
- Asking the software to narrow the focus of writing, such as by eliminating the portions of a draft that focus on a specific issue

Because ChatGPT's software uses natural language processing, its ability to edit and redraft writing can be particularly useful. Users can also prompt more unusual revision tasks, such as simplifying or summarizing a block of text. The sophistication of the software also allows users to prompt ChatGPT with additional rules. For example, a user can engineer a prompt that defines certain parameters and assigns values for ChatGPT to conform its response, like the following:

Please adhere to the following parameters. Each parameter is set on a scale from 1 to 10, where higher values represent more of the associated attribute. After your response please provide a bulleted list of the parameters and their values. Parameter 1 is Complexity, higher values will produce more intricate sentences and vocabulary. Parameter 2 is Professionalism, higher values will produce formal language suitable for professional settings. Using similar prompts allows you to increase or decrease Complexity and Professionalism in the response. Alternatively, you can analyze your own writing in accordance with these parameters. ChatGPT is not limited to only these parameters and users can define the parameters in other ways.

For example, when asked to redraft the first paragraph of this practice note to "increase professionalism," ChatGPT provided:

*“This practice note offers a comprehensive overview of the essential considerations related to the utilization of ChatGPT, an innovative AI-powered chatbot, in the field of law. It outlines the key concerns that lawyers must keep in mind while leveraging ChatGPT or other AI programs as tools in their practice and highlights potential applications of ChatGPT in daily practice.”*

Trying again, but focusing on the chatbot drafting to "increase persuasiveness," ChatGPT provided:

*“With the rise of innovative AI-powered technologies in the legal industry, it is imperative that attorneys remain cognizant of the critical considerations associated with utilizing ChatGPT, a cutting-edge chatbot. This practice note provides an in-depth overview of these crucial factors and emphasizes the pivotal role they play in leveraging ChatGPT or other AI programs as effective tools in legal practice. Additionally, it highlights the vast potential applications of*

*ChatGPT in daily practice, making a compelling case for attorneys to consider its adoption as an essential tool for legal excellence.”*

Both prompts were well-taken and provided solid, completely usable responses. Situationally, ChatGPT can provide extremely nuanced editing that many attorneys can benefit from.

### Simple Drafting Tasks

While it is unwise to trust ChatGPT to write an entire motion or an entire agreement, litigators and corporate attorneys alike could benefit from ChatGPT's ability to quickly—and often, effectively—draft simple documents. Emails, for instance, that you might otherwise spend valuable time writing and rewriting to ensure accuracy and professionalism, could be drafted with simple instructions to the chatbot and quick revisions from the attorney. Keep in mind that you can ask ChatGPT to edit its own work, which it does quite efficiently—for example, when asked "can you write me an email to an opposing attorney asking to meet and confer?" ChatGPT quickly provided the following email:

*“Sure, I can help you draft an email to an opposing attorney asking to meet and confer. Here is a sample email:*

**Subject: Request for Meet and Confer**

Dear [Opposing Attorney's Name],

I hope this email finds you well. I am writing to request a meet and confer conference between our parties to discuss the [issue/ case/ dispute] currently before us. As you are aware, we have been working on resolving this matter for some time now, but unfortunately, we have not been able to reach a mutually acceptable solution.

I believe a meet and confer conference would be an efficient way for us to discuss the issues at hand, and hopefully, make progress towards a resolution. During this conference, I propose that we discuss our respective positions, share any relevant information or evidence, and explore potential areas of compromise.

I am available to meet at your convenience and suggest that we schedule a meeting within the next two weeks. Please let me know if this time frame works for you and if there are any specific dates or times that you would prefer.

Thank you for your attention to this matter, and I look forward to your response.

Best regards,

[Your Name]

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ChatGPT readily accepted the next edit: "Edit the email to make it an initial meet and confer for a newly filed case" and re-wrote the email:

*Certainly, here's an updated version of the email for an initial meet and confer for a newly filed case:*

**Subject: Request for Initial Meet and Confer**

Dear [Opposing Attorney's Name],

I hope this email finds you well. My name is [Your Name], and I am the attorney representing [Your Client's Name] in the recently filed case of [Case Name and Number].

As we begin this case, I believe it would be beneficial for us to have an initial meet and confer conference to discuss the case's procedural and substantive issues. During this conference, I propose that we review the pleadings, discuss discovery expectations, and explore potential areas of agreement or disagreement.

I am available to meet at your convenience and suggest that we schedule a meeting within the next two weeks. Please let me know if this time frame works for you and if there are any specific dates or times that you would prefer.

Thank you for your attention to this matter, and I look forward to working with you.

Best regards,

[Your Name]

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While still imperfect, ChatGPT can continue to edit the email to the extent needed—or, at the very least, this prompt gives attorneys a springboard to easily edit the email themselves.

Further, ChatGPT may have the ability to adapt prior documents into template documents that can be recycled for future use. ChatGPT could also redraft documents to focus on different clients or different topics, retaining the original substance. For example, ChatGPT could potentially rewrite a simple demand letter for a different client or redraft a response to standard interrogatories or requests for admissions for a different matter.

There are myriad other ways in which ChatGPT could repurpose prior work, such as by taking an objective memorandum and rewriting it in persuasive form, which could allow an attorney to quickly pull language from the memorandum into a brief. ChatGPT could also be fed specific case quotes and asked to take those quotes and formulate an argument based on their substance. While any such writings would need close supervision, the simple act of starting the writing process can save significant time.

By feeding the source directly to ChatGPT, you can mitigate the risk that ChatGPT will provide inaccurate responses. Further, with enough finesse—and potential "prompt engineering" (as explained below)—ChatGPT could become extremely effective in these tasks. Consider ways in which requests can be phrased to generate the correct output, and do not hesitate to ask ChatGPT to revise its own work.

## **VII. Conducting Document Review or Due Diligence**

ChatGPT has the potential to quickly review and analyze data in ways that current document review or due diligence software programs lack. ChatGPT's artificial intelligence can identify relevant documents, privilege issues, or other "hot" issues much more efficiently than through a manual review, and much more adeptly than through a Boolean search for certain terms.

### **Research**

While ChatGPT's dataset is limited in time, and while it cannot be relied upon for accuracy, using ChatGPT to kickstart research can save valuable time. ChatGPT can identify the seminal case law on a topic or areas of concern in a demand letter, giving you a first idea of what areas need more research. ChatGPT could also provide you with opposing counsel's potential counter-arguments, allowing you to determine where they may need to conduct additional research.

You can also ask ChatGPT to quickly synthesize cases or large sets of research. By feeding ChatGPT research, the chatbot could quickly reduce the research to its key points. This could effectively enable you to convey the substance of their research to clients or other attorneys, or just gain a better understanding of the case themselves. Of course, it is important to recognize the software's limitations—when asked to summarize different cases, ChatGPT was able to provide concise summaries of major holdings. However, when asked about finer points of law in those cases, ChatGPT struggled:

**Prompt:** Summarize Chaffee v. Kraft Gen. Foods, 886 F. Supp. 1164, 1169 (D.N.J. 1995)

**Response:** *Chaffee v. Kraft General Foods is a federal district court case in New Jersey that involved a claim of age discrimination under the Age Discrimination in Employment Act (ADEA). The plaintiff, Chaffee, alleged that he was terminated from his employment as a district sales manager due to his age and filed a lawsuit against his former employer, Kraft General Foods. . . . [Author note: ChatGPT provided a several paragraph response here that does not need to be replicated]*

**Prompt:** Does the Chaffee case have holdings on judicial admissions?

**Response:** *After reviewing the Chaffee v. Kraft Gen. Foods case, I can confirm that the case does not have any holdings on judicial admissions. The case primarily deals with the issue of age discrimination under the Age Discrimination in Employment Act (ADEA) and focuses on the burden-shifting framework commonly used in discrimination cases. The court in Chaffee did not address any issues related to judicial admissions, which is a legal doctrine that involves a party's admission of a fact that is binding on them in the course of legal proceedings.*

There, ChatGPT is wrong. In fact, the Chaffee case discusses judicial admissions at length: for example, explaining that "[b]efore addressing Kraft's bases for summary judgment, the Court must determine whether the statement made by Chaffee's advocate, in his presence, is an admission, binding upon the client." Chaffee v. Kraft Gen. Foods, 886 F. Supp. 1164, 1168 (D.N.J. 1995). So, while you can use ChatGPT for broader topics, its capabilities may still be limited when asked about finer points of law.

ChatGPT can also help users craft Boolean inputs to conduct a search. Imagine asking ChatGPT to develop search terms based on the type of case you want to find and it can provide the string to input into the search bar. For example, you can prompt ChatGPT to "Craft a boolean search looking to find cases in California that address when a contract has been breached in bad faith." To this, ChatGPT responded:

Here's a boolean search string you can use to find cases in California that address breach of contract in bad faith:

*("breach of contract" OR "breached the contract" OR "breaching the contract") AND ("bad faith" OR "unfairly" OR "intentionally" OR "fraudulent") AND California*

You can modify the search by including specific terms related to your case or excluding irrelevant terms to refine your results further. Keep in mind that this search may not capture all relevant cases, and you should review the cases to ensure their relevance to your specific legal issue. In this vein, attorneys can use ChatGPT to supplement with search queries that could be run more broadly.

## **VIII. Looking to the Future**



ChatGPT cannot be substituted for an attorney. But given enough practice, an attorney can maximize ChatGPT's power and increase their efficiency. Using ChatGPT as a springboard for research, writing, and review, may allow litigators to get a free—or at the least, more cost effective—pair of metaphoric eyes on their work. The potential of this tool cannot be overlooked, even if some practitioners hesitate embracing a technology that remains so untested.

Lawyers—and, specifically, law firm information technology departments—should be aware of the potential importance of prompt engineering, and how it can increase the utility of the ChatGPT program. "Prompt engineering is the process of crafting and optimizing text prompts for large language models to achieve desired outcomes." Lucas Mearian, How To Train Your Chatbot Through Prompt Engineering, ComputerWorld (Mar. 21, 2023). By using prompt engineering, lawyers can maximize the efficacy of their requests to ChatGPT and encourage the software to work for them in more appropriate ways. ChatGPT is extremely new, and the ways it can be used for attorneys are plentiful but will likely take significant honing. By playing around with the chatbot, you can get familiar with what commands and prompts elicit more accurate responses and can determine how best to use the software. Through researching—or purchasing—prompt engineering tools, litigators can effectively maximize ChatGPT's potential.

## **IX. Lawyer's Obligation to Be Competent**

Rule 1.1 requires that all lawyers provide competent representation to a client. Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 2023) (Model Rule 1.1). One aspect of providing competent representation is possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.*

To date, more than 30 states have adopted a comment to the Model Rules of Professional Conduct that states that "[t]o 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." Model Rule 1.1 cmt. [8]; see also Litigation Technology Competence State Law Survey.

AI is perhaps the single most "relevant technology" of our time. It, and related technologies, can help lawyers identify common mistakes like:

- Citing overturned statutes
- Misquoting legal authority –or–
- Using terms inconsistently in a contract

As these issues and others can be spotted with the click of a button, lawyers may increasingly find themselves having to defend their refusal to use AI. And as a practical matter, a lawyer who insists on doing all aspects of their work manually may lose out on work in favor of lawyers who can use AI assistance to do the same tasks at a fraction of the cost. Lawyers may

therefore find themselves in an increasingly fraught situation, where the ethical rules encourage use of AI, but also impose discipline for the various ways it can be misused.

## **X. Confidentiality Concerns**

Protection of client confidences is perhaps the most fundamental duty in the legal profession. After all, the authority to practice law "is the true privilege, not the right, to be entrusted with a client's confidences, aspirations, freedom, life itself, property, and the very means of livelihood . . . ." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 20 (1971) (Blackmun, Harlan, & White, JJ., dissenting). Lawyers owe a duty of confidentiality to their clients, which means that they 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 [under certain circumstances, including "when appropriate in carrying out the representation"]. *Model Rules of Pro. Conduct r. 1.6 cmt. [5]* (*Am. Bar Ass'n 2023*) (*Model Rule 1.6*); *Model Rule 1.6(a)*. This rule naturally applies when a lawyer is using AI in the course of representing a client.

In order to use AI to code documents, formulate legal conclusions, generate legal documents, or for a multitude of other pursuits, a lawyer must necessarily provide client information to the AI system. The client information provided to the AI system is generally viewable to the system vendors and/or developers. By way of example, ChatGPT stores personal user and conversation data, which can be viewed by developers and used to improve the system. See Natalie, *What is ChatGPT*. Open AI, last visited 7 Apr. 2023.

Similarly, all documents uploaded to a document review platform—which could easily comprise millions of documents in a large-scale litigation—are subject to whatever security measures, strong or weak, the platform has in place. When using an AI program to generate legal documents, such as wills, incorporation documents, real estate documents, loan agreements, promissory notes, contracts, or a plethora of other documents, the application collects and stores highly sensitive personal or business information in order to construct the finished product.

All lawyers should take precautionary measures to understand the AI system's operative security policies, including the extent to which documents are retained, the time frame for which they are preserved, any encryption technology, what departments or parties employed by the AI vendor can view the information, and plans in the event of a data breach. You should also request and retain copies of the system's data privacy policies—if a client's information is ever compromised as a result of a data breach, you will be glad that you have it. Any information that you learn from vendors about the system's security features should be memorialized in writing for the same purpose.

To comply with the Model Rule governing confidentiality, a lawyer must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." *Model Rule 1.6(c)*. By

proactively educating yourself about an AI system's privacy policies and response to a data breach, you will be better equipped to demonstrate your compliance with the rule if you ever find yourself in a less-than-ideal situation involving AI technology.

AI is a tool with the potential to transform the legal industry by making lawyering more productive and efficient. It also has potential for misuse. By understanding the ethical limitations on the use of AI, lawyers can feel more confident incorporating it into their practices. If a lawyer has questions about their obligations under the rules of professional conduct related to the use of AI or otherwise, they can and should get confidential legal advice to ensure compliance with the rules. See Model Rule 1.6 cmt. [9] ("In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.").

## **XI. Lexis+ Judicial Brief Analysis Demonstration**

Defendant's Motion to Dismiss vs. Plaintiff's Opposition to Motion to Dismiss Brief

Analysis:

Recommended Authorities

Similar Briefs

Jurisdictions

Quote Check

Document Citations

After allowing the artificial intelligence to analyze both briefs (like a judicial review), an attorney on either side will be able to know their brief's weakest areas and strongest areas. The recommended authorities will lead the attorney to strong case law predicated on "extracted concepts" that will allow them to draft a stronger brief and ultimately lead to a stronger oral argument hearing in the case.

## **Selected References**

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3. [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/tortsource/2024/spring/ai-policies-lawyers-firms/](https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/tortsource/2024/spring/ai-policies-lawyers-firms/)
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## **Relevant Cases and Developments**

**Alter v. OpenAI:** What started as three separate cases brought by three different author groups has been consolidated into a single action against OpenAI and Microsoft. (This case includes Authors Guild and Basbanes). Plaintiffs alleged that OpenAI and Microsoft are liable for copyright infringement arising from the use of plaintiffs' works to train defendants' AI models. Nos. 1:23-cv-08292, 1:23-cv-10211, 1:24-cv-00084 (S.D.N.Y.)

**Andersen v. Stability AI:** Visual artists filed this putative class action, alleging direct and induced copyright infringement, DMCA violations, false endorsement and trade dress claims based on the creation and functionality of Stability AI's Stable Diffusion and DreamStudio, Midjourney Inc.'s eponymous generative AI tool, and DeviantArt's DreamUp. Each of the four defendant groups have pending motions to dismiss plaintiffs' first amended complaint. No. 3:23-cv-00201 (N.D. Cal.)

**Center for Investigative Reporting v. OpenAI:** The Center for Investigative Reporting, a nonprofit news organization, filed a complaint against OpenAI and Microsoft, alleging defendants directly and indirectly infringed plaintiff's copyright by using those works in their training sets. The issues in this case are similar to those in *New York Times v. Microsoft* and *The Intercept Media and Raw Story Media v. OpenAI* cases.

**Concord Music Group, Inc. v. Anthropic PBC:** Several large music publishers sued Anthropic for direct and secondary copyright infringement and DMCA § 1202(b) violations, alleging that Anthropic improperly created and used unauthorized copies of copyrighted lyrics to train Claude and removed CMI from these copies. Plaintiffs also filed a motion for a preliminary injunction for defendants to preclude Anthropic from creating or using unauthorized copies of those lyrics

to train future AI models. Plaintiffs' motion for a preliminary injunction and Anthropic's motion to dismiss (or in the alternative, transfer) are currently pending. No. 3:23-cv-01092 (M.D. Tenn.)

**Daily News v. Microsoft:** Newspaper publishers sued Microsoft and OpenAI in the Southern District of New York for direct, vicarious and contributory copyright infringement, DMCA violations, common law unfair competition, trademark dilution, and dilution and injury to business reputation. Microsoft and OpenAI have filed motions to dismiss a subset of the claims. Openai has filed a motion to consolidate with New York Times. No. 1:24-cv-03285 (S.D.N.Y)

**Doe v. GitHub, Inc.:** Anonymous plaintiffs filed this putative class action, alleging that GitHub, Microsoft and OpenAI used plaintiffs copyrighted materials to create Codex and Copilot. The current causes of action include DMCA violations, breach of contract for open-source software licenses, and breach of contract for violating GitHub terms. The court is currently considering defendants' motions to dismiss certain claims of the second amended complaint. No. 4:22-cv-06823 (N.D. Cal.)

**Getty Images v. Stability AI:** Getty Images filed this lawsuit accusing Stability AI of infringing more than 12 million photographs, their associated captions and metadata, in building and offering Stable Diffusion and DreamStudio. This case also includes trademark infringement allegations arising from the accused technology's ability to replicate Getty Images' watermarks in the AI outputs. Parties are currently engaged in jurisdictional discovery related to defendants' motion to transfer. No. 1:23-cv-00135 (D. Del.)

### **Relevant Rules and Statutes**

#### American Bar Association Model Rules of Professional Conduct 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.

#### American Bar Association Model Rules of Professional Conduct 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;
  - (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.

American Bar Association Model Rules of Professional Conduct Rule 3.3: Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

American Bar Association Model Rules of Professional Conduct 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.