



Command Prompt:

What Is ChatGPT and Why Does It Matter to Immigration Lawyers?

By Michele Carney¹

By now, you've probably heard of ChatGPT. But what is it exactly, and why does it matter to immigration attorneys? To get us started, why don't we ask ChatGPT to explain:

ChatGPT² is an AI-powered chatbot that is trained on large amounts of text data to generate human-like responses to various types of questions. It is a pre-trained language model developed by OpenAI,³ and it uses state-of-the-art deep learning techniques to generate answers.

As for why ChatGPT may matter to immigration lawyers, it can help automate and streamline some aspects of the practice of law, particularly with regard to answering frequently asked questions or providing information about immigration laws and procedures. By using ChatGPT, immigration lawyers can provide quick and accurate answers to clients, freeing up more time to focus on other important tasks. However, it's important to note that while ChatGPT can provide helpful information, it is not a substitute for the expertise and guidance of a qualified immigration lawyer.

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² As of the publication of this article, GPT-4 is the latest version of ChatGPT.

³ OpenAI, or Open Artificial Intelligence, was spearheaded by Elon Musk in 2015, to develop an artificial general intelligence (AGI) available to everyone. The OpenAI research laboratory is made up of a for-profit OpenAI LP and non-profit OpenAI Inc.

Legal decisions should always be made after consultation with a licensed professional.

As shown in the two paragraphs above, ChatGPT uses clear language to explain concepts. ChatGPT may allow immigration lawyers to do their job more efficiently, but not necessarily more accurately. While the chatbot does have a good knowledge base, it has been found to make errors that could harm a client's case.

Competence in Technology

The ABA Model Rules of Professional Conduct guides lawyers in how they should move forward with technology.

First, lawyers should keep abreast of technology advances to remain competent in the practice of law. ABA Model Rule 1.1, Comment 8, states:

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

Certainly, this rule does not require the lawyer to be a tech geek and to know every advancement in the world of technology. But it does require lawyers to keep up with basic changes in technology to remain competent in the practice of law. ChatGPT has been heralded as a huge advancement in research and writing for the public, and lawyers may find that they are using it more often for quick responses or to assist in writing a clear draft document for a client's case. However, if the lawyer is using the technical knowledge of ChatGPT to help with a case, they also must be aware of the potential risks the client may face.

Comment 8 to the Model Rule 1.1 indicates that if a lawyer is relying on new technology such as ChatGPT to predict or develop content or information for clients, they must also understand the program, how the data is used, and whether the response is correct, which can be accomplished by cross-referencing the outcome with primary legal sources.

One of the cornerstones of being competent as a lawyer is to use tools that are effective in client representation. Lawyers should also consider whether those tools have bias built into the data points that could be exacerbated by artificial intelligence (AI).

Confidentiality

Perhaps one of the biggest risks of ChatGPT is an inadvertent disclosure of confidential information. Under Model Rule 1.6 (c), the "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."

How can this be accomplished? First, having a clearly written informed consent document signed by your client is a start. But does an informed consent document completely protect the attorney and is it always necessary? Lawyers routinely research case law and often plug in potentially identifying search terms into common software programs.

Let's ask ChatGPT about whether data is anonymized:

OpenAI has not publicly stated whether the data used to train ChatGPT is anonymized. However, as a responsible AI company, OpenAI is likely to take measures to protect user privacy and secure the data it uses for training its models. This could include methods such as de-identifying or aggregating the data to remove personal information, or storing the data securely in accordance with industry-standard practices.

It's also worth noting that ChatGPT operates on an "input-response" basis where the model takes in text as input and generates a response based on that input, without access to any additional information about the user or their identity. So, while the data used to train the model may not be anonymized, the interactions with ChatGPT are designed to be anonymous from the perspective of the model.

This response clearly shows that there is a risk in using ChatGPT that a client's data will not be kept confidential.⁴ Therefore, a prudent start would be to avoid entering into the chat anything that could expose a client's confidential data; instead, focus on asking broader questions without identifying details.

⁴ It should be noted that OpenAI has implemented new policies for confidentiality, but these could be subject to change.

Lawyers should clearly communicate with their clients regarding the use of ChatGPT if it could result in a confidential disclosure issue. However, if used for simple research on a case, then this duty does not extend any more than it does to other forms of research tools. Expect firms and legal research tools to begin to create similar AI tools that protect client confidences without saving searches and information the lawyers asked about.⁵

Safeguarding a Client's Property

Lawyers should consider obligations to protect a client's file (client property) under MR 1.15, Safeguarding Client Property. The client's file—whether on paper or in an electronic format—must be properly safeguarded under MR 1.15.⁶ This protection also extends to data that is inserted into an AI system. The lawyer needs to consider how safe that property is in that system. Is it being properly safeguarded to satisfy MR. 1.15? The lawyer should ensure that client data remain in an accessible form and guard against any unauthorized disclosure.

As an example, if an attorney inserts a Request for Evidence response containing client data and asks ChatGPT to redraft a better letter, the system may do that, but all the data that has been inserted into the program is at risk of becoming part of the data that may pattern match to other scenarios. As a result, both the client data and the attorney work product are consumed for potential future use by third parties. Safeguarding a client's property and confidentiality are woven together, but lawyers may not want their work product or draft responses to be part of a larger system they cannot control.

In addition, companies may have trade secrets—in other words, intellectual property that could inadvertently be swallowed by a ChatGPT query. Although beyond the scope of this article, who then owns that intellectual property—the original company or OpenAI? It is something worth considering, and copyright law will most likely develop in different directions and change in the future as the use of AI grows.

Plagiarism

In 2018, New York Formal Opinion, 2018-3: Ethical Implications of Plagiarism in Court Filings stated:

Although a lawyer's verbatim use of another's writing without attribution in a brief or litigation filing is not always per se deceptive under Rule 8.4(c), lawyers are well-advised to cite source material, particularly where language is lifted from published writings or judicial opinions as distinguished from prior briefs. Under specific circumstances, lifting language from source materials without attribution may violate any of several other Rules, including those requiring competence and diligence and forbidding frivolous filings. Moreover, although there does not appear to be a consensus of judicial opinion or an authoritative judicial rule or ruling in New York, many courts have disapproved of extensive copying in briefs.

Lawyers need to be careful about churning out boilerplate responses or briefs. With ChatGPT, it is possible that several lawyers using the same search terms could come up with the exact same response. This could hurt the client's chances if the language is not individualized. Therefore, a lawyer needs to be an active drafter.

How Can Lawyers Use ChatGPT?

Think of ChatGPT as a blank piece of paper that can populate ideas. ChatGPT can get the ball rolling on ideas as it uses a predictive model, and the more information the lawyer inserts into the query, the more responsive the answer will be. The lawyer can get several responses from ChatGPT, and then perhaps the writer's block will be lifted, and the lawyer will have a springboard from which to draft a document.

The lawyer can also use ChatGPT for marketing purposes, and perhaps Dall-E—an AI system that can create realistic images and art from a description in natural language—to produce artwork for a brochure. For example, the lawyer may insert certain data points into a query, such as their experience, the types of cases they enjoy, their geographic location, and the languages they speak, and then ask the program to create a marketing template. The lawyer can then switch to Dall-E, which is also powered by OpenAI, to create artwork for the marketing material, and voilà, they now have a nice brochure made with minimal effort. Of course, the lawyer may need to polish and refine the brochure, but the foundation is there to begin the project.

⁵ See the CaseText announcement on CoCounsel, an AI legal assistant, at <https://casetext.com/blog/casetext-announces-cocounsel-ai-legal-assistant>.

⁶ ABA Committee on Ethics & Professional Responsibility, Formal Opinion 483 at 7.

Another interesting use for ChatGPT is to have it write a placid response to a negative online review. While many lawyers know that answering a negative review in a calm tone is in our best interest, it is hard to set aside feelings and give a kind response after working hard on a case. By contrast, ChatGPT is adept at placid prose that exudes confidence and is generally friendly.

The program can also be useful for providing guidance on how to navigate a website or answer FAQs. In addition, you can ask it to summarize text that has already been written, and it will do so in plain language that would be helpful for some lawyers who commonly write at a higher level and have a hard time making their writing accessible to all levels.

Supervision of Tech and People

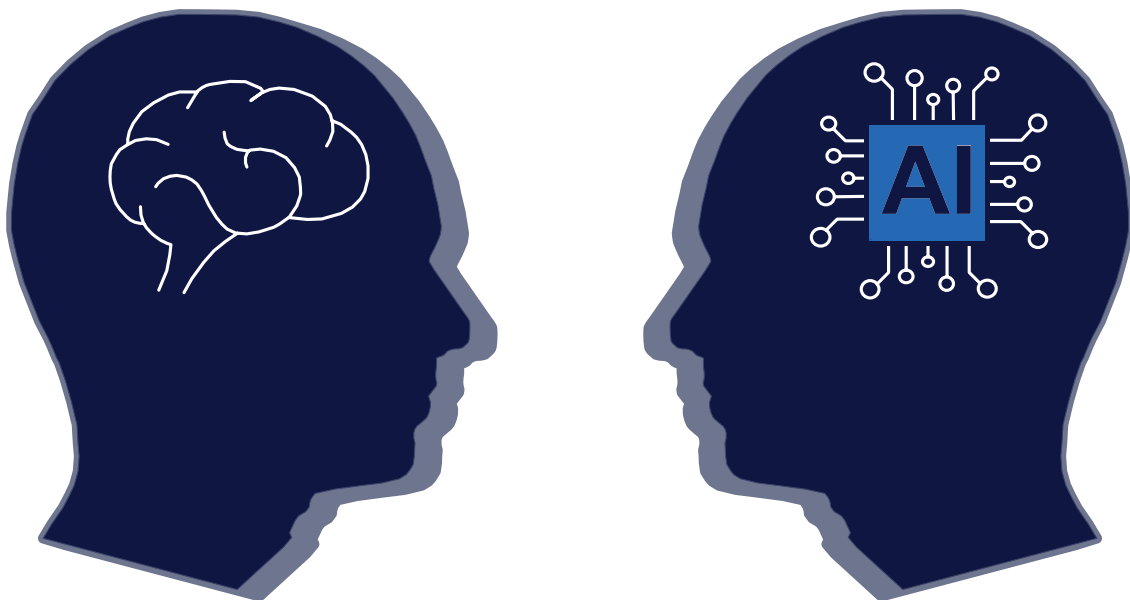
It is essential that ChatGPT and AI products do not produce the final, unreviewed version of documents.⁷ Just as a lawyer must supervise their staff's work on a case, this duty to review would also extend to

a product produced by an AI tool. The lawyer should cross-reference and check that the information being produced is technically correct before posting or submitting it.

Finally, supervising lawyers should discuss ChatGPT at their firm. First, determine what the firm's policy is on the use and purpose of ChatGPT. Then, train staff and associates on misuse, proper use, and specifically, query engineering. The worst-case scenario would be that a supervising lawyer does not know that their associate used AI to generate the document they are reviewing. Skepticism and scrutiny of ChatGPT are not only appropriate but also necessary at this point in the technology's development.

ChatGPT is an exciting step in the world of technology, but it must be used with caution. Finally, it is important to note that ChatGPT may be hot today, but gone tomorrow, so lawyers should keep current on the latest technology craze to hit the market and know its ins and outs before they use it to accomplish their work.

⁷ See MR 5.1, Responsibilities of a Partner or Supervisory Lawyer, MR 5.2, Responsibilities of a Subordinate Lawyer, and MR 5.3, Responsibilities Regarding Nonlawyer Assistance, which set out personal responsibility of supervising lawyers for their own actions and the actions of subordinates in most situations, as well as subordinate lawyer responsibility (a subordinate lawyer does not violate the Rules of Professional Conduct if they act in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty"). Supervision of a nonlawyer AI is not an arguable question — at least not yet.



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<https://www.law.com/newyorklawjournal/2023/03/13/artificial-intelligence-cannot-substitute-for-actual-legal-intelligence/> NOT FOR REPRINT **Artificial Intelligence Cannot Substitute for Actual Legal Intelligence**

The legal limitations and pitfalls of ChatGPT and the use of automated intelligence in the legal industry.



March 13, 2023 at 12:00 PM



By Michael A. Kaplan, Raymond S. Cooper and Ruth Fong Zimmerman | March 13, 2023 at 12:00 PM



ChatGPT, an AI chatbot created by OpenAI, was launched in November 2022 and has quickly become the hot topic in the legal world. It has gained national attention for achieving passing scores on exams administered by the Minnesota University Law School. The chatbot scored a C+ overall and displayed a strong grasp of basic legal rules, organization, and composition. However, the chatbot struggled to spot issues when given an open-ended prompt.

ChatGPT can process enormous amounts of information and generate text responses to natural language prompts. While law firm leaders and associates alike may have dreams of how this technology will save time and money, all should be cautious about utilizing ChatGPT to perform real-world legal analysis. This article will discuss the current state and limitations of the technology and the potential pitfalls for attorneys using ChatGPT in practice.

The pairing of copious amounts of data with advanced computing techniques powers ChatGPT. The technological combination allows the chatbot to respond to natural language inquiries. It attempts to mimic speech patterns in its responses and is known for reasonably accurate, while sometimes completely inaccurate, responses. OpenAI designed the software with built-in guardrails, or a “moderation application programming interface (API),” to warn of or block certain types of unsafe content.

ChatGPT has been widely experimented with in a variety of settings, including academia, where it has been banned, with OpenAI launching follow-up software developed to detect AI-generated writing (Samantha Deloya, *Teachers Rejoice! ChatGPT Creators Have Released a Tool to Help Detect AI-generated Writing*, Business Insider, Jan. 31, 2023, <https://www.businessinsider.com/openai-launched-program-to-detect-ai-writing-chatgpt-2023-1>); health care, where an experiment was highly criticized because of ethical concerns (Bethany Biron, *Online Mental Health Company Uses ChatGPT to Help Respond to Users in Experiment — Raising Ethical Concerns Around Healthcare and AI Technology*, Business Insider, January 7, 2023, <https://www.businessinsider.com/company-using-chatgpt-mental-health-support-ethical-issues-2023-1>); business settings, where companies are warning against inputting sensitive data (*Microsoft Warns Employees Not to Share ‘Sensitive Data’ With ChatGPT*, Business Insider (January 31, 2023), <https://www.businessinsider.com/chatgpt-microsoft-warns-employees-not-to-share-sensitive-data-openai-2023-1>); and, most relevantly, here, the legal field.

Concerns and Limitations

ChatGPT has myriad limitations. See Avinash Saravanan, *The Limitations of Chat-GPT*, Medium (Dec. 19, 2022), <https://medium.com/@asarav/the-limitations-of-chat-gpt-8b73f5859bb4>. The most obvious limitation is the potential for inaccuracy. There are widely reported instances where ChatGPT has produced answers that sound reasonable but are just plain wrong. ChatGPT is unable to make qualitative judgments (ignoring for a moment the jailbreaking methods discussed below), is unable to access the internet (and thus has faulty or outdated data and no access to Westlaw or Lexis), and can perpetuate implicit biases through the pool of data that it is fed.

Similarly, the software also lacks regional and country-specific understanding of certain language usages. The obvious implication of these limitations is that lawyers cannot trust its outputs for use in high-stakes litigation.

Another concern is that the creators have not yet effectively prohibited ChatGPT from including discriminatory ideologies and conspiracy theories in its outputs. While the creators assert that there is a moderation API that can warn of or block unsafe content, the creators also “expect it to have some false negatives and positives for now.” (Samantha Murphy Kelly, *This AI Chatbot Is Dominating Social Media With Its Frighteningly Good Essays*, CNN (Dec. 8, 2022), <https://www.cnn.com/2022/12/05/tech/chatgpt-trnd/index.html>.) But savvy users have been able to “jailbreak” the software by telling the chatbot to follow different rules, called “Do Anything Now,” or “DAN,” rules. Under these rules, the chatbot is instructed to role-play as a chatbot that does not have moderation rules, thereby releasing the chatbot from OpenAI’s safety filters.

Ethical Considerations

The Model Rules of Professional Conduct address certain ethical considerations for attorneys using ChatGPT. These considerations include the unauthorized practice of law (Rule 5.5), confidentiality (Rule 1.6), competence with technology (Rule 1.1, cmt. 8), and discriminatory/biased behaviors (Rule 8.4). Further, there are ethical considerations regarding attorney-client privilege.

First, there are concerns that ChatGPT could be engaging in the unauthorized practice of law, as other software companies have been accused of doing in the past. See, e.g., David Horrigan, *Can Software Engage in the Unauthorized Practice of Law?*, Law Technology News (June 23, 2022, 10:21 a.m.), <https://www.law.com/legaltechnews/2022/06/23/can-software-engage-in-the-unauthorized-practice-of-law/>; *Texas Supreme Court Probing Nolo Press*, Los Angeles Times (March 26, 1998, 12:00 a.m.), <https://www.latimes.com/archives/la-xpm-1998-mar-26-fi-32788-story.html>.

Next, there are concerns that data entered into ChatGPT is not confidential, and any entry of client or case data into ChatGPT could constitute a breach of client confidentiality. This would affect both confidentiality and the attorney-client privilege doctrine. Foster J. Sayers, *ChatGPT and Ethics: Can Generative AI Break Privilege and Waive Confidentiality?* Law.com (Jan. 26, 2023, 9:01 a.m.), <https://www.law.com/legaltechnews/2023/01/26/chatgpt-and-ethics-can-generative-ai-break-privilege-and-waive-confidentiality/>.

The lack of confidentiality through this software is not limited to the legal context, but given attorneys’ ethical duties to maintain confidentiality, it poses a particular risk to attorneys who may feed confidential client information into the software. Lance Eliot, *Generative AI ChatGPT Can Disturbingly Gobble Up Your Private and Confidential Data, Forewarns AI Ethics and AI Law*, Forbes (Jan. 27, 2023, 8:00 a.m.), <https://www.forbes.com/sites/lanceeliot/2023/01/27/generative-ai-chatgpt-can-disturbingly-gobble-up-your-private-and-confidential-data-forewarns-ai-ethics-and-ai-law/?sh=5b35d33f7fdb>.

Considering ChatGPT’s capacity to espouse harmful ideologies, perpetuate implicit biases, and role-play without any moderator supervision, there are attorney ethics considerations under Rule 8.4’s prohibition for discriminatory conduct.

Tech Competence

Attorneys also have a duty to maintain competence with technology. Some commentators maintain the perspective that ChatGPT can greatly assist attorneys with their daily practices—although it should not necessarily be used in place of attorneys. See Stephanie Wilkins, *ChatGPT Is Impressive, But Can (and Should) It Be Used in Legal?* Law.com (Dec. 15, 2022, 1:25 p.m.), <https://www.law.com/legaltechnews/2022/12/15/chatgpt-is-impressive-but-can-and-should-it-be-used-in-legal/>.

For attorneys who may resist using ChatGPT, the rule requiring competence with emerging technologies may be an important consideration, especially assuming ChatGPT becomes more prevalent and commonplace.

Potential Uses

Firm leaders and associates dreaming of potential uses to save time and money imagine using ChatGPT to draft email replies, search for specific data (in document review, contract disputes, chronology creation, etc.), create summaries of legal sources (*i.e.*, contractual clauses, statutes, regulations, etc.), draft entire motions and briefs, assist with research, and even pitch clients.

Another suggested potential use for ChatGPT would be training and running ChatGPT software to create model forms on an individual firm basis. See Wilkins *supra*. Legal service providers and vendors have already implemented ChatGPT or other AI programs. Nicole Black, *The Case for ChatGPT: Why Lawyers Should Embrace AI*, ABA Journal (Feb. 21, 2023, 1:11 p.m.). Harvey, Ironclad, LawDroid, DocketAlarm, Lexion, and Alexsei are among the legal service tools that have integrated artificial intelligence, including plug-ins that use ChatGPT.

Further Pitfalls

The prevalence of the technology only underscores the major concerns about data security and confidentiality, inaccurate output, and the integrity of the legal profession overall. Additionally, while users can feed ChatGPT information that allows it to understand uncommon words or acronyms, there are linguistic barriers in ChatGPT's data set that prevent it from understanding regional or legally nuanced language.

Looking again at the limitations of the software, many relate to the potential pitfalls in the legal context; attorneys may become complacent about the software's capabilities and fail to catch inaccuracies that may sound reasonable but are not the law in the relevant jurisdiction. Reliance on ChatGPT could call into question attorney competency should a practitioner over rely on the software to draft or formulate documents.

In addition to the limitations of ChatGPT, there are several areas where ChatGPT's application to legal advocacy would fall short due to the variable aspect of human nature: common human variables—such as judicial preferences, economic standing of clients or of opponents, evidentiary limitations, jury composition, and local court practices—and all the other things that make the practice of law a human endeavor.

While many of these intangibles could theoretically be fed as data into the ChatGPT software, these advocacy issues would still require attention.

Conclusion

No one can predict how the technology will develop and whether the limitations discussed above can be addressed. History suggests that the inability to imagine is our only true limitation. That said, clients, firms, and attorneys alike should not allow expediency—the principal benefit of the technology—to drive decisions, particularly when serious questions of accuracy, security, and utility exist.

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LAWYERS AND AI: HOW LAWYERS' USE OF ARTIFICIAL INTELLIGENCE COULD IMPLICATE THE RULES OF PROFESSIONAL CONDUCT

📅 Mar 13, 2023 👤 By Jonathan Grabb ▶ Florida Bar Ethics Counsel 📁 Top Stories



Jonathan Grabb: “This may go without saying for many lawyers, but it is worth repeating: every lawyer is responsible for their own conduct. While a chatbot may be able to draft a document in mere seconds, any lawyer who uses AI assistance is still responsible for generating work product that is legally and factually accurate, competent, and meritorious.”

[3]

Can AI programs cause copyright problems?[4]

Though The Florida Bar has not published an opinion addressing the ethical implications of lawyers using AI to assist in the practice of law, the adoption of other new technologies offers helpful guidance. Existing opinions regarding e-filing, cloud computing, online research tools, metadata, and more, provide useful context. With that in mind, here are a few points to consider before you let an A.I. program draft your next brief:

1. Lawyers are ethically responsible for the services they provide

From chatbots to image generators, news outlets have been inundated with stories discussing the implications of artificial intelligence or “AI” programs.

Though the results appear mixed, ChatGPT, a free AI chatbot, has already managed to pass law school exams^[1] while Midjourney, an AI image generator, won first prize in the Colorado State Fair’s digital art competition. [2]

Developments in AI have the potential to irrevocably change numerous industries and the practice of law is no exception. Stories regarding these new A.I. programs naturally lead lawyers to additional questions: Can I rely on AI programs to draft my briefs?



This may go without saying for many lawyers, but it is worth repeating: every lawyer is responsible for their own conduct. While a chatbot may be able to draft a document in mere seconds, any lawyer who uses AI assistance is still responsible for generating work product that is legally and factually accurate, competent, and meritorious.

Rule 4-5.2 of the Rules Regulating The Florida Bar provides that every lawyer is bound by the Rules of Professional Conduct regardless of whether they are acting at the direction of another lawyer. Law firm partners and other supervisory lawyers must also provide reasonable policies and efforts to ensure that other lawyers in the firm comply with the Rules of Professional Conduct.^[5]

Providing competent services often requires more knowledge than simply passing a law school exam. “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice... including an understanding of the benefits and risks associated with the use of technology[.]”

[6]

Rather than relying on an AI program for a final product, it may be best to limit use to first drafts or a potential framework.^[7] Even as these technologies improve, a lawyer “must review and be responsible for the work product of” an AI program just as a lawyer must do for the work of any nonlawyer staff.^[8]

2. AI services may “create” facts

Rule 4-3.3 prohibits a lawyer from knowingly “making a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal[.]” Similarly, when representing a client, “a lawyer shall not knowingly... make a false statement of material fact or law to a third person[.]”^[9]

AI programs do not always cite to their sources, and some AI programs have been caught making “‘surprising mistakes’ with basic math”^[10] or even creating facts (or polling data) that doesn’t exist.^[11]

Factual misstatements to the court or to an opposing party can lead to major consequences, including disbarment or suspension.^[12] Further, lawyers are obliged to “inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”^[13] This means that relying on AI to provide an accurate depiction of the facts and law is, at best, a risky proposition.



3. **Lawyers must maintain the confidentiality of client information**

Lawyers are prohibited from voluntarily disclosing any information relating to the representation of a client absent the client's informed consent or an applicable exception in the confidentiality rule.^[14] While a lawyer is "impliedly authorized to make disclosures about a client when appropriate in carrying out the representation," that authorization is still subject to the "client's instructions or special circumstances [which] limit that authority."^[15]

Consistent with these obligations, The Florida Bar's Professional Ethics Committee advised that a lawyer may utilize cloud computing services provided that the lawyer "take[s] reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely."^[16] The lawyer must also research the cloud computing service prior to use^[17] and assure that files stored electronically are "readily reproducible and protected from inadvertent modification, degradation or destruction."^[18]

Additionally, lawyers are cautioned to avoid inadvertently disclosing confidential client information. Recommended practices include removing metadata from documents,^[19] sanitizing storage and media devices before disposition,^[20] and ensuring that communications are encrypted, as appropriate.^[21]

Given that many AI programs frequently rely on user input and proprietary methods to generate responses, it may be difficult or impossible to determine whether client information is kept confidential when shared with an AI program. Further, it is unclear whether sharing information with an AI program would be discoverable and would waive claims of attorney-client privilege. Absent answers to these questions, lawyers should exercise extreme caution when sharing client information with AI programs and should carefully explain the implications of these disclosures when seeking a client's informed consent.

4. **Whose work is this?**

Another concern regarding AI generated documents: who "created" them and who owns them? These questions don't lend themselves to easy answers when AI programs such as chatbots can generate essays, briefs, motions, or images from a simple 10-word prompt and may not attribute their sources.



To date, the U.S. Patent & Trademark Office (USPTO) has declined to issue patents to AI programs and the U.S. Copyright Office (USCO) has declined to grant copyright registration to AI generated artwork.^[22] In the first instance, the USPTO's decision was affirmed by the United States Court of Appeals, Federal Circuit, on the basis that the statute "requires an 'inventor' to be a natural person[.]"^[23] Similarly, the USCO concluded that artwork created by AI "lacks the human authorship necessary to support a copyright claim," and was subsequently affirmed by the Copyright Review Board.^[24]

Conversely, are AI programs plagiarizing the work of others? Some artists believe so and have filed suits alleging that AI generated artwork does not properly credit or reimburse its sources.

[25]

Given that Florida lawyers have been sanctioned for plagiarism,^[26] utilizing an A.I. program to draft documents may not be risk free.

5. Chatbots require supervision, too

Though they may not be as advanced as the chatbots offered by ChatGPT or Microsoft Bing, many lawyers and law firms already utilize automated chat services for those who visit the lawyer's website. As these chatbots become more advanced, lawyers should be wary that these services may unintentionally create a lawyer-client relationship and the ethical obligations it entails.

A lawyer-client relationship exists whenever a person consulting with a lawyer develops a reasonable subjective belief that they are receiving the benefit of a lawyer-client relationship.^[27] The lawyer's intent is irrelevant in this analysis,^[28] and the creation of a lawyer-client relationship does not require that the lawyer receives a fee.^[29] Even when providing services that are "distinct from legal services," a lawyer is subject to the Rules Regulating The Florida Bar "if the lawyer knows or reasonably should know that the recipient might believe [they are] receiving the protection of a client-lawyer relationship" and the lawyer has failed to make reasonable efforts to avoid any misunderstanding by the recipient.^[30] In turn, these unintended lawyer-client relationships create a variety of ethical concerns, including most notably, conflicts of interest.

Similarly, a consultation may occur pursuant to Rule 4-1.18 if the chatbot on a lawyer's website "specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary



statements that limit the lawyer's obligations, and a person provides information in response."^[31] These consultations are confidential and can create conflicts of interest for the relevant lawyer or law firm.^[32]

Proceed with caution

Many questions regarding a lawyer's use of A.I. programs are currently unanswered and may remain unanswered for the indefinite future. For this reason, lawyers are advised to maintain a healthy dose of skepticism regarding AI programs and to proceed with caution. While these programs may someday revolutionize the practice of law, a lawyer's ethical obligations have not changed. Duties of candor, competence, and confidentiality have remained steadfast in the face of prior technological innovations and should be expected to guide the practice of law indefinitely into the future.

^[1] Karen Sloan, Some law professors fear ChatGPT's rise as other see opportunity, Reuters (January 10, 2023, 7:19 PM EST), <https://www.reuters.com/legal/legalindustry/some-law-professors-fear-chatgpts-rise-others-see-opportunity-2023-01-10/>; Samantha Murphy Kelly, ChatGPT passes exams from law and business schools, CNN (January 26, 2023, 1:35 PM EST), <https://www.cnn.com/2023/01/26/tech/chatgpt-passes-exams/index.html>.

^[2] Kevin Roose, An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy, The New York Times (September 2, 2022), <https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html>.

^[3] Blair Chavis, Does ChatGPT produce fishy briefs?, ABA Journal (February 21, 2023, 1:58 PM CST), <https://www.abajournal.com/web/article/does-chatgpt-produce-fishy-briefs?>.

^[4] Ella Feldman, Are A.I. Image Generators Violating Copyright Laws?, Smithsonian Magazine (January 24, 2023), <https://www.smithsonianmag.com/smart-news/are-ai-image-generators-stealing-from-artists-180981488/>.

^[5] Rule 4-5.1, R. Reg. The Fla. Bar.

^[6] Comment to Rule 4-1.1, R. Reg. The Fla. Bar.

^[7] See Sloan, supra.

^[8] See Rule 4-5.3(c).

^[9] Id.



[10] Kelly, supra.

[11] John Simon, The Creator of ChatGPT Thinks AI Should Be Regulated, Time (February 5, 2023, 9:00 AM EST), <https://time.com/6252404/mira-murati-chatgpt-openai-interview/>; Amelia Thompson-DeVeaux and Curtis Yee, ChatGPT Thinks Americans Are Excited About AI. Most Are Not., (February 24, 2023, 6:00 AM EST), <https://fivethirtyeight.com/features/chatgpt-thinks-americans-are-excited-about-ai-most-are-not/>.

[12] See The Florida Bar v. Dove, 985 So. 2d 1001 (Fla. 2008) (lawyer suspended for 3 years for, among other violations, failing to provide all material facts in an ex parte hearing and filing documents containing material misstatements, thereby obtaining an order terminating parental rights that family court would not otherwise have granted); The Florida Bar v. Koko Head, 84 So.3d 292 (Fla. 2012) (lawyer suspended for 91 days for dishonest conduct, including sending a notice to a tenant with a fictitious case number, submitting a false affidavit to the court, and testifying untruthfully in the disciplinary matter); The Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001) (court notes that disbarment is the presumptive sanction, but suspended prosecutor for one year in light of mitigating factors after prosecutor failed to disclose true identity of prosecution witness prior to and during trial); The Florida Bar v. Catalano, 685 So. 2d 1299 (Fla. 1996) (attorney disbarred for advising client to transfer money to attorney's trust account after client ordered not to dispose of any property by court, then misrepresented amount of transfer to court).

[13] Comment to Rule 4-3.1, R. Reg. The Fla. Bar.

[14] Rule 4-1.6 and Comment, R. Reg. The Fla. Bar.

[15] Id.

[16] Florida Bar Ethics Opinion 12-3 (2013).

[17]

Id.

[18] Florida Bar Ethics Opinion 06-1 (2006).

[19] Florida Bar Ethics Opinion 06-2 (2006).

[20] Florida Bar Ethics Opinion 10-2 (2010).

[21] Florida Bar Ethics Opinion 00-4 (2000).



[22] Jane Recker, U.S. Copyright Office Rules A.I. Art Can't Be Copyrighted, Smithsonian Magazine (March 24, 2022), <https://www.smithsonianmag.com/smart-news/us-copyright-office-rules-ai-art-cant-be-copyrighted-180979808/>.

[23] Thaler v. Vidal, 43 F.4th 1207, 1209 (Fed. Cir. 2022).

[24]

A Recent Entrance to Paradise, USCO Correspondence ID 1-3ZPC6C3; SR # 1-7100387071 (Copyright Rev. Bd., February 14, 2022), available at: <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>.

[25] Feldman, supra.

[26] The Florida Bar v. Gonzalez, SC08-434 (Fla. 2008) (lawyer was suspended from the practice of law for violating rule 4-8.4(c), which prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, following the lawyer's submission of an article that copied the writing of other published authors without permission or attribution).

[27] Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992), rev. dismissed, 618 So.2d 208 (Fla. 1993) (whether person who consults attorney is client for purposes of evidence code depends on subjective intent of person seeking consultation rather than the lawyer's conduct); Bartholomew v. Bartholomew, 611 So.2d 85 (Fla. 2d DCA 1992) (test for determining existence of attorney-client relationship is a subjective one hinging upon client's belief that he is consulting an attorney in that capacity and his manifested intention is to seek professional legal advice, but the belief must be a reasonable); Rule 4-5.7(a-b), Rules Regulating The Florida Bar.

[28] Id.

[29] The Florida Bar v. King, 664 So.2d 925, 927 (Fla. 1995).

[30] Rule 4-5.7(b, d), R. Reg. The Fla. Bar.

[31] Comment to Rule 4-1.18, R. Reg. The Fla. Bar.

[32] Id.

