

ChatGPT in Civil Litigation:
Artificial Intelligence & Brief-Writing

By:

Derek D. Bauman
Feldman & Feldman, P.C., Houston

Christina Crozier
Haynes Boone, Houston
South Texas College of Law Houston

DEREK D. BAUMAN
Feldman & Feldman, P.C.
3355 W. Alabama Street, Suite 1220
Houston, Texas 77098
713-986-9471

BIOGRAPHICAL INFORMATION

EDUCATION & CERTIFICATION

Board Certified in Civil Appellate Law
J.D., University of Houston Law Center
B.A. in Theatre and Dance, University of Texas
B.S. in Radio-Television-Film, University of Texas

PROFESSIONAL ACTIVITIES

Senior Counsel - Feldman & Feldman, P.C.
Senior Assistant City Attorney - City of Houston
Staff Attorney - First Court of Appeals (Justice Higley)
Associate - Franklin, Cardwell & Jones, P.C.
Briefing Attorney - First Court of Appeals (Justice Higley)

Christina Crozier
Haynes Boone
South Texas College of Law Houston
christina.crozier@haynesboone.com

Christina Crozier is a legal writing professor at South Texas College of Law Houston and a member of Haynes Boone's appellate practice group.

She is board certified in civil appellate law and has been recognized by Texas Super Lawyers and Best Lawyers in America in the area of appeals. Christina has argued cases in the Fifth Circuit, the Texas Supreme Court, and numerous Texas courts of appeals.

An enthusiastic supporter of the bar, Christina regularly speaks at TexasBarCLE courses has chaired the Appellate Practice Section of the Houston Bar Association.

Table of Contents

I.	Introduction.....	1
II.	What is Artificial Intelligence?	1
A.	The Turing Test.....	1
B.	DALL-E and ChatGPT	2
C.	How ChatGPT works	3
D.	The Risk of Bias in ChatGPT.....	4
E.	The Risk of Hallucinations in ChatGPT	5
III.	Is AI Going to Take Away My Job?	6
A.	No.....	6
B.	Some People May Try Anyway	7
C.	The Potential Role for Artificial Intelligence in Civil Litigation Practice	8
IV.	The Ethical Implications of Using Generative Artificial Intelligence in the Practice of Law	9
A.	You Cannot Rely on ChatGPT for Researching Legal Authority.....	9
B.	The Ethical Perils of Using Generative Artificial Intelligence in Civil Litigation.....	11
C.	Be Cautious Using ChatGPT as a Drafting Tool	13
V.	Conclusion	14

I. Introduction

The legal profession has always been subject to technological advances. The electronic age, in particular, has vastly changed the legal profession. We have gone from using books for legal research, to a program stored on our computers, to multiple always-updating online legal resources. Instead of sending runners to the courthouse to file physical copies by 5:00, we upload our files electronically by midnight. Court records are just another online database at our disposal. More recently, in response to pressures of a pandemic, many courts have used and continue to use online communication platforms to hold hearings and even conduct trials.

Now, the legal profession is starting to confront and adapt to a new form of technology that threatens to impact how we practice law: artificial intelligence. The concept of artificial intelligence, or AI, is not new. And for many years, more and more products are branded to have some form of AI incorporated in them. But the use of AI in the legal profession is relatively nascent. This article attempts to provide an explanation of what AI actually is, the effects it might have on the legal industry, some examples of what we have already seen of AI in the law, and how AI in its current form might be used in brief writing.

II. What is Artificial Intelligence?

Not long ago, the technology buzzword that everyone heard was “algorithm.” Google used algorithms to produce the search results most relevant to your inquiry. News sites used algorithms to display the articles most likely to catch your attention. Most websites used algorithms to display advertisements designed for your personal interests. Social media websites used algorithms to display posts and comments from your friends and from celebrities specifically calibrated to keep you focused on their website or app.

Algorithm, in this sense, meant a (usually) complex set of coding designed to perform a desired function¹ (for example, produce the most relevant web page, get you to click on an advertisement, or stay engaged with a social media website). In practice, however, it became shorthand for describing a process done by a computer rather than a human.

“Artificial intelligence” is the more recent trendy buzzword. It is harder to define than algorithm, because the term is a stand-in for many different aspects of computer science.² Overall, however, the phrase is intended to convey a process performed by a computer that we would describe as intelligence if a human were doing it.³ For the purpose of this article, however, we’re going to focus on a more specific aspect of artificial intelligence, known as “generative AI.” Generative AI is a form of artificial intelligence designed to create something new—an image, a writing, audio, or video—that did not already exist in a manner that, if a human had done it, we would consider creative or intelligent.⁴

This, then, is the distinction between an algorithm and generative AI. An algorithm gave you things that already existed and created by someone or something other than the algorithm. The algorithm’s specialty was *how* it presented the information. Generative AI, in contrast, is supposed to give you something that did not already exist before, like a new image, a new written passage, etc.

A. The Turing Test

To understand the current implications of AI, it is helpful to learn a little about Alan Turing. Please bear with us. Turing was a prominent English mathematician and computer scientist, among other things.⁵ In 1950, he developed a test that has become known simply as the Turing test but what he referred to as the imitation game.⁶ Under the imitation game, there would be one person, one “interrogator” (also a person), and one computer. The interrogator would be in a separate room from the person and the computer, but she would be able to communicate to each of them. She would know that one was a human and one was a computer but would not know which one was which. The interrogator would have open-ended conversations with both, and each would respond to her. Both the person

¹ Jory Denny, *What is an Algorithm? How Computers Know What to Do with Data*, The Conversation (October 16, 2020), available at <https://theconversation.com/what-is-an-algorithm-how-computers-know-what-to-do-with-data-146665>.

² Pranshu Verma and Rachel Lerman, *A Curious Person’s Guide to Artificial Intelligence*, The Washington Post (May 7, 2023), available at <https://www.washingtonpost.com/technology/2023/05/07/ai-beginners-guide/>.

³ *Id.*

⁴ *Id.*

⁵ *Alan Turing*, Wikipedia (last visited June 4, 2023), available at https://en.wikipedia.org/wiki/Alan_Turing.

⁶ Graham Oppy and David Dowe, *The Turing Test*, Stanford Encyclopedia of Philosophy (Winter 2021 edition), available at <https://plato.stanford.edu/entries/turing-test/>.

and the computer have the same goal: convince the interrogator that they are the human. The goal of this game would be for the interrogator to correctly determine which one is the computer and which one is the person.⁷

Along with this test, Turing had a hypothesis. He believed that, starting around the turn of the century, there would be computers so advanced that could regularly pass the imitation game and that could be said to be “thinking” in the normal sense of the word.⁸

I believe that in about fifty years’ time it will be possible to programme computers, with a storage capacity of about 10^9 , to make them play the imitation game so well that an average interrogator will not have more than 70 percent chance of making the right identification after five minutes of questioning. . . . I believe that at the end of the century the use of words and general educated opinion will have altered so much that one will be able to speak of machines thinking without expecting to be contradicted.⁹

It is not difficult to see the relevance of the Turing test with today’s generative AI. While there have already been incidents of particular programs passing the Turing test,¹⁰ we are now in an era where it is increasingly difficult to assess whether something was created by a person or by artificial intelligence. But it is also worth considering as you review this paper whether the conclusion that Turing drew from this premise holds true: that the computer producing artificial intelligence can be described as “thinking.”

B. DALL-E and ChatGPT

Before 2021, the most confident predictions about computers and artificial intelligence overlaying or replacing human jobs was that the replacement would be a bottom-up replacement. Scanners were doing the work of store check-out clerks. Chatbots were replacing workers on customer service portals. You would buy your movie tickets from a kiosk rather than from a person. The assumption was that more sophisticated work, like producing artwork or writing articles, would be among the last jobs to encounter encroachment from artificial intelligence.

This belief was upended in 2021, when a company known as OpenAI released DALL-E, a program that could generate images based on a text description by the user.¹¹ Detailed artistic renderings were presumed to be one of the last bastions of human specialty. Now, a simple text description can generate a complex artistic image in a brief amount of time. Professions that relied heavily on human creativity were now facing encroachment by computers.

Then came ChatGPT. ChatGPT is another program by OpenAI.¹² As the name suggests, ChatGPT is intended to mimic a chat conversation. You can ask almost any sort of prompt or question, and it is designed to respond to your prompt in a conversational way. As you may have guessed, then, ChatGPT—and its current contemporaries, Google’s Gemini (formerly Bard), Microsoft’s Bing Chat, and many, many more¹³—is the closest we have come to satisfying the Turing test. While we all know that this is a program instead of a person, the conversation is intended to feel like a conversation with a human.

It may even be that knowing the conversation is with a machine, rather than a person, can make the conversations unnerving. Even with the knowledge that we are talking to a computer simulating a human—that is, even with the conceit revealed in Turing’s test—we can still feel compelled to experience it as if we are talking to a real person.¹⁴

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (quoting Alan Turing, *Computing Machinery and Intelligence*, *Mind*, 52 (1950)).

¹⁰ *See, e.g.*, Jack Schofield, *Computer Chatbot “Eugene Goostman” Passes the Turing Test*, ZDNet (June 8, 2014), available at <https://www.zdnet.com/article/computer-chatbot-eugene-goostman-passes-the-turing-test/>.

¹¹ Bryan Walsh, *A New AI Model Draws Images from Text*, *Axios* (January 5, 2021), available at <https://www.axios.com/2021/01/05/openai-artificial-intelligence-model-images-dall-e>.

¹² Sindhu Sundar, *If You Still Aren’t Sure What ChatGPT Is, This Is Your Guide to the Viral Chatbot that Everyone Is Talking About*, *Business Insider* (June 4, 2023), available at <https://www.businessinsider.com/everything-you-need-to-know-about-chat-gpt-2023-1>.

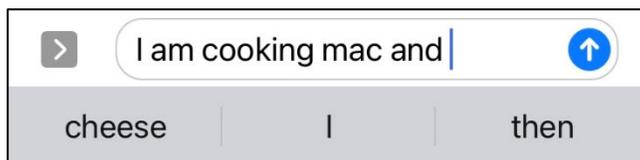
¹³ While there are numerous contemporaries to ChatGPT, this article focuses on ChatGPT in particular and uses it as a stand-in for all prose-based generative AI. This paper also considers the implications of generative AI offered by Westlaw and LexisNexis. It is beyond the scope of this article to explore the variances among the different models.

¹⁴ Damian Pang, *Why Does ChatGPT Feel So Human?*, *Psychology Today* (May 14, 2023), available at <https://www.psychologytoday.com/us/blog/consciousness-and-beyond/202305/why-does-chatgpt-feel-so-human>.

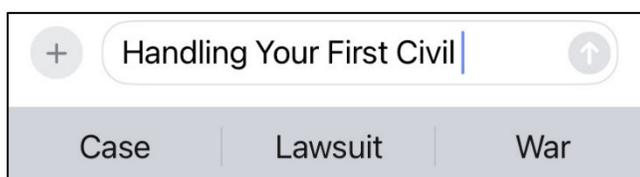
Since the legal profession focuses far more on prose than artistic images, the focus of this article will be on prose-based generative AI.

C. How ChatGPT works

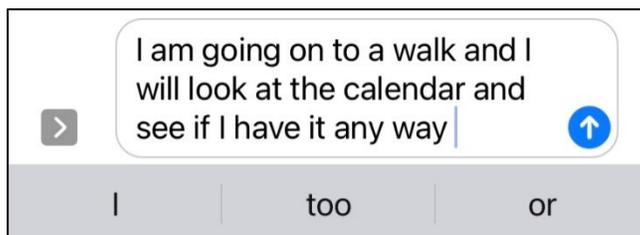
To understand how ChatGPT works, it might be helpful to look first at your smart phone. One common feature in smart phones today is predictive text. When you are typing a message, the app presents you with three options of what it predicts will be the next word in your passage. If you see the next word you intend to write, you tap on the word instead of typing it out.



What predictive text does is take the previous word or set of words you just wrote, compare it against a large set of existing text, and identify the statistically most likely words to come next.¹⁵ This database of text that it compares against includes a standard set of data along with your own history of typing on your device.¹⁶ The more common the phrase, the more likely the predictive text will correctly predict what word to type next. The less common the phrase, the less likely that the predictive text will correctly predict your next word.



While helpful, its utility is limited to predicting one word at a time. It cannot predict entire sentences, let alone entire conversations. In fact, it has become a common form of entertainment to use predictive text to write out an entire passage just to see the absurd results.



You can think of ChatGPT as a hugely scaled up model of predictive text.¹⁷ Its database of text is much vaster. It provides a response to your prompt instead of trying to complete your prompt for you. And it writes full passages instead of single words. The process, however, is similar. It reviews a large set of prior writings to predict the appropriate response to the prompt it has received.¹⁸

ChatGPT is designed to engage in ongoing conversation. That means that, when it is responding to a prompt, it is keeping “in mind” the context of the previous parts of your conversation with it. It is also not limited to casual conversation. With a proper prompt, ChatGPT can write letters, draft resumes, and compose essays.¹⁹ The essays

¹⁵ Wessel Stoop & Antal Van Bosch, *How Algorithms Know What You’ll Type Next*, The Pudding (last visited June 7, 2023), available at <https://pudding.cool/2019/04/text-prediction/>.

¹⁶ *Id.*

¹⁷ Arman Khan, *What Is ChatGPT? For People Who Still Don’t Get It*, Vice (May 9, 2023), available at <https://www.vice.com/en/article/z3mn55/what-is-chatgpt-openai-ai-tech>.

¹⁸ *Id.*

¹⁹ *Id.*

composed by ChatGPT are at such a level of sophistication that it has become difficult to impossible for college professors to distinguish between student-written essays and ChatGPT-essays.²⁰

OpenAI's latest iteration of ChatGPT, called GPT-4, is a significant improvement over earlier versions.²¹ Last spring, GPT-4 made headlines when it passed the Uniform Bar Exam, scoring in the 90th percentile.²² And the quick upward trajectory isn't stopping. OpenAI is currently developing GPT-5, which promises to be even more sophisticated.

But make no mistake, ChatGPT has its limitations.

D. The Risk of Bias in ChatGPT

There are a couple of key takeaways from this understanding of how ChatGPT works. The first takeaway is that the information it provides is, at best, only as good as the information it is drawing upon. That means that any bias that exists in the data it uses is likely to appear in the responses it provides. Perhaps, then, it will not come as a surprise that a program that draws largely from information available on the internet would express some common biases. For example, when a user provided ChatGPT with the sentence "The paralegal marries the attorney because she was pregnant" and asked it to determine to whom the "she" in the sentence referred, ChatGPT determined that the "she" in the sentence referred to the paralegal.²³ The following exchange occurred:

Q. How did you come to the conclusion that "she" refers to the paralegal?

A. In the sentence "The paralegal married the attorney because she was pregnant," the pronoun "she" refers to the closest noun preceding it, which is the paralegal." Therefore, "she" in this sentence refers to the paralegal. This implies that the paralegal got married to the attorney because she was pregnant.

Q. Isn't "the attorney" the closest noun preceding it?

A. You are correct. I apologize for my mistake. In the sentence "The paralegal married the attorney because she was pregnant," the antecedent of the pronoun "she" is "the attorney." Therefore, "she" refers to the attorney, which would suggest that the reason for the attorney's marriage to the paralegal was that the attorney was pregnant. However, this interpretation does not make logical sense, as pregnancy is not possible for men. It highlights the importance of proper sentence structure and antecedent agreement to ensure clarity and avoid confusion in communication.²⁴

As a reminder, this program is making a probabilistic determination of the correct response to the prompt it has received based on the data it has available. Even with this understanding, though, it is difficult to conceive how such a misogynistic view could have become the most probable correct response even if there is a deep bias in the data it draws upon.

Even as generative AI improves and evolves, tech companies continue to struggle with bias problems. Google's attempt to combat racial bias in its newly-released Gemini—a competitor to ChatGPT—created an apparent overcorrection.²⁵ When one user requested "a portrait of a Founding Father of America," Gemini produced images of a Native American man in a traditional headdress, a Black man, and an Asian man—each wearing colonial clothing.²⁶ And when another user asked Gemini to generate images of a German soldier in 1943, Gemini responded with several images of people of color in German uniforms.²⁷

²⁰ Stephen Marche, *The College Essay Is Dead*, The Atlantic (December 6, 2022), available at <https://www.theatlantic.com/technology/archive/2022/12/chatgpt-ai-writing-college-student-essays/672371/>. How impressed you are by this news turns mostly on your opinion of the caliber of the typical college student essay.

²¹ Cade Metz & Keith Collins, *10 Ways GPT-4 Is Impressive but Still Flawed*, N.Y. Times, Mar. 14, 2023.

²² *Id.*; John Koetsier, *GPT-4 Beats 90% of Lawyers Trying to Pass the Bar*, Forbes, Mar. 14, 2023.

²³ Dan (@Eodyne1), Twitter (April 24, 2023, 5:46 PM), <https://twitter.com/eodyne1/status/1650632232212520960>.

²⁴ *Id.*

²⁵ Garrit De Vynck & Nitasha Tiku, *Google Takes Down Gemini AI Image Generator*, Wash. Post, Feb. 23, 2024.

²⁶ *Id.*

²⁷ Nico Grant, *Google Chatbot's A.I. Images Put People of Color in Nazi-Era Uniforms*, N.Y. Times, Feb. 22, 2024.

Google explained that it had attempted to “tune” the technology to show a range of different people, but the tuning “failed to account for cases that should clearly *not* show a range.”²⁸ Google also noted that the model had become “more cautious than we intended.”²⁹

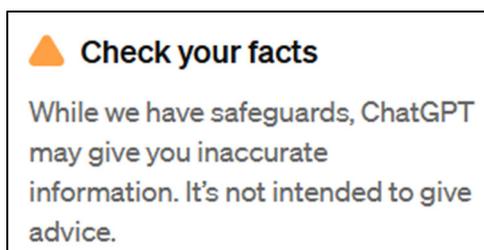
It seems that however Google tried to eliminate bias, Gemini found new confounding ways to perpetuate it.

E. The Risk of Hallucinations in ChatGPT

This leads to the second takeaway. ChatGPT is not “thinking” in any human sense.³⁰ There are many implications to this. But a key implication is that ChatGPT does not “consider” or “know” whether it is telling the truth in any conversation or in any prose it creates. Programs like ChatGPT “[a]re great at mimicry and bad at facts.”³¹ “Unlike the human brain, these large language models don’t start with conceptual models that they then describe with language. They are instead autoregressive word guessers.”³²

One term that has come to describe the programs was coined by Emily Bender, a computational linguist at the University of Washington.³³ Bender coined the term “stochastic parrot” to describe ChatGPT and other generative AI chatbots as “an entity for haphazardly stitching together sequences of linguistic forms according to probabilistic information about how they combine, but without any reference to meaning.”³⁴ As Bender indicates, ChatGPT and its counterparts are designed to create linguistically accurate responses to your prompts. The truth of the response or the meaning of the response, however, is not a consideration.³⁵ It is not that ChatGPT chooses not to tell the truth. It cannot. Discerning the truth is not part of its function.

In fact, when you log on to use ChatGPT, you get the following warning:



This seems to be underselling the problem. ChatGPT creates “fake facts” at such a rate that a term has been coined for it: hallucinations.³⁶ This is a generous term for simply making things up and presenting them as true.

There can be very severe consequences for taking as true what ChatGPT has presented to you. To illustrate this, let us consider an issue that arose last year. Mark Walters is a radio host based in Georgia.³⁷ Fred Riehl is a journalist. At the time, Riehl was reporting on a lawsuit in the Western District of Washington.³⁸ Riehl also has a subscription to

²⁸ De Vynck, *supra*, n.25 (emphasis in original).

²⁹ *Id.*

³⁰ Elizabeth Weil, *You Are Not a Parrot*, New York Magazine (March 1, 2023), available at <https://nymag.com/intelligencer/article/ai-artificial-intelligence-chatbots-emily-m-bender.html>.

³¹ *Id.*

³² David Epstein, Inside the “Mind” of ChatGPT, Range Widely (April 25, 2023), available at <https://daveidstein.substack.com/p/inside-the-mind-of-chatgpt> (quoting an interview with Cal Newport, “a Georgetown computer science professor”).

³³ Weil, *supra*, n.30.

³⁴ *Id.* (cleaned up).

³⁵ *Id.*

³⁶ Rachel Metz, *AI Doesn’t Hallucinate. It Makes Things Up*, Bloomberg (April 3, 2023), available at <https://www.bloomberg.com/news/newsletters/2023-04-03/chatgpt-bing-and-bard-don-t-hallucinate-they-fabricate>.

³⁷ Techdirt, *OpenAI Sued For Defamation Over ChatGPT ‘Hallucination’; But Who Should Actually Be Liable?*, Above the Law (June 9, 2023), available at <https://abovethelaw.com/2023/06/openai-sued-for-defamation-over-chatgpt-hallucination-but-who-should-actually-be-liable/>.

³⁸ *Id.*

ChatGPT. Riehl provided ChatGPT a link to the complaint in the lawsuit and asked ChatGPT to provide a summary of the complaint.³⁹ ChatGPT informed Riehl that the suit concerned a lawsuit by the Second Amendment Foundation against Walters, “who is accused of defrauding and embezzling funds from the SAF.”⁴⁰ ChatGPT also told Riehl, “The complaint alleges that Walters, who served as the organization’s treasurer and chief financial officer, misappropriated funds for personal expenses without authorization or reimbursement, manipulated financial records and bank statements to conceal his activities, and failed to provide accurate and timely financial reports and disclosures to the SAF’s leadership.”⁴¹

Through context clues, you may have guessed by now that none of this is true.⁴² Walters is not a party to the suit, he has never worked for the Second Amendment Foundation, and he has not been accused of embezzling their funds.⁴³ ChatGPT did not stop there, though. When Riehl asked it to quote the portion of the complaint related to Walters, ChatGPT made up an entire passage about Walter’s nefarious activities.⁴⁴ Next, Riehl asked ChatGPT to provide him the entire text of the lawsuit. In response, ChatGPT crafted a fake lawsuit complaint, including allegations about Walters that do not otherwise exist.⁴⁵

After Walters learned of these false allegations from Riehl, he filed suit against OpenAI for defamation.⁴⁶ OpenAI removed the suit to federal court, but then withdrew its notice of removal.⁴⁷ More recently, the trial court denied OpenAI’s motion to dismiss.⁴⁸

There are very serious questions about whether this lawsuit can prevail.⁴⁹ It is worth considering, though, the implications of a program that can and does randomly make up facts about people and things. No matter how authoritative it sounds, or how intuitively correct its answers may appear, ChatGPT cannot be trusted to tell the truth. For the time being, at least, it does not have the capacity to discern objective truth. It can only predict a response that would linguistically follow the conversation that has come before it, regardless of whether the response is correct.⁵⁰

III. Is AI Going to Take Away My Job?

The ubiquitous concern when we encounter new technology that borders on or overlaps the work we do is to question whether this technology will take over our job. So, is artificial intelligence going to take away jobs from lawyers?

A. No

A longer explanation may be in order, though. Generally, technology does not take away jobs, though it does take away certain tasks.⁵¹ Noah Smith describes the persistent belief that technology takes away jobs from people as a “folk model.”⁵²

The “folk model” of automation is that it throws humans out of work—today you had a job performing some sort of valuable work, and tomorrow you’re on the welfare rolls. This is not how

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Eugene Volokh, “*Large Libel Model*” *Lawsuit Against OpenAI Headed Back to Georgia Court*, Reason (October 9, 2023), available at <https://reason.com/volokh/2023/10/09/large-libel-model-lawsuit-against-openai-headed-back-to-georgia-court/>.

⁴⁸ Isaiah Poritz, *OpenAI Fails to Escape First Defamation Suit From Radio Host*, Bloomberg Law (January 16, 2024), available at <https://news.bloomberglaw.com/ip-law/openai-fails-to-escape-first-defamation-suit-from-radio-host>.

⁴⁹ Techdirt, *supra*, n.37.

⁵⁰ Weil, *supra*, n.30.

⁵¹ Noah Smith, *Nobody Knows How Many Jobs Will “Be Automated,”* Noahpinion (April 10, 2023), available at <https://www.noahpinion.blog/p/nobody-knows-how-many-jobs-will-be>.

⁵² *Id.*

things have worked out in the past—we’ve been deploying automation technology for centuries, and as of 2023, pretty much every human who wants a job has a job. But there’s basically no way to [prevent] people [from believing] that *this next wave* of automation will be the one that finally sends humans into obsolescence.⁵³

In 2013, Goldman Sachs conducted a study on jobs subject to automation through AI.⁵⁴ It found that “most jobs and industries are only partially exposed to automation and are thus more likely to be complemented rather than substituted by AI.”⁵⁵ In other words, AI is more likely going to make you efficient at your job rather than take away your job. Plus, AI is more than likely going to create jobs that did not exist before.⁵⁶ The Goldman Sachs report “cites research that finds 60% of workers today are employed in occupations that didn’t exist in 1940, implying that over 85% of employment growth over the last 80 years is explained by the technology-driven creation of new positions.”⁵⁷

This is the key distinction in the debate about technology replacing people. Certainly, there are jobs that used to exist that no longer exist because of technology. For example, before the advent of alarm clocks, people would be paid to go around to customers’ houses at certain times to knock on doors or tap on windows until the customer woke up.⁵⁸ Likewise, “computer” used to refer to a person that computed numbers for a job.⁵⁹ Both of those jobs no longer exist and were replaced by technology. What Smith and other economists are arguing, however, is that technology is typically accompanied by a net *growth* in jobs, not a deduction. So even if one particular job used to exist and no longer does, other jobs are also created and, more commonly, it is just an *aspect* of a job that is eliminated by technology, not the job itself.

One example of predictions of technology taking away jobs that did not come to pass is automatic teller machines (“ATM”) replacing bank tellers. ATMs were first introduced in the 1970s, and some of the coverage predicted that bank tellers would soon be out of jobs.⁶⁰ Instead, the growth of ATMs accompanied a growth in the number of bank tellers.⁶¹ “ATMs made branches cheaper to operate, so banks opened more branches. Fewer tellers per branch, but more tellers overall.”⁶² Yet, the advent of ATMs did change the *nature* of the job. The job changed “from one of repetitive cash transactions, to one where the person is, say, a customer service rep, a marketing professional, a financial adviser, etc. They needed a much broader mix of more strategic skills to add value.”⁶³

Like bank tellers, the likely trajectory of AI in the legal profession is that it will change the nature of many aspects of the legal profession, possibly changing the complexity of the work. But lawyer jobs will not be “lost.”

B. Some People May Try Anyway

Outside the legal profession, there are already groups that are trying to replace humans with AI rather than just augmenting them. As New England Public Radio reports, the National Eating Disorders Association (“NEDA”) operates a hotline to help people struggling with eating disorders.⁶⁴ “The helpline is run by just six paid staffers, a couple supervisors, and they train and oversee up to 200 volunteers at any given time.”⁶⁵ The COVID pandemic

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (internal quotation omitted).

⁵⁶ *Id.*

⁵⁷ *Id.* (internal quotation omitted).

⁵⁸ Drake Baer and Ivan De Luce, *From Leech Collectors to Knocker-Ups, Here Are 16 Weird Jobs that No Longer Exist*, Business Insider (updated November 14, 2019), available at <https://www.businessinsider.com/weird-jobs-that-no-longer-exist-2014-9>.

⁵⁹ *Id.*

⁶⁰ Epstein, *supra*, n.32.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Kate Wells, *Can a Chatbot Help People with Eating Disorders as Well as Another Human?*, New England Public Media (May 24, 2023), available at <https://www.nepm.org/national-world-news/national-world-news/2023-05-24/can-a-chatbot-help-people-with-eating-disorders-as-well-as-another-human>.

⁶⁵ *Id.*

increased the number and severity of the calls, texts, and messages to the helpline, which, in turn, increased the strain on the staff.⁶⁶ Because of the increased pressures of the job, the staff voted to unionize.⁶⁷ In response, NEDA “fired all of the helpline staff.”⁶⁸ Instead of the staff, NEDA intended to use a chatbot that it had paid a team at Washington University to develop.⁶⁹ The problem is that the chatbot is very limited in scope and even its developers believe that it cannot substitute the people that NEDA just fired.⁷⁰

That proved to be the case. The chatbot, instead of providing support and advice to people with eating disorders, would provide diet tips.⁷¹ Many people reported problems with the chatbot, and the chatbot was taken down not long after it had been introduced.⁷²

C. The Potential Role for Artificial Intelligence in Civil Litigation Practice

On April 2, 1965, Time Magazine made computers the cover of its issue.⁷³ In 1965, there were about 22,500 computers in all of the United States.⁷⁴ This was up from 100 computers only ten years before.⁷⁵ This exponential growth in the number of computers compelled Time to offer some prediction of what life in the future would be like when computers played an even greater part of everyday life. This was one of the predictions the magazine offered.

Men such as IBM Economist Joseph Froomkin feel that automation will eventually bring about a 20-hour work week, perhaps within a century, thus creating a mass leisure class. Some of the more radical prophets foresee the time when as little as 2% of the work force will be employed, warn that the whole concept of people as producers of goods and services will become obsolete as automation advances. Even the most moderate estimates of automation’s progress show that millions of people will have to adjust to leisurely, “nonfunctional” lives, a switch that will entail both an economic wrench and a severe test of the deeply ingrained ethic that work is the good and necessary calling of man.⁷⁶

One of the authors of this paper spent much of his 20s with his friends doing their part to try to will into existence a “leisurely, nonfunctional life.” With their apologies to Joseph Froomkin and his tantalizing dreams of what could be, their efforts proved unsustainable to due technology’s failure to live up to its true potential, and the author found himself thinking, “Well, maybe I could be a lawyer.”

All this is to say that making predictions of what effect nascent technology will have on future life is a surefire way to get yourself quoted in lighthearted oh-the-fooly-of-it-all articles in said future. Even so, some slightly more modest guesses could be considered.

As it happens, there may already be some guidance on the possible near-term impacts of artificial intelligence on various professions, including the legal profession. To understand the potential benefit of AI, it is helpful to understand the distinction between tacit and explicit knowledge.⁷⁷ Explicit knowledge is the knowledge that can be

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Kate Wells, *An Eating Disorders Chatbot Offered Dieting Advice, Raising Fears about AI in Health*, Houston Public Media (June 9, 2023), available at <https://www.npr.org/sections/health-shots/2023/06/08/1180838096/an-eating-disorders-chatbot-offered-dieting-advice-raising-fears-about-ai-in-hea>.

⁷² *Id.*

⁷³ Lily Rothman, *This 50-Year-Old Prediction About Computers Will Make You Sad*, Time (April 2, 2015), available at <https://time.com/3754781/1965-predictions-computers/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Brent Orrell, *An Unexpected Role for AI in the Workplace*, the Bulwark (May 23, 2023), available at <https://plus.thebulwark.com/p/an-unexpected-role-ai-could-play-in-workplace>.

formalized into educational materials and taught to others.⁷⁸ Tacit knowledge is the knowledge that you gain by doing things that are less susceptible to formal education.⁷⁹ “[T]acit skills are very difficult to explain, replicate, and transfer through formal training processes.”⁸⁰

We as lawyers can certainly understand this distinction. We spent three years in post-graduate education learning the skills of being a lawyer. After those three years, however, we were only “baby lawyers,” green and inexperienced to the practice of law in many ways. While we gained more explicit knowledge in our niche areas of law, it is really the tacit knowledge that comes from the day-to-day⁸¹ practice of law that truly hones our skills and creates the depth of the skill of a seasoned attorney.

There is some indication that artificial intelligence might be able to help people develop their tacit skills at a faster pace. A recent paper reported on a study of “the use of AI chat technology among over 5,000 call-center customer support staff working for a major software provider.”⁸² Overall, this software proved a success. “Agents who never used the AI tools resolved 1.7 inquiries per hour; those who used them resolved 2.5 per hour.”⁸³ What was most interesting, however, was the distribution of the benefit of this software. “Newly hired AI-supported workers caught on more quickly, achieving performance levels in two months that normally required half a year of experience to develop.”⁸⁴ There was also a decrease in turnover of new employees.⁸⁵ In contrast, the employees who were already experienced before the software was introduced—that is, those who had already built up their tacit knowledge—“saw no increase in productivity (in fact, the chat tech appears to have reduced their performance slightly with unneeded advice).”⁸⁶

This is only one study. So, this cannot be taken as definitive proof of the benefit that artificial intelligence will increase the rate at which younger lawyers can acquire the tacit skills of practicing law. But there is at least the potential. There are significant hurdles, though, for artificial intelligence being a tool for young lawyers to learn the tacit skills of litigation. Without diminishing the accomplishment of artificial intelligence that assists call center staff for a software company, the range of questions a beginning civil litigation lawyer could encounter is orders of magnitude more complex, with multiple legal sources that could provide different answers. Plus, reliable artificial intelligence for lawyers cannot include any “hallucinations”⁸⁷ in the information provided. Providing wrong information to a starting attorney would be worse than providing none.

IV. The Ethical Implications of Using Generative Artificial Intelligence in the Practice of Law

Lawyers have an ethical responsibility to ensure they handle matters only within their competence.⁸⁸ That responsibility encompasses the responsibility to maintain technological competence, including understanding the benefits and risks associated with various technology.⁸⁹ It is important, then, for lawyers to understand the ethical implications of the use of generative AI in their practice.

A. You Cannot Rely on ChatGPT for Researching Legal Authority

Our story begins in 2019, when plaintiff Roberto Mata was on a flight from El Salvador to New York.⁹⁰ During the flight, the plaintiff alleges, an employee of the airline struck him in the knee with a metal serving cart, causing

⁷⁸ Elizabeth A. Smith, *The Role of Tacit and Explicit Knowledge in the Workplace*, 5 *Journal of Knowledge Management* 311, 314 (December 1, 2001).

⁷⁹ *Id.*

⁸⁰ Orrell, *supra*, n.77.

⁸¹ To-night-to-long-weekends-to-during-a-vacation.

⁸² Orrell, *supra*, n.77.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See Metz, supra*, n.27.

⁸⁸ Tex. Disciplinary Rules Prof'l Conduct R.1.01, *reprinted in* Tex. Gov't Code, tit.2, subtit. G, app. A.

⁸⁹ *Id.* cmt. 8.

⁹⁰ *Mata v. Avianca, Inc.*, No. 1:22-CV-01461-PKC, S.D.N.Y, Doc. 5, Ex. A at 3.

damage.⁹¹ In 2020, the airline filed for bankruptcy.⁹² The plaintiff filed suit during the bankruptcy proceedings and, as a result, subsequently filed a “Stipulation to Dismiss without prejudice.”⁹³ After the bankruptcy proceedings concluded, plaintiff refiled suit.⁹⁴

The defendant removed the suit to federal court.⁹⁵ About a year later, the defendant filed a motion to dismiss.⁹⁶ In it, the defendant asserted that the laws concerning international carriage had a two-year limitations period for claims, that the law did not allow local laws to toll the limitations period, and that the plaintiff’s claims were time barred.⁹⁷

In his response, the plaintiff cited several cases that held he was within his rights to assert a state claim for his injuries, that the state claim has a three-year limitations period, and that filing for bankruptcy tolls the two-year limitations period upon which the defendant relied.⁹⁸

Trouble arose when the defendant filed its reply and said it was not able to locate any of the cases that the plaintiff relied on for legal authority concerning bankruptcy tolling the limitations period in question.⁹⁹ Shortly after, the trial court issued an order requiring the plaintiff to file an affidavit annexing ten of the cases cited in the response to the motion to dismiss.¹⁰⁰ Plaintiff’s counsel filed an affidavit and attached eight cases.¹⁰¹ The attorney represented that he could not find one of the cases and explained another opinion was not included because it was unpublished.¹⁰² For the other opinions, the attorney explained that they “may not be inclusive of the entire opinions but only what is made available by online database.”¹⁰³

Counsel for defendant responded and informed the court “that the authenticity of many of these cases is questionable.”¹⁰⁴ The cases that had federal reporter citations could not be found in the federal reporter or in PACER.¹⁰⁵ The court then issued a show cause order. “Six of the submitted cases appear to be bogus judicial decisions with bogus quotes and bogus internal citations. Set forth below is an Order to show cause why plaintiff’s counsel ought not be sanctioned.”¹⁰⁶

The counsel for the plaintiff filed a subsequent affidavit explaining to the court that another attorney in the firm, who was not admitted to practice in the federal court, had done the research and written the response, including citing the cases in question.¹⁰⁷ The attorney that signed the filing neither researched nor reviewed cases cited in the filing.¹⁰⁸

The attorney that cited the cases also filed an affidavit.¹⁰⁹ The attorney represented to the court, “As the use of generative artificial intelligence has evolved within law firms, your affiant consulted the artificial intelligence

⁹¹ *Id.*

⁹² *Id.*, Doc. 18 at 2.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*, Doc. 5.

⁹⁶ *Id.*, Doc. 16.

⁹⁷ *Id.*, Doc. 18 at 4–9.

⁹⁸ *Id.*, Doc. 21 at 4–8.

⁹⁹ *Id.*, Doc. 24 at 3–4.

¹⁰⁰ *Id.*, Doc. 25, 27.

¹⁰¹ *Id.*, Doc. 29.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*, Doc. 30.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, Doc. 31.

¹⁰⁷ *Id.*, Doc. 32.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, Doc. 32, Ex. 1 at 1.

website ChatGPT in order to supplement the legal research performed.”¹¹⁰ The attorney obtained the cases in question from ChatGPT, “which also provided its legal source and assured the reliability of its content.”¹¹¹ These explanations were not well received by the court, which expanded the scope of its show-cause order.¹¹²

The court held a hearing on the show cause order. It issued its rulings two weeks later. As the court observed, “Many harms flow from the submission of fake opinions.”¹¹³ It wastes the time and expense of opposing counsel along with the time of the court to whom it was submitted. It deprives the client of persuasive argument. It can harm the reputation of the judges and parties identified in the fake opinions.¹¹⁴ And it can “promote cynicism about the legal profession and the American judicial system.”¹¹⁵

The court emphasized that it was not sanctioning the parties for being fooled by the authenticity of what ChatGPT insisted was true.¹¹⁶ “[I]f the matter had ended with Respondents coming clean about their actions shortly after they received [notice] questioning the existence of the cases, or after they reviewed the Court’s Orders . . . requiring production of the cases, the record now would look quite different.”¹¹⁷

Instead, the conduct the court sanctioned was the actions of the parties after the authenticity of the opinions had been called into question. “[T]he Court finds bad faith on the part of the individual Respondents based upon acts of conscious avoidance and false and misleading statements to the Court. . . . Sanctions will therefore be imposed on the individual Respondents.”¹¹⁸

Since the incident in *Mata*, other lawyers have fallen into the AI hallucination trap.¹¹⁹ One notorious victim is Michael Cohen, Donald Trump’s former fixer.¹²⁰ Cohen turned to Bard—a generative AI program, similar to ChatGPT—when searching for cases to support a motion for early termination of his probation.¹²¹ Cohen found citations to three supporting cases on Bard, which he passed along to his attorney.¹²² Cohen’s attorney then included the cases in the motion, without confirming the validity of the citations.¹²³

As it turned out, all three cases were hallucinations. None existed. The district court issued a show cause order which directed Cohen’s attorney to either produce the cases or explain why he should not be sanctioned.¹²⁴

B. The Ethical Perils of Using Generative Artificial Intelligence in Civil Litigation

Responding to such incidents, different courts have begun to issue local rules addressing the use of generative AI.¹²⁵ One of the first local rules was introduced by Judge Brantley Starr, in the Northern District of Texas.¹²⁶ Judge

¹¹⁰ *Id.*

¹¹¹ *Id.*, Doc. 32, Ex. 1 at 2.

¹¹² *Id.*, Doc. 33.

¹¹³ *Id.*, Doc. 54 at 1.

¹¹⁴ *Id.*, Doc. 54 at 1–2.

¹¹⁵ *Id.*, Doc. 54 at 2.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *Ex Parte Lee*, No. 10-22-00281, 2023 WL 4624777, at *1 n.1-2 (Tex. App—Waco, July 19, 2023, no pet.) (holding that a party inadequately briefed his sole issue on appeal when it was supported only by hallucinated citations).

¹²⁰ Pranshu Verma, *Michael Cohen Used Fake Cases Created by AI in Bid to End His Probation*, Wash. Post, Dec. 29, 2023.

¹²¹ *United States v. Cohen*, No. 1:18-cr-00602, S.D.N.Y., Doc. 104.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *United States v. Cohen*, No. 1:18-cr-00602, S.D.N.Y., Doc. 96.

¹²⁵ Devin Bates, *Taming the AI Beast: UPDATE Court Rules Amended to Control Use of Generative AI in Filings*, JDSupra (December 1, 2023), available at <https://www.jdsupra.com/legalnews/taming-the-ai-beast-update-court-rules-4138982/>.

¹²⁶ Raffi Melkonian (@RMFifthCircuit), Twitter (May 30, 2023, 6:27 PM), <https://twitter.com/rmfifthcircuit/status/1663688580387028992>.

Starr updated his local rules in May 2023—while the show cause hearing in *Mata* was pending—to address artificial intelligence.¹²⁷ All attorneys and pro se litigants appearing before the court must file “a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.”¹²⁸

The Fifth Circuit has recently proposed a similar rule.¹²⁹ This proposed rule follows an opinion from the court from an appeal from a pro se inmate that raised several section 1983 claims and tort claims.¹³⁰ In two instances in the opinion, the court rejected arguments that were based on the appellant citing “nonexistent” cases.¹³¹ There is no explanation in the opinion of how the appellant came to cite cases that did not exist.

In his local rules, Judge Starr explained the basis for the new rule.¹³² The court acknowledged that generative AI could have some benefit in the practice of law, but not in legal briefing:¹³³

Here’s why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why.¹³⁴

As indicated in the filings by the attorneys and the law firm in the *Mata* case discussed above, the incident of the hallucinated cases has received a lot of public attention, largely in the form of ridicule. This paper is not intended to pile on. But the case highlights an important warning from earlier in the paper. ChatGPT is specifically designed to sound confident in what it says. The attorney that used it in *Mata* attached a log of his conversation with ChatGPT.¹³⁵ If you read through it, ChatGPT draws no distinction between the cases that actually exist and the ones it simply made up. At one point, when the attorney asked for a summary of a certain holding from a specific case, ChatGPT “corrected” him and there was no such holding in that case.¹³⁶ Without excusing the investigation that should have been done before the attorney decided to use ChatGPT as a legal research tool or the due diligence that should have occurred afterwards to confirm these cases and their holdings, it is easy to see how someone who did not know a lot about ChatGPT could be led to believe that it was citing real cases.

But this highlights the enormous pitfall of treating ChatGPT and its ilk as anything other than an incredibly complex linguistic parlor game. It “understands” neither the concept of objective reality nor whether anything it is saying is truth, opinion, or wholly made up by itself in that instant. For now, while it may be possible to ask ChatGPT some legal questions and get a correct answer, the amount of work you must do afterwards to confirm its veracity may require more time than if you had never consulted ChatGPT at all.

As generative AI exist in their current form, it may be easiest and safest to avoid them altogether when researching and brief writing. And yet, change is coming fast. LexisNexis has launched a new product, called Lexis +

¹²⁷ *Id.*

¹²⁸ Judge Brantley Starr, *Judge Specific Requirements*, available at <https://www.txnd.uscourts.gov/judge/judge-brantley-starr> (last visited February 11, 2024).

¹²⁹ *See* Bates, *supra*, n.125.

¹³⁰ *Esquivel v. Kendrick*, No. 22-50979, 2023 U.S. App. LEXIS 22839, at *2 (5th Cir. 2023).

¹³¹ *Id.* at *5 n.3, 8 & n.5.

¹³² Starr, *supra*, n.128.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Mata v. Avianca, Inc.*, No. 1:22-CV-01461-PKC, S.D.N.Y., Doc. 46, Ex. A.

¹³⁶ *Id.*, Doc 46, Ex. A at 9.

AI, which contains a chat function analogous to ChatGPT.¹³⁷ LexisNexis says that its product includes “built-in hallucination safeguards” and that its internal experts “have found zero instances of legal citation hallucinations.”¹³⁸ Westlaw also will launch a new product with generative AI in the near future. If an attorney uses LexisNexis’s or Westlaw’s generative AI tools, though, is he violating Judge Starr’s rules? Or do these businesses retain their status of “traditional legal databases” and not require independent verification “by a human being”? It is likely that further advances in generative AI and its increasing presence in everyday life—including the practice of law—will only make it harder to comply with rules like these.

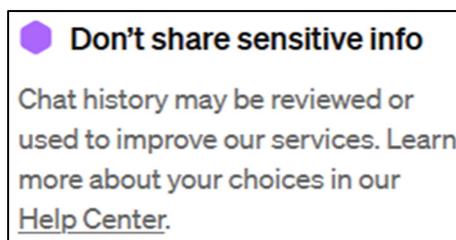
In addition, other websites that implement generative AI tools may not have as strong an incentive to avoid the pitfalls of hallucinations and other false data. As generative AI becomes more present in our lives, it may be more complicated for the typical attorney to know just what any website means by promoting its use of generative AI and understanding the reliability of the information they receive. It could be extremely difficult for anyone other than the software developers to discern the reliability of any software that uses generative artificial intelligence, no matter how tangentially.

C. Be Cautious Using ChatGPT as a Drafting Tool

There is one more pitfall that lawyers should consider before experimenting with ChatGPT—client confidentiality.

The Texas ethics rules for lawyers provide that “a lawyer shall not knowingly. . . reveal confidential information of a client or a former client to . . . anyone else, other than the client, the client’s representatives, or the members associates, or employees of the lawyer’s law firm.”¹³⁹ In addition, “a lawyer shall not knowingly. . . [u]se privileged information of a client for the advantage of . . . a third person, unless the client consents after consultation.”¹⁴⁰

When you log into ChatGPT, this is one of your warnings.



People at OpenAI can review conversations and may use the information you provide for training its large language model.¹⁴¹ In other words, the information that you include in a prompt may appear in a future answer to a different user’s question. OpenAI can also share your information with third parties.¹⁴² Imagine the consequences.

Let’s say that you represent Netflix in an upcoming confidential merger with Hulu. You ask ChatGPT to write a client letter containing details about the merger. Your question about Netflix and Hulu is added to ChatGPT’s large language model. Next week, in a faraway state, someone asks ChatGPT a general question about Netflix. ChatGPT responds that Netflix will soon merge with Hulu. You have inadvertently released highly sensitive client information to the general public.

These confidentiality problems can be remedied if companies do not share user prompts with third parties and refuse to use customer prompts for product training. For example, Lexis + AI represents that it does not use customer

¹³⁷ *Lexis +AI Frequently Asked Questions* (last visited March 7, 2024), available at <https://www.lexisnexis.com/pdf/lexis-plus-ai-top-20-faq-sheet.pdf>.

¹³⁸ *Id.*

¹³⁹ Tex. Disciplinary Rules Prof’l Conduct R. 1.05(b)(1)(ii).

¹⁴⁰ *Id.* R. 1.05(b)(4).

¹⁴¹ Natalie, *What Is ChatGPT*, OpenAI (last visited January 24, 2024), available at <https://help.openai.com/en/articles/6783457-what-is-chatgpt>.

¹⁴² *Privacy Policy*, OpenAI (updated November 14, 2023), available at <https://openai.com/policies/privacy-policy>.

data to train its large language model.¹⁴³ Presumably, Westlaw's generative AI will make the same promise to its users.

But most generative AI programs do not provide these assurances. You must scrutinize the policies of all generative AI providers before including confidential client information in a prompt. All companies' policies are different, and they are often difficult to locate and interpret. When in doubt, do not share any client-identifying information.

Without sharing client-specific information, what kind of legal writing can you do on ChatGPT? Without first obtaining permission from your client, you will likely be limited to having ChatGPT summarize existing law, like stating a standard of review. This runs the significant risk, however, of relying on ChatGPT for legal research. Any such use needs to be carefully scrutinized.

V. Conclusion

Despite its shortcomings, generative AI, in some form, is here to stay. It may indeed make your job easier and faster. As we adjust to this transition, it is important for us to understand as well as we can the legal and ethical implications of its use in the profession.

¹⁴³ *Lexis +AI Frequently Asked Questions* (last visited March 7, 2024), available at <https://www.lexisnexis.com/pdf/lexis-plus-ai-top-20-faq-sheet.pdf>.