Artificial Intelligence and the Practice of Law

Wednesday, Sept. 20, 2023

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League of California Cities Conference
September 20, 2023

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Introduction

In May 2023, New York lawyer Steven Schwartz was confronting a well-founded motion to dismiss his case against Avianca Airlines.[1] His client, Roberta Marta, failed to sue within the statute of limitations for injuries caused by a serving cart on a flight from JFK. Fortunately, it appeared multiple cases supported tolling the statute of limitations under similar circumstances, which Schwartz argued in his opposing brief.[2] The problem? Many of the case he cited never existed. Rather, the cases were made up by ChatGPT, which Schwartz had used to conduct his legal research. Avianca's counsel immediately discovered the error and brought it to the court's attention.[3]

Schwartz later explained he did not understand ChatGPT could produce false results, and relied on the tool's assurance that the cases were real.[4] The district judge imposed $5,000 dollars in sanctions for bad faith and "acts of conscious avoidance and false and misleading statements to the court."[5] The court also ordered the attorneys involved to write apology letters to judges identified as authors of the fake cases.

The *Marta* case confirmed warnings sounding throughout the legal community since generative AI tools, such as ChatGPT, burst onto the scene in late 2022. Generative AI will revolutionize the way lawyers perform reading and writing tasks thought immune to automation. Law firms have begun incorporating AI tools in their practices; to perform legal research, draft and edit contracts, and perform electronic discovery. However, generative AI also presents significant risks, both to lawyers and nonlawyers. This paper discusses those risks, and summarizes some of the generative AI legal tools already available in the market.

What is Generative AI?

Generative AI tools are a form of artificial intelligence, which rely on Large Language Models ("LLMs") to understand and interpret languages such as English. LLMs work by ingesting huge amounts of data, then using an algorithm that predicts how to put words together to make meaningful responses to questions.[6] Thus, a LLM can be instructed to "write a haiku about a lawyer that is anxious about the impact of AI on their practice." And it can produce the following result:

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[1] Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT,* N.Y. Times (May 27, 2023) <https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html> [as of Aug. 15, 2023].
[2] *Ibid.*
[3] Sloan, *A lawyer used ChatGPT to cite bogus cases. What are the ethics?* Reuters (May 30, 2023) <https://www.reuters.com/legal/transactional/lawyer-used-chatgpt-cite-bogus-cases-what-are-ethics-2023-05-30/> [as of Aug. 14, 2023].
[4] Affidavit filed May 24, 2023, *Roberta Mata v. Avianca Inc.,* Southern District of New York, Civil Action No. 22-cv-1461.
[5] Merken, *New York lawyers sanctioned for using fake ChatGPT cases in legal brief*, Reuters (Jun. 26, 2023) <https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/> [as of Aug. 15, 2023].
[6] Sundar, *Everything you need to know about ChatGPT,* Business Insider (June 4, 2023) <https://www.businessinsider.com/everything-you-need-to-know-about-chat-gpt-2023-1> [as of Aug. 14, 2023].

Briefs and code clash,

AI's legal mind ascends,

Doubt fills the courtroom.

Because LLMs not only source vast amounts of information, but understand words in context, generative AI tools can produce incredibly human seeming answers. However, these tools are not people and are not exercising any judgment in formulating answers, and so can be convincing even when wrong.

Most lawyers have been using AI for years, such as Westlaw Edge's natural language search.[7] And companies like Meta[8] and Google[9] have made LLMs available to developers for several years. However, the public AI boom was kickstarted by OpenAI's ChatGPT,[10] a public user interface allowing anyone to use GPT, OpenAI's large language model. ChatGPT was released in November 2022, had amassed one million users within five days (in comparison, Twitter took two years to reach the same mark.)[11] ChatGPT now has over 100 million users less than a year after its release.[12]

Workers quickly saw the benefit of using generative AI to streamline drafting tasks. For example, ChatGPT can act as a writing assistant, helping employees organize their thoughts and solving the ever present "blank page" problem. Generative AI tools can also analyze and interpret vast amounts of data. The Office for Economic Co-operation and Development determined generative AI can now achieve many tasks thought to be bottle necks to AI development, such as "reading comprehension, deductive and inductive reasoning skills, fluency of ideas and scheduling skills."[13]

But the availability of AI also creates serious concerns. Using generative AI may save significant time and effort, but what happens when the model provides incorrect or biased information? Are consumers entitled to know when they are interacting with content drafted by artificial intelligence? And what impacts will generative AI have on content creators, whose work LLMs are trained on and who have legitimate fears of being replaced by artificial intelligence?

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[7] See Thompson Reuters, Westlaw Edge <https://legal.thomsonreuters.com/en/products/westlaw-edge> [as of Aug. 16, 2023].

[8] See Meta, Introducing Llama 2 <https://ai.meta.com/llama/> [as of Aug. 16, 2023].

[9] v <https://ai.google/discover/generativeai> [as of Aug. 16, 2023].

[10] See OpenAI, ChatGPT<https://chat.openai.com/> [as of Aug. 16, 2023].

[11] Buchholz, Threads Shoots Past One Million User Mark at Lightning Speed (July 7, 2023) Statista <https://www.statista.com/chart/29174/time-to-one-million-users/> [as of Aug. 16, 2023].

[12] Sundar, *supra*, at fn. 6.

[13] Lassébie & Quintini, *OECD Social, Employment and Migration Working Papers, No. 282: What skills and abilities can automation technologies replicate and what does it mean for workers?: New evidence* (2022) OECD Publishing <https://doi.org/10.1787/646aad77-en> [as of Aug. 16, 2023].

Risks of Generative AI

a. Privacy

As with any new technology, the risks presented by generative AI are multifaceted and have no easy solutions. Chief among these concerns is the loss of privacy. Machine learning systems require enormous amounts of data to teach,[14] and AI companies get that data by scraping the internet. As models grow in size and complexity, the market drives demand for collecting data and combining data sets. People may quickly find their private information has been used to train LLMs, and might be accessible to malicious actors.[15]

Generative AI's ability to analyze and predict from data may further undermine privacy. Prompts entered into large language models become part of the model, used to train the algorithm and produce better results. But those inputs are also a valuable source of information themselves, and consumers using public tools shouldn't be surprised when targeted adds seem suspiciously similar to their LLM prompts.[16]

b. Bias

AI algorithms are only as good as the data they are built on, and may be unintentionally biased in ways difficult to predict. For example, Amazon scrapped an AI recruiting tool because it was biased against women.[17] The machine learning computer program reviewed job applicant's resumes and gave them a rating between one to five stars. But developers quickly realized that the model consistently discriminated against women when rating candidates for technical positions, such as software developers. Because the model had been trained on resumes submitted to the company over a 10 -year period, and those resumes were predominantly from men due to male domination in the tech industry, the model taught itself male candidates were better for the job. References to "women" in a resume would automatically reduce its score.

In another instance, a widely used healthcare algorithm predicted future medical needs by looking at past medical costs.[18] But in reality, "[l]ess money is spent on Black patients who have the same level of need, and the algorithm thus falsely concludes that Black patients are healthier than equally sick White patients."[19] Had the algorithm been accurate, nearly three times as many

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[14] For example, ChatGPT has approximately 175 billion parameters. See Dilmegani, *Large Language Model Training in 2023,* AI Multiple (May 20, 2023) <https://research.aimultiple.com/large-language-model-training/≥ [as of Aug. 14, 2023].

[15] See, e.g., Kovacs, *ChatGPT Data Breach Confirmed as Security Firm Warns of Vulnerable Component Exploitation,* Security Week (Mar. 28, 2023) <https://www.securityweek.com/chatgpt-data-breach-confirmed-as-security-firm-warns-of-vulnerable-component-exploitation/> [as of Aug. 16, 2023].

[16] Hunter, *Why you shouldn't tell ChatGPT your secrets,* Washington Post (Apr. 27, 2023) <https://www.washingtonpost.com/technology/2023/04/27/chatgpt-messages-privacy/> [as of Aug. 14, 2023].

[17] Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women,* Reuters (Oct. 10, 2018) <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G> [as of Aug. 15, 2023].

[18] Obermeyer et al., *Racial bias in health algorithms* (2019) 366 SCIENCE 447 <https://www.science.org/doi/10.1126/science.aax2342≥ [as of Aug. 15, 2023].

[19] *Ibid.*

Black patients would have received additional help.[20] AI tools are constantly at risk of similar missteps, magnifying systemic and unconscious biases.

c. Unemployment

Workers are also justifiably concerned that automation will create greater efficiencies that may replace employees and lead to large scale job loss. Until recently, those concerns have been primarily about blue collar jobs. For example, in 2016, the Council of Economic Advisers estimated that self-driving cars threaten 2-3 million driving jobs in the U.S.[21] But LLMs now present concerns for white collar workers too, with many basic legal tasks (such as document review) capable of automation with generative AI. Generative AI tools can now pass the bar exam with an average score higher than recent law school graduates.[22] In March 2023, Goldman Sachs estimated that up to 44% of legal tasks could be automated using generative AI.[23] While the ultimate impact of generative AI on the legal and other white collar professions is hard to predict, there is no doubt it will be transformative, and it may also ultimately create many jobs while augmenting others.

d. Fraud and Misrepresentation

If generative AI tools make legitimate work easier, they do the same for illegitimate work, too, and malicious actors can use LLMs to scale their attacks. For example, while misinformation and fake news are already prevalent in social media, ChatGPT and similar applications will allow fake content to be created and disseminated far more rapidly than before.[24] AI can also convincingly mimic someone's identity in online interactions, a practice known as a "deep fake."[25] And generative AI can comb data breaches at astonishingly fast speeds, pulling out data for criminals to exploit.[26] On the more mundane side, educators are deeply concerned about the impact generative AI will have on students, who may use it to complete assignments without learning the material.[27]

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[20] *Ibid.*

[21] Exec. Off. of the Pres., Artificial Intelligence and the Economy (Dec. 2016) p. 15 <obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Artificial-Intelligence-Automation-Economy.PDF> [as of Aug. 15, 2023].

[22] Illinois Tech, *GPT-4 Passes the Bar Exam* (Mar. 15, 2023) <https://www.iit.edu/news/gpt-4-passes-bar-exam#:~:text=CHICAGO%E2%80%94March%2015%2C%202023%E2%80%94%20GPT-4%2C%20the%20new%20multimodal%20deep,Illinois%20Institute%20of%20Technology%E2%80%99s%20Chicago-Kent%20College%20of%20Law> [as of Aug. 15, 2023].

[23] Hatzius et al, *The Potentially Large Effects of Artificial Intelligence on Economic Growth (Briggs/Kodnani)* (Mar. 26, 2023) Goldman Sachs <https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst_-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf> [as of Aug. 15, 2023].

[24] See, e.g. Glorioso, *Fake News? ChatGPT Has a Knack for Making Up Phony Anonymous Sources*, NBCUniversal Media (Feb. 23, 2023) <https://www.nbcnewyork.com/investigations/fake-news-chatgpt-has-a-knack-for-making-up-phony-anonymous-sources/4120307/> [as of Aug. 15, 2023].

[25] Telesign, *The growing impact of generative AI on cybersecurity and identity theft* (Jul. 21, 2023) <https://venturebeat.com/security/the-growing-impact-of-generative-ai-on-cybersecurity-and-identity-theft/> [as of Aug. 15, 2023].

[26] *Ibid.*

[27] *Ibid.*

In the legal field, the unauthorized practice of law by tech companies is becoming an increasing concern. DoNotPay billed itself as the world's first "robot lawyer," and claimed to automate dozens of legal tasks, such as analyzing terms of service, drafting demand letters, and appealing parking tickets.[28] In 2023, it made headlinese with its plan to have a robot lawyer in court, by having an algorithm dictate responses to a customer wearing a microphone and smart glasses.[29] Multiple state bars sent letters opposing the plan, even noting "unauthorized practice of law is a misdemeanor in some states punishable up to six months in county jail."[30] DoNotPay quickly scuttled its plans.

DoNotPay is also being sued by its clients, who claim its advertising practices are deceptive and its "legal" work shoddy. Plaintiffs say they reasonably assumed they were purchasing legal documents and services that would be fit for use, as from a lawyer competent to provide them."[31] Instead, they received documents that were inaccurate and almost entirely unusable.[32] Today, DoNotPay has backed away from advertising itself as robot lawyer, and instead bills itself as an "AI consumer champion" that "uses artificial intelligence to help you fight big corporations, protect your privacy, find hidden money, and beat bureaucracy."[33] However, DoNotPay still offers the same products, and in a country starved for affordable legal services, tech companies will continue to look for ways to fill the void.[34]

e. Copyright infringement

LLMs and the generative AI tools based on them also present massive potential copyright infringement of texts, images, and other content taken from the internet. So far, it is unclear if training an LLM on copyrighted material constitutes fair use. A group of over 4,000 writers signed an open letter in December 2022 to top AI companies, "accusing them of exploitative practices in building chatbots that 'mimic and regurgitate' their language, style and ideas."[35] And IAC[36] Chairman Barry Diller has indicated litigation from a coalition of publishing companies is coming soon: "[W]e have to do it. It's not antagonistic. It's to stake a firm place in the ground to say that you cannot ingest our material without figuring out a business model for the future."[37]

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[28]DoNotPay, Your AI Consumer Champion <https://donotpay.com> [as of Aug. 15, 2023].

[29] Allyn, *A robot was scheduled to argue in court, then came the jail threats*, NPR (Jan. 25, 2023) <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail-threats> [as of Aug. 15, 2023].

[30] *Ibid.*

[31] Pachecho, *ANALYSIS: DoNotPay Lawsuits: A Setback for Justice Initiatives?,* Bloomberg Law (Mar. 28, 2023) <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-donotpay-lawsuits-a-setback-for-justice-initiatives> [as of Aug. 15, 2023].

[32] *Ibid.*

[33] DoNotPay, *supra*, at fn. 28.

[34] Allyn, *supra*, at fn. 29.

[35] O'Brien, *ChatGPT-maker OpenAI signs deal with AP to license news stories*, AP News (Jul. 13, 2023) <https://apnews.com/article/openai-chatgpt-associated-press-ap-f86f84c5bcc2f3b98074b38521f5f75a> [as of Aug. 15, 2023].

[36] The parent company for content brands such People Magazine, Better Homes and Gardens, and Daily Beast.

[37] CBS News, Transcript: Barry Diller, IAC chairman and senior executive, on "Face the Nation," (Jul. 16, 2023), <www.cbsnews.com/news/barry-diller-face-the-nation-transcript-07-16-2023/> [as of Aug. 15, 2023].

Other companies see opportunity, such as the Associated Press, which signed a deal recently to license AP's archive of news stories to be used in OpenAI's LLM development.[38] Several lawsuits have been filed against OpenAI, including by comedian Sarah Silverman, who alleges OpenAI illicitly obtained a copy of her 2010 book to train its model.[39] Regulators are getting involved too, and the Federal Trade Commission has informed OpenAI it is investigating whether the company "had engaged in unfair or deceptive privacy or data security practices in scraping public data — or caused harm by publishing false information through its chatbot products."[40]

Overall, these risks highlight the need for effective governance, both public and private. The Biden Administration has released a "Blueprint for an AI Bill of Rights" which identifies several governing principles, such as creating safe and effective systems, preventing algorithmic discrimination, protecting data privacy, providing notice when AI is being used, and promoting human alternatives to artificial intelligence.[41] In July 2023, the seven largest AI companies voluntary committed to self-regulations for the industry, including internal and external security testing of their AI systems before release, information sharing, investing in cybersecurity and insider threat safeguards, developing watermarking and other technologies to easily identify AI generated content, taking steps to counter bias and discrimination, and protecting privacy.[42]

Litigation Tools for Lawyers

Despite the risks inherent in LLMs, the generative AI tools already available to lawyers are incredibly powerful, and will only grow more efficient and useful as time goes on. Generally, these tools fall into three categories. The first are publicly accessible tools such as OpenAI's ChatGPT or Google's Bard.[43] Free and available to the public, these tools are not trained on legal sources specifically, and have a tendency to "hallucinate" or make mistakes when asked legal questions. Further, the information placed into them is not private, and prompts are incorporated into the model and used to train it. Thus, while certain tasks, like drafting an email, can be done quickly and cheaply with ChatGPT, lawyers should carefully scrutinize what goes into, and comes out of, these tools.

Next are "off-the-shelf" legal tools that use a LLM as their base, such as Casetext's CoCounsel, Lexis+ AI, and Westlaw Precision. These tools are further trained on legal databases, and programmed to limit their responses to real authority. They also keep client data secure,

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[38] O'Brien, *supra*, at fn. 35.

[39] O'Brien, *Sarah Silverman and novelists sue ChatGPT-maker OpenAI for ingesting their books*, AP News (Jul. 26, 2023) <https://apnews.com/article/sarah-silverman-suing-chatgpt-openai-ai-8927025139a8151e26053249d1aeec20, [as of Aug. 15, 2023].

[40] O'Brien, *supra*, at fn. 35.

[41] White House, Blueprint for an AI Bill of Rights <https://www.whitehouse.gov/ostp/ai-bill-of-rights/> [as of Aug. 15, 2023].

[42] White House, FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI (Jul. 21, 2023) <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/#:~:text=As%20part%20of%20this%20commitment%2C%20President%20Biden%20is,safe%2C%20secure%2C%20and%20transparent%20development%20of%20AI%20technology.> [as of Aug. 15, 2023].

[43] See Google, Google Bard <https://bard.google.com/> [as of Aug. 15, 2023].

meaning the tool can be used without risking confidentiality. CoCounsel has been adopted by major law firms such as DLA Piper and Orrick, Herrington & Sutcliffe, and was used to produce many examples that follow.[44] Other tools are coming out which focus more directly on a single aspect of legal work. These include Spellbook, a contract drafting platform that interfaces directly with Microsoft word, and Everlaw, which is designed for eDiscovery.[45]

Finally, there are boutique and in-house products, which go a step further and train a model based on a firm's own data. For example, in February 2023, Allen & Overy announced it was partnering with Harvey AI, a legal services AI platform that "combines general internet data from the GPT model with legal-specific data, including case law and reference materials. When engaged by a law firm, Harvey AI undergoes further training using the firm's own work products and templates," which allows Harvey AI to tailor its product directly to client needs.[46] While these products offer the most benefit to consumers, they also take significant resources to build or buy, and may not be justifiable for public entities and smaller firms.

The potential applications of generative AI to legal tasks are nearly endless, but in these early days, it appears certain tasks are particularly suited to automation. These include legal research, deposition preparation, and document review and drafting. The following are examples of how those tasks are achieved by AI uses ChatGPT and CoCounsel.

1) Legal research

Legal research is the often first task that comes to mind when lawyers ask how they can use AI. Litigators spend an inordinate amount of time researching, and the prospect of telling a computer what you want and getting the right answer in minutes or seconds is enticing. In practice, legal research using an LLM can be risky if the model isn't trained on and limited to legal sources. ChatGPT and other broad-based tools can be surprisingly accurate, but are also convincing even when wrong. Thus, tools such as CoCounsel, which is trained on a legal database and only returns results from that database, present a safer and more accurate option. Below are some examples:

Test 1: Here, we ask both ChatGPT and CoCounsel to answer a basic question: "What are the elements of a breach of contract claim in California?" The correct answer is "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3)

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[44] Merken, *Legal AI race draws more investors as law firms line up*, Reuters (Apr. 26, 2023) <https://www.reuters.com/legal/legal-ai-race-draws-more-investors-law-firms-line-up-2023-04-26/> [as of August 14, 2023]. CoCounsel was used here as it is an off-the-shelf product currently available in the market. This paper is not intended to endorse CoCounsel or any other product.

[45] See Everlaw, Get straight to the truth with Everlaw <https://www.everlaw.com/> [as of August 14, 2023]; Spellbook, Draft contracts 3x faster with AI <https://www.spellbook.legal/> [as of August 14, 2023].

[46] Williams, *Introducing Harvey AI: Revolutionizing the Legal Field with Artificial Intelligence*, Martindale AVVO (May 25, 2023) <https://www.martindale-avvo.com/blog/harvey-ai-artificial-intelligence/#:~:text=It%E2%80%99s%20built%20on%20Open.AI%E2%80%99s%20GPT%20AI%2C%20just%20like,legal-specific%20data%2C%20including%20case%20law%20and%20reference%20materials> [as of Aug. 14, 2023].

defendant's breach, and (4) the resulting damages to the plaintiff."[47] ChatGPT provides an answer that, if not exactly correct, is close to the mark:

> In California, a breach of contract claim typically requires the following elements to be established:
>
> **Valid Contract:** There must be a valid and enforceable contract between the parties. A contract is an agreement that creates legal obligations between the parties, and it must contain essential terms, mutual consent, and consideration (something of value exchanged).
>
> **Breach:** There must be a material breach of the contract. This means that one party failed to perform a significant obligation or violated a key term of the contract.
>
> **Damages**: The breach of contract must have resulted in actual damages. Damages can be economic (such as monetary losses) or non-economic (such as harm to reputation or emotional distress).
>
> **Performance or Excuse:** The non-breaching party must have performed their obligations under the contract, unless there's a valid legal excuse for non-performance. Common excuses include impossibility, impracticability, frustration of purpose, or the other party's material breach.
>
> **Causation:** There must be a causal connection between the breach of contract and the damages suffered by the non-breaching party. In other words, the breach must be a direct cause of the harm.
>
> **Mitigation:** The non-breaching party has a duty to mitigate (minimize) their damages by taking reasonable steps to lessen the impact of the breach.
>
> **Statute of Limitations:** The breach of contract claim must be filed within the applicable statute of limitations. In California, this is typically four years for written contracts and two years for oral contracts.

ChatGPT adds several additional factors which are not strictly speaking elements, but which would be present in many contract cases. CoCounsel is much more succinct, stating:

> The elements of a breach of contract claim in California are: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages.

CoCounsel then summarizes the sources it took the information from, and a gives longer list of quotes form those sources.

Test 2: Here we ask a much more nuanced question "In California, does a transfer of utility rate revenue to a city's general fund violate Proposition 218?" The actual answer will

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[47] *D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 800 [cleaned up].

depend on number of factors, including the type of utility and whether the city has offsetting non-rate revenues.[48] ChatGPT does not provide a direct answer:

> As of my knowledge cutoff date in September 2021, I don't have information on specific, current legal cases or rulings. However, I can provide some general information about Proposition 218 and its implications for transferring utility rate revenue to a city's general fund in California.
>
> Proposition 218, also known as the "Right to Vote on Taxes Act," is a California constitutional amendment passed by voters in 1996. It establishes requirements for local governments (including cities) regarding property-related fees and charges, including utility rates. Proposition 218 imposes various limitations and protections to ensure that fees and charges related to property assessments and property-related services are reasonable, transparent, and subject to voter approval in some cases.
>
> Under Proposition 218, certain fees or charges imposed by a local government (such as a city) require a majority vote of affected property owners or ratepayers if the fee is considered a "tax" or a "special assessment." The definitions and classifications of fees can be legally nuanced, and whether a transfer of utility rate revenue to a city's general fund constitutes a violation of Proposition 218 would depend on the specific circumstances, including how the transfer is structured and the purpose of the transfer.
>
> If a transfer of utility rate revenue to a city's general fund is challenged as a potential violation of Proposition 218, a court would need to analyze the details of the transfer, the legal arguments presented by the parties involved, and potentially applicable legal precedents to determine whether Proposition 218 has been violated.
>
> Since this is a legal matter with potential implications for a specific city and its utility rate structure, it's essential to consult with legal experts who are up to date on the latest legal developments and any relevant court decisions or changes that may have occurred after September 2021. If there have been new rulings or legislative changes since that time, they could affect the interpretation and application of Proposition 218 in this context.

CoCounsel, however, both understands the prompt and provides an appropriately nuanced answer, referencing the correct cases to allow the lawyer to conduct their own research:

> The answer to the query is not entirely clear, but the cases suggest that a transfer of utility rate revenue to a city's general fund may violate Proposition 218 if the revenue is used for general governmental services rather than the specific service for which the fee was imposed…

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[48] See *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1; *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244; *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373.

Several cases address the question of whether a city's transfer of utility rate revenue to its general fund violates Proposition 218. In Wyatt v. City of Sacramento, the court discusses the relationship between Proposition 218 and a measure to replace certain fees with a general tax, but does not directly address the question at issue. However, in Howard Jarvis Taxpayers Assn. v. City of Roseville, the court concludes that a fee imposed by a city on its municipal utilities is subject to Proposition 218 and violates it because the revenue is used for general governmental services rather than the specific service for which the fee was imposed.

In Palmer v. City of Anaheim, the court discusses whether a city's transfer of utility rate revenue to its general fund violates Proposition 218, but the case does not directly answer the question because it focuses on a specific charter provision that authorized the transfer. However, the court does find that the transfer was approved by the voters and therefore does not violate Proposition 218.

In Lejins v. City of Long Beach, the court addresses whether a surcharge on water and sewer rates, which was used to fund general city services, violated Proposition 218. The court finds that the surcharge does violate the proposition because it does not reasonably represent the cost of providing service and the revenue is used for general governmental services.

In Citizens for Fair REU Rates v. City of Redding, the California Supreme Court discusses whether a city's transfer of utility rate revenue to its general fund constitutes a tax under Proposition 218. The court finds that the rate does not exceed the reasonable costs of providing service and therefore does not violate the proposition.

In Howard Jarvis Taxpayers Assn. v. City of Fresno, the court finds that a city's "in lieu fee" for water, sewer, and solid waste utilities violates Proposition 218 in three ways, including that the revenue is used for a purpose other than that for which the fee was imposed.

Finally, in Jacks v. City of Santa Barbara, the court discusses whether a charge imposed by a city on utility customers constitutes a tax under Proposition 218. The court finds that the charges are not subject to the proposition's voter approval requirements because they constitute compensation for the use of government property.

Taken together, these cases suggest that a transfer of utility rate revenue to a city's general fund may violate Proposition 218 if the revenue is used for general governmental services rather than the specific service for which the fee was imposed. However, the cases do not provide a definitive answer, and further research may be necessary.

Test 3: Here, we asked a simple but esoteric question: "In California, is a City required to verify its complaint?" The correct answer is no, public entities do not have to verify their complaints under Code of Civil Procedure section 446. This time, ChatGPT simply gets the answer wrong, stating:

> In California, a city or any plaintiff filing a complaint in a civil lawsuit is generally required to verify the complaint under certain circumstances. Verification means that the complaint is accompanied by a signed statement (affidavit) declaring that the contents of the complaint are true and correct to the best of the signer's knowledge and belief….

CoCounsel gets the answer right:

> Based on the authorities found, it appears that a City in California is generally not required to verify its complaint, unless a specific statute or regulation requires it.

While CoCounsel's subsequent analysis does not cite to section 446, the first case it provides is *Paul Blanco's Good Car Co. v. Superior Court*,[49] which discuss the verification requirement in relation to public entities at length.

Finally, while the above questions are all simple in framing, LLMs can respond to much more nuanced prompts. A lawyer can describe their client, background of the case, and procedural posture, and then ask a generative AI tool what arguments should be made for a particular motion. Or, an opponent's brief could be fed into the tool, which is then asked to identify weakness in the arguments.

Overall, public generative AI tools such as ChatGPT are not (yet) useful in conducting legal research beyond the basics. Conversely, tools designed for lawyers can significantly shorten the time to complete research tasks. Such tools should be treated as a prolific first year associate. Prone to errors and misunderstandings, but able to sift large amounts of data and provide concise summaries that will point quickly point attorneys in the right direction.

2) Deposition Preparation

LLMs are very good at "brainstorming" type activities, where the tool is prompted with information and produces a list of possible responses. For example, ChatGPT can quickly plan a daily itinerary if told where you are going and the activities you like. Legal tool developers have taken this capability to create a deposition preparation function, where the tool generates a list of topics and questions for a deponent based on the user's description. For example, we gave CoCounsel the following prompt:

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[49] (2020) 56 Cal.App.5th 86.

I am the City Attorney for the City of Pawnee. At the annual Harvest Festival, an event put on by the Pawnee Parks and Recreation department, local librarian T. Swanson was bitten by a miniature horse named Li'l Sebastian.

T. Swanson has sued the City for negligence, premises liability, and intentional infliction of emotional distress. She was formerly married to the director of the Parks and Recreation Department, R. Swanson, and any bias against R. Swanson is relevant. Please prepare deposition questions for T. Swanson related to her claims.[50]

Given this information, CoCounsel produces deposition topics and questions, including:

The extent of T. Swanson's injuries from the bite

- What injuries did you sustain from the bite?
- Did you seek medical attention for your injuries?
- What treatments or medications were prescribed to you as a result of the bite?
- Are you still experiencing any symptoms or pain from the bite?
- Has the bite impacted your ability to work or perform daily activities?

Any prior interactions T. Swanson had with Li'l Sebastian

- Had you ever interacted with Li'l Sebastian before the Harvest Festival?
- If so, how many times?
- What was the nature of those interactions?
- Did you ever experience any aggressive behavior from Li'l Sebastian in the past?
- Did you ever witness anyone else experience aggressive behavior from Li'l Sebastian?

The nature of T. Swanson's relationship with R. Swanson and any potential bias

- What is your current relationship with R. Swanson?
- Were you ever married to R. Swanson?
- If so, when did your marriage end?
- Would you describe your relationship with R. Swanson as amicable or contentious?
- Do you believe you have any bias against R. Swanson?

As with most generative AI output, simply copying and pasting the results into a deposition outline would be a mistake. But these tools can help formulate questions, brainstorm different categories of questioning, and speed up the process of deposition preparation.

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[50] See generally *Parks and Recreation* (NBC Universal) <https://www.youtube.com/watch?v=qjPnbUrYsw0> [as of Aug. 16, 2023].

3) Document Review

Generative AI tools are also excellent for sifting large amounts of information, which makes them ideal for assisting with discovery tasks. For example, a tool can be given a document and asked to summarize its contents. As with all AI prompts, the more information given to the tool, the more accurate and helpful the output. So, for example, merely having CoCounsel summarize the U.S. Constitution produces the following result:

> The document is the Constitution of the United States. It begins by outlining the process for apportioning representatives among the states, before establishing the purpose of the Constitution and the structure of the government. The Constitution sets out three branches of government: legislative, executive, and judicial. Article I outlines the powers and responsibilities of the legislative branch, which consists of the Senate and House of Representatives. It specifies the qualifications for serving in each chamber, the process for filling vacancies, and the rules for conducting business. It also outlines the Senate's role in impeachment proceedings. Article I, Section 8 enumerates the specific powers granted to Congress, which include the ability to tax, borrow money, regulate commerce, coin money, establish post offices, and declare war. Section 9 restricts certain actions that Congress is not allowed to take, while Section 10 restricts the powers of the states. The Constitution also outlines the powers and responsibilities of the executive and judicial branches, as well as the process for amending the Constitution. It addresses the relationship between the states and the federal government, and contains information about the process for ratifying the Constitution, the Bill of Rights, and subsequent amendments. These amendments include the abolition of the poll tax, the lowering of the voting age to 18, and the establishment of procedures for presidential succession.

While correct, the result misses some of the content users would consider most critical, such as the First, Fourth, and Fourteenth Amendments. Thus prompting tools with the information the lawyer thinks is important is critical.

More impressive is generative AI's ability to sort through large databases for information. For example, when CoCounsel is given the complete works of Shakespeare and asked to "find all references to Falstaff," it will respond:

> There are numerous references to Falstaff in the results above. Falstaff appears as a character in three of Shakespeare's plays: "The Merry Wives of Windsor," "Henry IV, Part 1," and "Henry IV, Part 2." In "The Merry Wives of Windsor," Falstaff is a central character, appearing in multiple scenes and engaging in dialogue with various other characters. In "Henry IV, Part 1" and "Henry IV, Part 2," Falstaff also plays a significant role, appearing in multiple scenes and interacting with characters such as the Prince, Bardolph, and the Chief Justice

The tool will then give hyperlinked page and line references.[51] During discovery, large databases of information can be uploaded, and then searched rapidly to answer simple questions, such as "where is Falstaff referenced?" and complex ones, such as "what is each plays primary theme, and who are their protagonists and antagonists?" Firms can also build a brief bank, making it possible to rapidly search their own precedent for answers.

4) Drafting and Revision

Generative AI is also good at producing first drafts of documents. Here, ChatGPT was asked to "draft a California ordinance authorizing and regulating ADUs" and produced:

ORDINANCE NO. [Insert number]

AN ORDINANCE OF THE CITY OF [Insert city], CALIFORNIA, APPROVING AND REGULATING ACCESSORY DWELLING UNITS IN COMPLIANCE WITH STATE LAW

WHEREAS, the California Legislature has recognized the need for additional housing units to accommodate the state's growing population and has passed several laws encouraging the creation of Accessory Dwelling Units (ADUs) to help address this need; and

WHEREAS, the City of [Insert city] has determined that ADUs can provide affordable housing opportunities, help address the City's housing shortage, and provide homeowners with additional income; and

WHEREAS, the City of [Insert city] has determined that it is necessary to adopt an ordinance regulating ADUs to ensure that they are designed and constructed in a manner that is compatible with the existing residential neighborhood, and to protect the health, safety, and welfare of the community.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of [Insert city] as follows:

SECTION 1. Purpose and Intent.

The purpose of this ordinance is to regulate the development of ADUs within the City of [Insert city] in compliance with California state law. The intent of this ordinance is to:

A. Allow property owners to create additional dwelling units on their property in a manner that is consistent with the existing residential neighborhood; B. Increase the supply of affordable housing units within the City; C. Promote the use of existing housing stock; D. Ensure that ADUs are designed and constructed in a manner that is compatible with the existing residential neighborhood; E. Protect the health, safety, and welfare of the community; and F. Implement the City's Housing Element.

SECTION 2. Definitions.

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[51] Although CoCounsel did miss Henry V, where Falstaff is referenced but does not appear. Another reason to always double check the work of generative AI tools, as their errors will not always be immediately apparent.

For the purposes of this ordinance, the following definitions shall apply:

Accessory Dwelling Unit (ADU): An attached or detached residential dwelling unit that provides complete independent living facilities for one or more persons and is located on the same lot as a primary dwelling unit.

Primary Dwelling Unit: The main residential structure on a lot.

Owner-Occupied: A dwelling unit in which the owner of the property also resides.

SECTION 3. ADU Standards.

A. Allowable Zoning Districts. ADUs are permitted in all residentially zoned districts.

B. Minimum Lot Size. No minimum lot size shall be required for an ADU.

C. Maximum Unit Size. The maximum size of an ADU shall be 1,200 square feet or 50% of the size of the primary dwelling unit, whichever is less.

D. Number of Bedrooms. The maximum number of bedrooms in an ADU shall be two.

E. Parking. One parking space shall be required for each ADU, except that no parking shall be required if the ADU is located within one-half mile of public transit or if it is located within an architecturally and historically significant district.

F. Owner-Occupancy. At least one of the units on the lot shall be owner-occupied.

G. Building Setbacks. The same setbacks required for the primary dwelling unit shall apply to the ADU.

H. Height. The maximum height of an ADU shall be the same as the maximum height allowed for the primary dwelling unit.

I. Utilities. The ADU shall be connected to the same utilities as the primary dwelling unit.

J. Permits. A building permit and any other permits required by law shall be obtained prior to construction of an ADU.

SECTION 4. Effective Date.

This ordinance shall take effect 30 days after its adoption.

SECTION 5. Severability.

If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

PASSED AND ADOPTED by the City Council of the City of [Insert city] this [Insert date].

Mayor:

ATTEST:

City Clerk:

This is a fictional example of a California ordinance for ADUs. It's important to consult with legal experts and local authorities when drafting and adopting actual ordinances to ensure they comply with state law and meet the specific needs of your community. Additionally, this example does not account for potential changes in state law or local regulations that may have occurred after September 2021, so it's essential to verify the current legal landscape.

While not perfect, the draft ordinance is decent starting place for drafting, and would save the user significant time. The user can then take that base and modify as necessary, or continue to prompt the model for revisions.

Legal specific tools also offer a variety of contract drafting options, and will create, review, and revise contracts based on certain parameters. For example, when the terms of use from the Cal Cities website[52] are inputted into CoCounsel as a draft contract, with an additional policy that "all agreements should contain an arbitration clause mandating binding arbitration in Los Angeles, California," CoCounsel suggests to following revisions:

> These Terms are entered into in the State of California and shall be governed by and construed according to the laws of the State of California, exclusive of its choice of law rules. Each party to these Terms ~~submits that~~ agrees to submit any ~~action at law or in equity~~ dispute arising out of the Terms ~~is subject~~ to ~~the exclusive jurisdiction of the state and federal courts sitting~~ binding arbitration in ~~the County of Sacramento, California, and hereby waives any jurisdictional, venue, or inconvenient forum objections to such courts over any suit, action, or proceeding arising out of the Terms.~~ Los Angeles, California. In any action to enforce these Terms, the prevailing party will be entitled to its costs and attorney's fees.

AI can also automate the business side of a law firm's practice, such as by automating client facing workflow to make it easy to generate documents with minimal client input.[53] Finally, much like formulating a good Boolean search became a key skill with online legal research, prompt editing will be an important legal skill going forward.

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[52] Cal Cities, Terms of Use <https://www.calcities.org/footer-utility-items/privacy-policy/terms-of-use> [as of Aug. 16, 2023].
[53] See, e.g. Gavel, Legal Document Automation <https://www.gavel.io/> [as of Aug. 16, 2023].

5) Ethical Considerations in Using Generative AI

The proliferation of new technology in the legal field is nothing new. Over the last 20 years, web-based legal research and electronic discovery have become the norm. When was the last time anyone looked up a case in book? Thus, the California State Bar's Standing Committee on Professional Responsibility and Conduct has noted "[a]n attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law."[54] Because this is not the first disruptive technology to hit the legal community in the computer age, the current rules of professional conduct are well positioned to address the use of generative AI, and more guidance can be expected.

a. Competency and diligence

Attorneys should be most concerned with the impact of generative AI on their competence, both when they use it, and if they abstain. The comments to Rule 1.1[55] of the California Rules of Professional Conduct note that "[t]he duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology." Citing the ABA model rules, the California Bar has held "[m]aintaining learning and skill consistent with an attorney's duty of competence includes keeping 'abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, ...'"[56] Nor can attorneys simply hand over their practice to AI without violating their duty of diligent representation. "A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client."[57] Most experts suggest treating AI as one would treat a recent law school graduate: assign it tasks were the cost savings make sense, knowing you must double check **all** of its work.

b. Transparency and Candor

LLMs also present issues regarding transparency, especially to public entity attorneys. Once generative AI becomes part of a practice, what should lawyers tell their clients? Rule 1.4(a)(2) states "a lawyer shall…. reasonably consult with the client about the means by which to accomplish the client's objectives in the representation." Thus, at a minimum, clients should be informed that an attorney uses generative AI in their practice.

The City of San Jose has adopted Generative AI Guidelines which suggest a practical framework for using generative AI.[58] It includes adding disclosures to all documents "when a substantial portion of the content used in the final version comes from the Generative AI."[59] Dentons, a large law firm operating its own proprietary GPT interface, "fleetAI," has similar

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[54] California State Bar, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015–193, < https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf> [as of Aug. 15, 2023].

[55] Unmarked citations to "rules" are to the California Rules of Professional Conduct.

[56] Opinion 2015–193, *supra*, at fn. 54.

[57] Rules Prof. Conduct, rule 1.3

[58] San Jose, Generative AI Guidelines (Jul. 20, 2023), <https://www.sanjoseca.gov/home/showpublisheddocument/100095/638255600904303329> [as of Aug. 15, 2023].

[59] *Ibid.*

guidance: "Users will be required to independently verify and validate all outputs and disclose to clients when interacting with fleetAI."[60]

Lawyers must also be aware of their duty of candor.[61] If an attorney uses AI to draft a brief, that may be something the court is entitled to know. And attorneys must be diligent in confirming the information provide by generative AI is correct. Recently, Judge Starr of the U.S. District Court for the Northern District of Texas "issued a standing order requiring attorneys to certify that generative AI drafted no portion of a filing, or that a human being checked the accuracy any language that AI did craft."[62] Failure to file the certification will result in the court striking all of that attorney's filings.[63]

The biggest take away from the *Marta* case should be that lawyers' professional responsibilities cannot be passed off to AI. California attorneys may neither "assert a position in litigation… without probable cause" nor "present a claim or defense in litigation that is not warranted under existing law…."[64] Lawyers are now on notice that AI isn't always accurate, and that uncritically filing AI product can be considered "dishonesty, fraud, deceit, or reckless or intentional misrepresentation. . . ." amounting to profession misconduct.[65]

c. Confidentiality

Finally, publicly available generative AI programs are not private, and the information entered into them is used to train the models. Attorneys likely break their duty of confidentiality if they enter privileged information into a public program, such as ChatGPT.[66] Legal industry products solve this problem by keeping information entered by their clients confidential and segregated. Thus, not only does information entered into CoCounsel, for example, not leave CoCounsel, it is also not used to train the model. The downside is because these models are not being trained on the information attorneys enter, they are also less responsive to the needs of a particular practice.

Conclusion

Generative AI will have a lasting impact on the way lawyers research, write and argue. It can vastly speedup and simplify basic legal work, freeing attorneys to pursue more complex tasks. But as with any new technology, attorneys must continue to be mindful of their ethical duties, including how to competently and safely use large language models. Ultimately, AI is likely to decrease the cost of legal services, making them available to a wider population.

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[60] Dentons, Dentons to launch client secure version of ChatGPT (Aug. 1, 2023) <https://www.dentons.com/en/about-dentons/news-events-and-awards/news/2023/august/dentons-to-launch-client-secure-version-of-chatgpt> [as of Aug. 15, 2023].
[61] Rules Prof. Conduct, rule 3.3.
[62] Hayes & Wise, *Attorneys Must Certify AI Policy Compliance, Judge Orders*, Bloomberg Law (May 31, 2023) <https://news.bloomberglaw.com/litigation/attorneys-must-certify-ai-policy-compliance-judge-orders> [as of Aug. 15, 2023].
[63] *Ibid.*
[64] Rules Prof. Conduct, rule 3.1
[65] Rules Prof. Conduct, rule 8.4(c)
[66] Rules Prof. Conduct, rule 1.6(a)