TO CHAT GPT OR NOT TO CHAT GPT: THAT IS THE QUESTION

Justice (ret.) John G. Browning
Chair, State Bar of Texas Task Force on Artificial Intelligence

Presented for:
The Computer and Technology Section, State Bar of Texas

Course Number: 174206926
September 29, 2023

WHAT IS "ARTIFICIAL INTELLIGENCE"?

Terms like "machine learning" and "cognitive computing" have been bandied about, but at its core, AI is the capability of a machine to imitate intelligent human behavior.

WHAT IS "GENERATIVE AI"?

An AI that relies on data, it's learned from to generate work product (which can be written or oral)

- Example: ChatGPT (GPT stands for "Generative Pre-Trained Transformer")

- When ChatGPT was initially launched in November 2022, it quickly grew to 1 million users; by Spring 2023, that figure swelled to 100 million users.

- The newest and more impressive iteration, ChatGPT 4, was released in March 2023.

WHAT CAN AI DO IN THE LEGAL WORLD?

There are many positive uses:

1) Document Review and Management

- Can quickly analyze large volumes of documents (contracts, financial records, court filings, etc.) and organize, identify, and classify case-related information.

2) Legal Research

- Can assist lawyers in finding relevant case law, statutes, etc., and can extract key information.

3) Contract Analysis

- Can analyze/summarize contracts and propose changes.

4) Predictive Analytics

- Can help lawyers predict case outcomes based on historical data.

GENERATIVE AI CAN:

1) Assist with drafting
   - Example: Clearbrief AI
2) Assist with client communication
   - Chatbots for law firm intake, scheduling, routine inquiries.
   - Drafting correspondence or legal blog content.
3) A recent Texas Bar CLE paper claimed to be the first generated by AI.

LAWYER ATTITUDES TOWARD AI

- March 2023 Goldman Sachs study estimated that 44% of legal tasks could be automated using AI tools.

- April 2023 Thompson Reuter Survey reported that 82% of lawyers said they believed that AI tools *can* be applied to legal work, while only 51% responded that they *should*.

JUDICIAL ATTITUDES TOWARD GENERATIVE AI VARY

- Judges in Colombia, Mexico, India, and several other countries have used ChatGPT in drafting opinions.

- Here in the United States, judges in Texas and around the country have adopted standing orders regarding the use of AI.

EXAMPLES:

1) Judge Brantley Starr (N.D. Tex.) requires attorneys to file a certificate attesting that:
   a. Either that no portion of the document filed was generated by AI, or
   b. That a human being has checked any AI-generated text and verified its accuracy.

2) Judge Roy Ferguson (394th District Ct.) requires pro ses and attorneys to attest that anything submitted using AI has been verified as accurate, and that they will be held responsible and subject to sanction.

A PARADE OF AI HORROR STORIES

Mata v. Avianca (N.Y. federal court June 2023)

- NY lawyer uses ChatGPT to research and draft brief in aviation personal injury case. Just one *slight* problem: the AI made up false cases and the lawyer never checked the work.

- Judge sanctions him $5,000 and orders lawyer to write apology letters to the real judges.

Ex Parte Lee (Waco Ct. of Appeals, July 2023)

- Appellant's brief in criminal case cites nonexistent cases, prompting court to speculate that ChatGPT was used.
- Relief denied.

Miscellaneous

- Lawyers in Colorado, Georgia, and other states sanctioned for using ChatGPT in filings that include made-up cases.

WHAT ARE THE ETHICAL DUTIES IMPLICATED BY AI USE?

1) *ABA Model Rule 1.1* (Texas Disciplinary Rule of Professional Conduct 1.01 – Competent and Diligent Representation)

- Competent Representation – We have a duty to provide competent representation, and Texas is one of 40 states to adopt Comment 8, which states that competence includes being conversant in "the benefits and risks associated with relevant technology."

But what does this mean? Depending on the engagement, use of AI tools may be appropriate and in the client's best interests. While there haven't been any U.S. cases linking an attorney's use of AI to tech competence, in 2018, two Canadian cases criticized lawyers' excessive time and billing, saying AI use would have reduced the attorneys' fees.

Cass v. 1410088 Ontario, Inc., 2018 ONSC 6959 (Nov. 22, 2018)

Drummond v. The Cadillac Fairview Corp., Ltd., 2018 ONSC 5350 (Sept. 13, 2018)

Both cases encouraged the use of AI in legal research.

Of course, lawyers competently using AI must be aware of its risks as well. These include the risk of "hallucinations," risks to confidentiality, risks of bias, etc.

"Hallucinations" by ChatGPT and other risks have been the subject of law firm policies and legal malpractice carrier advisories.

- New Zealand's Law Society warned its members of AI "hallucinations" that provided lawyers with "research" consisting of cases that didn't exist.
- Risks to confidential information: Samsung employees found out the hard way when they used ChatGPT and mistakenly shared confidential information and proprietary company information.
- Indiscriminate use of AI can result in defamation suits and copyright infringement litigation.

OTHER ETHICAL RISKS:

1) AI and the Risk of Bias:
   - ABA Model Rule 8.4
   - Multiple jurisdictions, like New York and Illinois, have passed "AI transparency" laws in areas like employment law, as has the EEOC.
   - Criminal justice, "risk assessment algorithms," and bias.
   - Using AI tools in jury selection can also present a bias concern.

2) AI and the Duty to Supervise:

- ABA Model Rules 5.1 and 5.3 (Texas 5.01 and 5.03) concern an attorney's responsibility in making sure that the attorneys and the non-lawyer assistants he/she supervises live up to the supervising lawyer's ethical duties.

- How does one supervise an AI tool?

3) Duty to Exercise Independent Professional Judgment:

- ABA Model Rule 2.1 (Texas 2.01 – the attorney's duty as advisor)
- Independent professional judgment must supplant any conclusions that may have been directly rendered by an AI.
- Under 2.1, considerations of factors beyond the scope of an AI tool may be in the client's interest (economics, social, political, moral factors).

4) Model Rule 1.5(1) – Charging Reasonable Fees
   - Use of AI tools for legal research or other tasks may be in the client's financial interests.

5) Lawyers also need to take reasonable precautions in the adoption and use of AI technology that requires client confidential information.

LAWYERS SHOULD:

1) Understand generally how the AI tool works;

2) Review the contract or terms of service to know what is being agreed to in using the AI provider;

3) Learn what data security measures the AI provider has in place;

4) Determine what additional steps may be warranted before submitting client's data to the AI provider;

5) Educate their staff and their client about the AI use;

6) Remain vigilant about whether the AI provider has any data security issues.

AUGUST 2019 ABA RESOLUTION

1) Lawyers must address the bias, explainability, and transparency of automated decisions made by AI;

2) Lawyers must address the ethical and beneficial usage of AI;

3) Lawyers must address the controls and oversight of AI and the vendors that provide AI.

STATE BAR OF TEXAS TASKFORCE FOR RESPONSIBLE AI IN THE LAW (TRAIL)

- Formed June 2023
- *Goals*:
  - Educating Texas practitioners;
  - Fostering ethical integration of AI within the legal profession in Texas;
  - Investigating how Texas practitioners can leverage AI responsibly and ethically.

Computer & Tech Section Membership (and App)

www.sbot.org

- Section Membership: $**25**

- **Free Use of APP** w/ **> 62 Searchable Codes** (ie Texas Family Code, Penal Code, Estates Code, Gov't Code, Trust Code, and Tx.R.Civ.Proc. and Tx.Rules.Evidence

  - **Searchable** by **Keyword/ linked** to **other codes/**sections, exportable, deep linked to Google Scholar

- Regular **Free CLE** and Annual Mtg CLE;

- **Circuits** Journal