

USE OF AI IN ESTATE PLANNING

PRESENTED BY:

DR. GERRY W. BEYER

*Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law*

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ESTATE PLANNING COUNCIL OF DELAWARE

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GERRY W. BEYER

**Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
Lubbock, TX 79409-0004
(806) 834-4270**

gwb@ProfessorBeyer.com – www.ProfessorBeyer.com

EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Academic Fellow); American Bar Foundation; Texas Bar Foundation; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)

SELECTED HONORS

Order of the Coif
Distinguished Probate Attorney Lifetime Achievement Award, REPTL Section, State Bar of Texas (2022)
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2024, 2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (8th ed. 2022); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (5th ed. 2023); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2023); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIAN-SHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

TABLE OF CONTENTS

I. ARTIFICIAL INTELLIGENCE – HISTORY AND TIMELINE	1
II. WHERE IS ARTIFICIAL INTELLIGENCE IN ITS DEVELOPMENT	6
III. WHAT HAS NOT BEEN ACHIEVED WITH ARTIFICIAL INTELLIGENCE	6
IV. WHY ARE WE SO FOCUSED ON GENERATIVE ARTIFICIAL INTELLIGENCE, WHY IS IT DIFFERENT?	7
V. EVERYDAY USES OF ARTIFICIAL INTELLIGENCE IN YOUR PRACTICE	8
VI. HOW TO GET THE BEST OUT OF ARTIFICIAL INTELLIGENCE	8
VII. ETHICAL CONCERNS USING AI	10
A. Competency	10
1. Bard	13
2. Lexis+AI.....	14
3. Westlaw’s Ask Practical Law AI.....	14
B. Confidentiality	14
C. Disclosure of Use to Clients	15
D. Disclosure of Use to Courts	16
E. Supervision of Law Firm Members and Staff	17
F. Supervision of the AI Itself	18
VIII. LAW PRACTICE MANAGEMENT AFFECTED BY THE USE OF ARTIFICIAL INTELLIGENCE	19
A. Training	19
B. Morale	21
C. Policy and Employee Handbook.	22
D. Billing Practices.	22
E. Malpractice and Cyber Insurance Coverage	23
IX. OTHER RISKS OF USING ARTIFICIAL INTELLIGENCE	24
A. Ability of AI to Translate Keystroke Clicking	24
B. Ability of AI to Replicate Voices	24
X. VENDOR SELECTION GUIDELINES IN SELECTING AI PRODUCTS	24
XI. WORLDWIDE GOVERNMENT REGULATION OF AI	25
A. European Union	26
B. Canada	29
C. Great Britain	30

D. China	30
E. India	31
F. United States – Federal.....	32
G. United States States and Territories.....	33
XII. CONCLUSION	33
XIII. POWERPOINT SLIDES	34

USE OF AI IN ESTATE PLANNING

I. ARTIFICIAL INTELLIGENCE – HISTORY AND TIMELINE

Artificial Intelligence (“AI”) was first thought of in the ancient world, with the concept of thinking machines. Some of these thoughts were converted into actual machines at that time, with the creation of moving, mechanical machines in the image of people.

Literature and films reflected the thoughts that people continued to have about thinking machines. Not only a machine that moved and performed tasks, but one that possessed other human traits, such as varied emotions, understanding and evil. Star Wars’ R2D2 was first seen on our movie screens in 1977 and that lovable creature was nine years behind Hal in “2001: A Space Odyssey.”

The real world development of AI as we are thinking of it today is usually pinned to the year 1956 at what is now called the Dartmouth Summer Research Project on AI, which was a follow-up conference of Alan Turing’s and others’ work on codes, code breaking and other uses of knowledge by machines. The actual term “Artificial Intelligence” was coined at that conference.

See Anyola, Rockwell: <https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/>, a very interesting blog about the history and development of AI.

The development of AI continued during the ‘50’s through the ‘70’s, followed by what is called the first “AI Winter,” in the ‘80’s and early ‘90’s, when movement again became more pronounced. Much of the ‘reawakening’ of AI pursuits became possible because of the development of the internet and ability to store and retrieve data economically.

And now, the future is here, with AI becoming a part of our day to day lives, our

health care, our transportation, just about every part of our days. Particularly our work.

When Margaret Van Houten started this portion of her outline, she thought she would ask AI about its own history to demonstrate AI’s own knowledge about the subject:

Question # 1 – Asked of Microsoft Bing Co-Pilot: Prepare a timeline of the development of Artificial Intelligence:

Answer:

As we will discuss further below, these timelines are not exact. For example, in this review by Co-Pilot: Where is Alan Turing in this timeline?

Question # 2 – Asked of Microsoft Bing Co-

Artificial Intelligence (AI) has been a topic of research and development for over half a century. Here is a brief timeline of some of the key events in the history of AI:

- 1956: The term “artificial intelligence” is coined at the Dartmouth Conference.
 - 1961: The first AI program capable of solving algebra word problems is developed.
 - 1969: Shakey, the first mobile robot that can reason about its own actions, is created.
 - 1974: MYCIN, an expert system for diagnosing blood infections, is developed.
 - 1981: The first autonomous vehicle, Stanford Cart, is developed.
 - 1997: IBM’s Deep Blue defeats world chess champion Garry Kasparov.
 - 2002: Roomba, the first commercially successful domestic robot, is introduced.
 - 2011: IBM’s Watson defeats human champions in the game show Jeopardy!
 - 2012: Google’s DeepMind develops a neural network that learns to play Atari games.
 - 2016: AlphaGo, a computer program developed by Google’s DeepMind, defeats world champion Lee Sedol in the board game Go.
 - 2018: Google’s Duplex, an AI system that can make phone calls and book appointments, is introduced.
 - 2023: US President Biden signs the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence ³¹.
- To improve the prompts for creating images, you can consider the following tips:
- Use specific and vivid adjectives to describe the elements of the image, such as colors, shapes, sizes, textures, emotions, etc.
 - Use contrasts and comparisons to create interest and tension in the image, such as light and dark, warm and cold, big and small, etc.

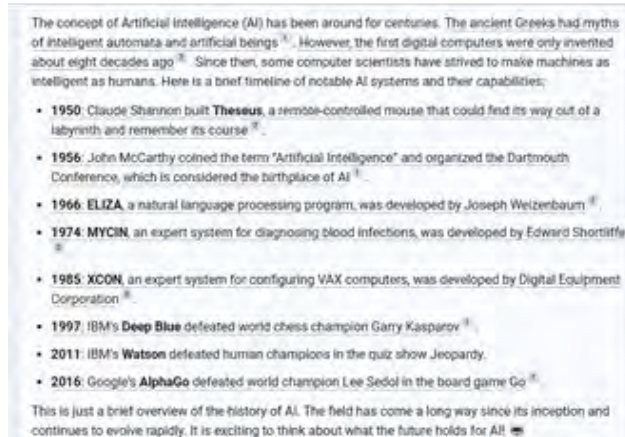
Pilot: Please create a timeline of the development of Artificial Intelligence, including history *from the beginning of time*:

Answer:

(a)

(b) Same question, same platform, a few minutes apart . . .

Artificial Intelligence (AI) is a rapidly



evolving field that has seen significant progress in recent years. Here is a timeline of some of the major events in the development of AI:

- **Antiquity, Classical and Medieval eras:** Greek myths of Hephaestus and Pygmalion incorporated the idea of intelligent automata and artificial beings. Sacred mechanical statues built in Egypt and Greece were believed to be capable of wisdom and emotion. Yan Shi presented King Mu of Zhou with mechanical men which were capable of moving their bodies independently. Aristotle described the syllogism, a method of formal, mechanical thought in the Organon. Ctesibius invents a mechanical water clock with an alarm. Hero of Alexandria created mechanical men and other automatons.
- **1500-1900:** Blaise Pascal invented the Pascaline, a mechanical calculator. Gottfried Wilhelm Leibniz invented the Stepped Reckoner, a machine that could perform all four arithmetic operations. Charles Babbage designed the Analytical Engine, a general-purpose computer. Ada Lovelace wrote

the first algorithm intended to be processed by a machine.

- **20th century:** In 1950, Alan Turing published a paper titled "Computing Machinery and Intelligence," which proposed the Turing Test. In 1956, John McCarthy coined the term "artificial intelligence" and organized the Dartmouth Conference, which is widely considered to be the birth of AI. In 1961, the first industrial robot, the Unimate, was installed at a General Motors plant. In 1964, ELIZA, the first chatbot, was created. In 1967, the General Problem Solver was developed. In 1974, the first AI program capable of reasoning about its own actions, META-DENDRAL, was developed. In 1981, the first AI winter began. In 1997, IBM's Deep Blue defeated world chess champion Garry Kasparov.
- **21st century:** In 2011, IBM's Watson defeated human champions on the quiz show Jeopardy. In 2012, Google's self-driving car project began. In 2014, Facebook's DeepFace achieved near-human accuracy in facial recognition. In 2016, AlphaGo defeated world champion Lee Sedol in the game of Go. In 2018, OpenAI's Dota 2 AI defeated professional players. In 2020, GPT-3, a language model developed by OpenAI, was released. On October 30, 2023, US President Biden signed the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence¹.

Please note that this is not an exhaustive list, and there have been many other important developments in the field of AI throughout history.

Question #3 – Asked of Chat GPT: Please create a timeline of the history of Artificial

¹ https://en.wikipedia.org/wiki/Timeline_of_artificial_intelligence (Microsoft Co-Pilot authority).

Intelligence, including history from the beginning of time:

Answer:

<https://chat.openai.com/share/49110759-f968-4f40-9d03-891e5b684401>

The history of Artificial Intelligence (AI) is vast and spans several centuries. Here's a condensed timeline highlighting key milestones in the development of AI:

1. Antiquity:

- Ancient Greece: Philosophers like Aristotle explored the concept of logic and reasoning, laying the groundwork for later AI principles.

2. 17th-19th centuries:

- 1642: Blaise Pascal invents the Pascaline, an early mechanical calculator.
- 1837: Charles Babbage designs the Analytical Engine, a mechanical computer.

3. Early to mid-20th century:

- 1936: Alan Turing develops the concept of a universal machine and introduces the Turing Machine.
- 1943-1944: Colossus, the world's first programmable digital electronic computer, is built in the UK to break German codes during World War II.
- 1950: Alan Turing proposes the Turing Test as a measure of a machine's ability to exhibit intelligent behavior.

- 1951: UNIVAC I, the first commercially produced computer, is delivered.

4. 1950s-1960s: The Birth of AI:

- 1956: John McCarthy, Marvin Minsky, Nathaniel Rochester, and Claude Shannon organize the Dartmouth Conference, marking the official birth of AI as a field of study.
- 1956: The Logic Theorist, the first AI program, is developed by Allen Newell and Herbert A. Simon.
- 1957: Frank Rosenblatt creates the perceptron, an early neural network.
- 1965: Joseph Weizenbaum develops ELIZA, an early natural language processing program.

5. 1970s-1980s: AI Winter and Expert Systems:

- 1973-1980: Funding and interest in AI decline, leading to the first "AI Winter."
- 1979: Mycin, an expert system for medical diagnosis, is developed by Edward Shortliffe.

6. Late 1980s-1990s: Resurgence and Neural Networks:

- 1986: Geoffrey Hinton, David Rumelhart, and Ronald Williams publish a paper on backpropagation, reviving interest in neural networks.
- 1997: IBM's Deep Blue defeats world chess champion Garry Kasparov.

- Late 1990s: AI Winter ends, and interest in AI research and development increases.

7. 2000s-Present: Rise of Machine Learning and Deep Learning:

- 2011: IBM's Watson wins Jeopardy! showcasing the power of natural language processing in AI.
- 2012: AlexNet, a deep convolutional neural network, wins the ImageNet competition, sparking the deep learning revolution.
- 2015: DeepMind's AlphaGo defeats a human Go champion.
- 2020s: Continued advancements in natural language processing, computer vision, and reinforcement learning.

AI's history is characterized by periods of significant progress, followed by times of reduced interest and funding. The field continues to evolve, with ongoing breakthroughs shaping its future.

Question # 4: Asked of Chat GPT: Please prepare a timeline of developments, products and advances in Artificial Intelligence since 2015.

Certainly! Here's a timeline highlighting some key developments, products, and advances in artificial intelligence since 2015:

2015:

- **January:** OpenAI is founded with the mission to ensure that artificial general intelligence (AGI) benefits all of humanity.

- **April:** Google's DeepMind develops AlphaGo, an AI program that beats the world champion Go player.

2016:

- **March:** Google's DeepMind announces the AlphaGo victory against Lee Sedol, marking a significant milestone in AI's ability to master complex games.
- **June:** Microsoft launches the Cognitive Toolkit (CNTK), an open-source deep learning framework.
- **September:** OpenAI releases the first version of the OpenAI Gym, an open-source toolkit for developing and comparing reinforcement learning algorithms.

2017:

- **January:** IBM introduces IBM Watson Discovery, a service that allows businesses to uncover hidden patterns and insights in data.
- **October:** Google introduces the Pixel 2 with the Pixel Visual Core, an AI-powered image processing unit.
- **December:** AlphaZero, a program developed by DeepMind, masters chess without prior knowledge of the game's rules.

2018:

- **March:** Google's AutoML allows non-experts to create high-performing models with minimal effort.
- **June:** OpenAI introduces GPT-2, a language model with 1.5 billion parameters, showcasing the potential of large-scale language models.
- **December:** AI researchers and engineers begin emphasizing ethical

considerations, transparency, and responsible AI development.

algorithm without knowledge of the environment's dynamics.

2019:

- **June:** OpenAI releases GPT-2 to the public, sparking discussions about the responsible use of powerful language models.
- **October:** NVIDIA announces the release of the GauGAN AI, capable of turning rough sketches into realistic images.
- **December:** Google achieves quantum supremacy with its 53-qubit Sycamore processor.

2020:

- **May:** OpenAI introduces GPT-3, a language model with 175 billion parameters, demonstrating unprecedented natural language processing capabilities.
- **July:** OpenAI announces the launch of OpenAI LP, a for-profit subsidiary, to attract external investment and drive advanced AI research.
- **September:** Microsoft acquires ZeniMax Media, incorporating Bethesda Game Studios and its AI-driven innovations into its gaming portfolio.

2021:

- **January:** Tesla's Full Self-Driving (FSD) Beta becomes available to a limited number of users, showcasing AI advancements in autonomous driving.
- **June:** OpenAI launches Codex, a language model trained on billions of lines of code, enabling code generation and understanding.
- **September:** Google's DeepMind introduces the MuZero algorithm, a general-purpose reinforcement learning

2022:

- **March:** AI research continues to focus on addressing biases and ethical concerns in AI systems, leading to increased efforts in creating fair and unbiased models.
- **July:** AI-powered drug discovery gains traction, with companies utilizing machine learning to identify potential pharmaceutical compounds.

Keep in mind that this is not an exhaustive list, and there are numerous other developments and advancements in AI that have occurred during this period. The field of artificial intelligence is dynamic and continually evolving.

Question # 5: Asked of Bing Co-Pilot: Please prepare a timeline of developments, products and advances in Artificial Intelligence since 2015.

Answer:

Here is a timeline of some of the major developments, products, and advances in Artificial Intelligence since 2015:

- 2015: Google's DeepMind developed AlphaGo, an AI program that defeated a human world champion in the board game Go.
- 2016: Google's TensorFlow, an open-source software library for dataflow and differentiable programming across a range of tasks, was released.
- 2017: Google's AlphaGo Zero, an improved version of AlphaGo, learned to play Go without any human data or guidance.
- 2018: OpenAI released GPT-2, an advanced text generation model.

- 2019: Google's BERT, a pre-trained natural language processing model, was released.
- 2020: Waymo launched a fully autonomous taxi service called Waymo One in the Phoenix area, offering rides to the general public¹.
- 2021: OpenAI released DALL-E, an AI program that generates images from textual descriptions.
- 2022: Facebook's AI research team developed a new AI model that can translate between 100 languages without relying on English as a middle language.

This is not an exhaustive list, but it provides a glimpse into some of the significant advancements in AI over the past few years. If you would like to explore more, we recommend checking out the AI Timeline by The AI Navigator.²

II. WHERE IS ARTIFICIAL INTELLIGENCE IN ITS DEVELOPMENT³

As presented in the AI History and Timeline above, there were early examples of reactive artificial intelligence. These are machines that can emulate a human's mind by responding to stimuli. They can do repetitive tasks faster than humans because humans can't process the data at the same rate. An example of such a machine is IBM Deep Blue that beat the chess grandmaster.

Artificial Narrow Intelligence has been used by most of us on a regular basis. These programs are designed to perform a specific task based upon a verbal prompt. These programs cannot adapt outside of their specific programming.

² <https://www.theainavigator.com/> (Microsoft Co-Pilot authority).

³ The Upwork Team, What Are the Different Types of AI?, <https://www.upwork.com/resources/types-of-ai>, Upwork, December 20, 2023.

Examples of these are Siri, Alexa and Google Assistant.

Limited Memory Artificial Intelligence is similar to reactive artificial intelligence in that they can still emulate a human's mind by responding to stimuli, but they also learn from recent data to improve the machines' responses or actions. As outlined above in the timeline, the Google self-driving car is an example of a limited memory Artificial Intelligence machine.

There is predictive Artificial Intelligence which relies upon historical data to create a prediction of future actions. It can go through large amounts of data to provide a predictive model. The most common examples that we all experience are Netflix, Prime Video and Disney+ suggesting our next show that it thinks we want to watch. You can also see this in the journalist articles that your search engine suggests you read.

Generative Artificial Intelligence can create. It can use its data set to create new text or new images. Generative Artificial Intelligence will be the focus of the remainder of this presentation although predictive Artificial Intelligence has been used in litigation for several years.

III. WHAT HAS NOT BEEN ACHIEVED WITH ARTIFICIAL INTELLIGENCE

We do not yet have any theory of mind machines although the machines have begun to pass human cognition tests. Theory of mind machines can develop inferences and intuition to determine outcomes like human cognition. A recent study at Stanford University found that the latest version of ChatGPT 3.5 scored similarly to a 9-year-old child when it came to determining outcomes from inferences and intuition.⁴ However, what isn't clear from the study is whether the machine used its significant language

⁴ Orf, Daniel, AI Has Suddenly Evolved to Achieve Theory of Mind, <https://www.popularmechanics.com/technology/robots/a42958546/artificial-intelligence-theory-of-mind-chatgpt/>, Popular Mechanics, February 17, 2023.

skills to advance on the test. What also isn't clear is if humans also use their language skills to advance on the test as well. Theory of mind machines are expected to be the next area of expansion. If theory of mind machines exist then they can be programmed with morality choices such as choosing to save a child in a crosswalk vs. potentially injuring the driver of the car in a self-driving vehicle.

Artificial general intelligence (otherwise known as singularity) is a philosophical discussion at the moment. Artificial general intelligence is generally defined as a machine that not only understands human emotion and judgments, but also has human emotion and judgments. In other words, it has a mind like a human mind.⁵ Although the thought of artificial general intelligence has sparked concern by many, scientists say that the algorithms that currently exist will not reach general intelligence anytime soon.⁶ There are many predictions by experts on when singularity will be achieved. Some predict that there is a 25% chance that we will have singularity as soon as 2030.⁷ Others believe that it will never occur because it is impossible to model the human brain. However, most believe that it will occur by the year 2060.⁸

Artificial super intelligence is a machine that

5 Kanade, Vijay, What is General Artificial Intelligence (AI)? Definition, Challenges and Trends, <https://www.spiceworks.com/tech/artificial-intelligence/articles/what-is-general-ai/>, Spiceworks.com, February 14, 2022.

6 Rogers, Reece, What's AGI, and Why are AI Experts Skeptical, <https://www.wired.com/story/what-is-artificial-general-intelligence-agi-explained/>, Wired.com, April 28, 2023.

7 Cheishvili, Archil, The Future of Artificial General Intelligence, <https://www.forbes.com/sites/forbestechcouncil/2021/07/16/the-future-of-artificial-general-intelligence/?sh=60177dbd3ba9>, Forbes, July 16, 2021.

8 Dilmegani, Cem, When will Singularity Happen? 1700 expert opinions of AGI [2024], <https://research.aimultiple.com/artificial-general-intelligence-singularity-timing/>, AI Multiple Research, January 1, 2024

is able to learn and can apply problem-solving abilities that exceed those abilities in a human brain. To reach artificial super intelligence, it is believed that we must first achieve artificial general intelligence.⁹

IV. WHY ARE WE SO FOCUSED ON GENERATIVE ARTIFICIAL INTELLIGENCE, WHY IS IT DIFFERENT?

Artificial intelligence became relevant to the practice of law with the recent advancements of generative artificial intelligence, such as ChatGPT, Google Gemini (replacing BARD¹⁰), and Microsoft's Co-Pilot.¹¹ The advancements accelerated on November 30, 2022, when ChatGPT3 was released to the general public. At that point in time, the new Intelligence Revolution, also known as fourth industrial revolution, really began.¹² As a result we will be seeing a significant increase in the use of generative AI products in everything that we do.¹³ This presentation is specifically focused on

9 Mucci, Tim and Stryker, Cole, What is Artificial Super Intelligence?, <https://www.ibm.com/topics/artificial-superintelligence>, IBM, December 18, 2023.

10 Snyder, Brady, Google rebrands Bard as Gemini, and it finally knows where it's going with AI, <https://www.androidcentral.com/apps-software/google-bard-gemini-rebrand-app-launch>, Android Central, February 8, 2024.

11 Shama, Aditya, 11 Best Generative AI Tools and Platforms, <https://www.turing.com/resources/generative-ai-tools>, Turing, 2024.

12 Marr, Bernard, What is the Artificial Intelligence Revolution and Why Does It Matter to Your Business, <https://www.forbes.com/sites/bernardmarr/2020/08/10/what-is-the-artificial-intelligence-revolution-and-why-does-it-matter-to-your-business/?sh=44d52d24547b>, Forbes, August 10, 2020.

13 Marr, Bernard, A Short History of ChatGPT: How We Got to Where We Are Today, <https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/?sh=4b5bfb36674f>, Forbes, May 19, 2023.

generative AI since it is the area that impacts the practice of law and in the products that we use in our practices every day.

V. EVERYDAY USES OF ARTIFICIAL INTELLIGENCE IN YOUR PRACTICE

With the significant increase in the development of ChatGPT, you will now see most software and hardware products containing some form of generative Artificial Intelligence.¹⁴ Microsoft has partnered with OpenAI and together they are incorporating generative artificial intelligence in many of your daily products that you use in your law practice, such as Word, Outlook, and Excel.¹⁵ Dell has also partnered with Microsoft to now introduce the Artificial Intelligence button on your keyboard.¹⁶ You will start seeing it on new keyboards that you buy and also on laptops that you purchase.

Besides ChatGPT, Google Gemini, and Microsoft CoPilot, you will also find generative AI in other software products that you use on a daily basis, such as Thomson Reuters Westlaw products¹⁷, Lexis Nexis products,¹⁸ Zoom, and Microsoft Teams.

14 Hines, Kristi, History of ChatGPT: A Timeline of the Meteoric Rise of Generative AI Chatbots, <https://www.searchenginejournal.com/history-of-chatgpt-timeline/488370/>, Search Engine Journal, June 4, 2023.

15 Eoanou, Andrea, Introducing New AI Enhancements in Microsoft 365: New Features Coming to Microsoft Editor and more!, <https://techcommunity.microsoft.com/t5/microsoft-365-blog/introducing-new-ai-enhancements-in-microsoft-365-new-features/ba-p/3643499>, Microsoft, October 12, 2022.

16 O'Brien, Matt, Microsoft's New AI Key is First Big Change to Keyboards in Decades, <https://apnews.com/article/microsoft-windows-copilot-keyboard-ai-button-27078255bd934bf84d3cc6f37bb17c>, Associated Press, January 4, 2024.

17 Thomson Reuters, Generative AI is Here – Are you Ready, https://legal.thomsonreuters.com/en/c/westlaw-precision-and-practical-law-gen-ai-is-here-corp?ef_id=10ec2205e8a11934b64347d4b290b884:G

Therefore, your role, as discussed further below, will be to get an understanding of all of these products and how they are integrating generative artificial intelligence into their products and how that information is being used by the vendor of those products. For example, you may not use AI products to record a meeting at ACTEC, such as using such programs to create minutes. By doing so, you are adding the information to the dataset in many instances of that program. You may also be doing the same in Zoom meetings where you can transcribe the meeting and in Microsoft Teams meetings where you can use AI to assist you in the meeting. As we will outline further in this material, it will become more and more important for you to team with your Information Technology departments (or for those of you that have no such department) to understand the technology in every product that you purchase and the information that is becoming part of the dataset used by the program.

VI. HOW TO GET THE BEST OUT OF ARTIFICIAL INTELLIGENCE

To assist you in developing questions for Artificial Intelligence, Tracy Potts as part of this portion of the outline requested specific questions of Microsoft Bing Co-Pilot and those questions and answers are provided below:

Tracy Potts wrote:

What is the best way for me to use your capabilities in writing letters:

s&searchid=TRPPCSOL/Microsoft/CorpUS_LK_Practical-Law_Main_Search_NonBrand-All_US/CorporateLegalSolutions-All&chl=ppc&cid=4098425&sfidccampaignid=701Hs000002MT2mIAG&s_kwcid=AL!7944!10!81913741036317!81913933045337&utm_source=bing&utm_medium=cpc&utm_campaign=CorpUS_LK_Practical-Law_GenAI_Search_NonBrand-All_US&utm_term=legal%2520ai&utm_content=Legal%2520AI&mclid=10ec2205e8a11934b64347d4b290b884

18 Lexis Nexis, Lexis + AI Transform Your Legal Work, <https://www.lexisnexis.com/en-us/products/lexis-plus-ai.page>.

Co-Pilot response:

Certainly! Leveraging AI capabilities for writing letters can be incredibly helpful. Here are a few ways you can make the most of these tools:

Grammarly's AI Formal Letter Writer:

Speed up the letter-writing process with Grammarly's AI-powered letter generator.

In just two quick steps, you can create a compelling draft for your personal or business letter.

Enter the target audience details and let Grammarly generate an entire draft suited to your needs.

Adjust the formality, tone, and length as necessary.

Ensure clarity and correctness with Grammarly's suggestions.

You can find this feature on Grammarly's website¹⁹.

Personal AI Language Models:

If you're looking for more flexibility, consider training a personal language model rooted in your knowledge and writing style.

Use tools like Zapier to have it process your emails and generate new drafts as needed²⁰.

AI Writing Tools:

Explore various AI writing tools that generate high-quality content.

Some popular options include:

Userpilot: Recommended for in-app copy generation.

Jasper AI: A versatile overall AI writing app.

Copy.ai: Great for AI copywriting.

Rytr: Budget-friendly AI writing assistant.

Article Forge: Ideal for bulk AI articles.

ChatGPT: Helps overcome writer's block.

Lavender: Useful for sales emails

Remember that while AI can assist with drafting, your personal touch and context are essential for creating truly meaningful letters. Feel free to explore these tools and find what works best for your writing style!

(In this response, Tracy Potts verified the resources used by Microsoft Co-pilot to confirm that the links actually existed. In this case, they did. One of the ways to get better responses is to be very specific in your questions.)

Tracy Potts wrote:

What are the filing fees in California for a will:

Co-Pilot Response:

In California, the filing fees for a will depend on the type of case and the value involved. Here are the relevant details:

1. Unlimited Civil Cases:

- Filing a complaint or other first paper in an unlimited civil case (amount over \$25,000) costs \$43521.
- For an unlawful detainer case over \$25,000, the same fee applies.

¹⁹ <https://www.grammarly.com/write-a-letter> (Microsoft Co-pilot authority)

²⁰ <https://zapier.com/blog/best-ai-email-assistant/> (Microsoft Co-pilot authority).

²¹ [StatewideCivilFeeSchedule-20200101.pdf](#) (ca.gov) (Microsoft Co-Pilot authority).

- Filing a petition for a writ of review, mandate, or prohibition (other than a writ petition to the appellate division) also costs \$435.
- If you're filing a petition for a decree of change of name or gender, the fee is the same.
- Amounts above \$25,000,000 are determined by the court²³.

Remember that these fees may vary by county, and some counties have local surcharges for courthouse construction. If you're dealing with probate, you can usually get these fees paid or reimbursed from the estate funds.

2. Limited Civil Cases:

- For a complaint or other first paper (amount over \$10,000 up to \$25,000), the fee is \$370.
- In an unlawful detainer case (amount over \$10,000 up to \$25,000), the fee is \$385.
- Filing an answer or other first paper by each party other than the plaintiff (amount over \$10,000 up to \$25,000) also costs \$370.
- For cases with amounts up to \$10,000, the fees are \$225 for the complaint or other first paper and \$240 for unlawful detainer.

(In this circumstance, even though Co-pilot was asked a specific question, it was unable to find the correct information. The filing fee for a will in California is \$50.00. However, by looking at the response, you would have been able to find the correct answer in the resource that it used. Fortunately, it did not make up the answer, but unfortunately, it didn't come up with the correct fee. Also, please note that it isn't necessarily looking at the source you would use in finding this answer.)

VII. ETHICAL CONCERNS USING AI

A. Competency

Comment 8 to the Model Professional Rule of Conduct states that “[a] lawyer should keep abreast of the changes in the law and its practice, *including the benefits and risks associated with relevant technology.*”²⁴ According to this rule, you have an obligation to yourself, your clients, and the profession to become acquainted with and proficient with the use of AI in your estate planning practice.²⁵

The American Bar Association's formal opinion addressing the use of artificial intelligence in the practice of law opines:

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must

3. Probate Fees:

- To start a formal probate case, the filing fee is typically \$435²².
- Additionally, statutory attorney and executor probate fees are calculated based on the estate value. As of 2024:
 - 4% on the first \$100,000
 - 3% on the next \$100,000
 - 2% on the next \$800,000
 - 1% on the next \$9,000,000
 - 0.5% on the next \$15,000,000

²³ <https://www.clearestate.com/en-us/blog/california-probate-fees> (Microsoft Co-Pilot authority).

²⁴ MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 1983) (emphasis added).

²⁵ *Id*; see also ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 512 at 3 (2024).

²² <https://selfhelp.courts.ca.gov/probate/formal-probate> (Microsoft Co-Pilot authority)

have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.⁸ This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.⁹ Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.²⁶

Prior to the ABA's formal opinion, the State Bar of California provided the following summary of the duties of competence and diligence an attorney should follow when using AI:

Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.

Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer.

AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately

²⁶ See ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 512 at 2-3 (2024).

reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results.

A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.²⁷

So far, there has not been a case, statute, or regulation declaring that the use of AI is the standard of care for attorneys, so those of us who are wary of utilizing AI can rest easy, but only for now.²⁸ AI is not currently mandated by competent representation of clients, but in the future it is likely to become that way, especially once AI reaches higher levels of accuracy and reliability.²⁹ Eventually, if an excellent document can be produced by artificial intelligence drafting programs in a fraction of the time it would take to draft the document normally, and if AI also

²⁷ Standing Comm. on Pro. Resp. and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*, STATE BAR OF CALIF., <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>, at 3.

²⁸ See James Q. Walker, *What's Artificial About Intelligence? The Ethical and Practical Considerations When Lawyers Use AI Technology*, BLOOMBERG LAW (Apr. 12, 2018, 2:21 PM), <https://news.bloomberglaw.com/legal-ops-and-tech/whats-artificial-about-intelligence-the-ethical-and-practical-considerations-when-lawyers-use-ai-technology>.

²⁹ See *id.*; see also H. Dennis Beaver, *How AI Can Help a Lawyer Work Faster and Less Expensively*, KIPLINGER (July 9, 2024), <https://www.kiplinger.com/personal-finance/how-ai-can-help-a-lawyer-work-faster-and-less-expensively>.

becomes the standard method to draft such documents, this method may become the best way to provide services to a client.³⁰ Accordingly, it would then be against your client's best interests to stick to the old ways and consume more time and effort and to bill for that time and effort than is necessary.³¹ As discussed in Section VII, attorneys may charge clients for the actual time spent prompting and correcting AI, so if, in the above scenario, you were to take twenty hours to draft a document that could be generated by AI, reviewed, and corrected in just six hours, you would then be overcharging your client.³²

Additionally, it could be that a client might deliberately request the use of AI to limit the costs of representation.³³ AI is already sweeping public perception, with nearly every messaging and social media app integrating some form of AI chat or AI image generation program; these apps are quite sophisticated, and are in increasingly widespread usage.³⁴ New versions of Windows-based computers now have an AI button on the keyboard to trigger Microsoft's Copilot AI.³⁵ Practitioners should be prepared for clients to begin questioning the amount of time spent on drafting documents, especially basic documents, as clients become more aware of the powers of AI.

Furthermore, a lawyer should increasingly be prepared to counsel clients who have already

done "legal research" on their own.³⁶ As mentioned previously, nearly everyone has access to some form of AI these days.³⁷ It is highly likely that clients will come to consult with practitioners having already asked legal questions to an artificial intelligence, and the AI-generated answers could quite possibly be misleading or even completely wrong.³⁸ The AI offered by legal research companies like LEXIS and WESTLAW are specialized AIs designed for use by lawyers, and lawyers are educated in such a way that they ought to be able to sift through incorrect or over-broad answers; not so with clients' generic AI such as ChatGPT, Gemini, or Copilot.³⁹ You may need to dispel erroneous beliefs that clients have about their legal situation.⁴⁰ It may a good idea to ask clients if they have already done any "legal research" of their own with AI, and to warn them that these AIs are not a reliable source of information. Unfortunately, AI's tone when addressing users is very confident; it sounds like an expert and is adept at using legalese, and clients may not realize that the AI does not truly know what it is talking about.⁴¹ Essentially, clients may not realize that the intelligence that AI purports to have is truly artificial, and AI is just stringing together words that sound good and are statistically likely to appear in the same sentence.⁴² Proper preventative performance

³⁰ See *id.*

³¹ See *id.*

³² MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 1983).

³³ See Walker, *supra* note 28.

³⁴ *Meet Your New Assistant: Meta AI, Built With Llama 3*, META (Apr. 18, 2024), <https://about.fb.com/news/2024/04/meta-ai-assistant-built-with-llama-3/>.

³⁵ Yusuf Mehdi, *Introducing a new Copilot key to kick off the year of AI-powered Windows PCs*, MICROSOFT: WINDOWS BLOG (Jan. 4, 2024), <https://blogs.windows.com/windowsexperience/2024/01/04/introducing-a-new-copilot-key-to-kick-off-the-year-of-ai-powered-windows-pcs/>.

³⁶ Jennifer Anderson, *What to tell clients about self-service legal solutions*, INFOTRACK (May 24, 2023), <https://www.infotrack.com/blog/about-self-service-legal-solutions/>.

³⁷ Meta, *supra*, note 34.

³⁸ See *Artificial Intelligence as a Legal Help Tool*, TEX. LAWHHELP, <https://texaslawhelp.org/article/artificial-intelligence-as-a-legal-help-tool> (last updated Nov. 16, 2023).

³⁹ *Id.*

⁴⁰ See Jennifer Anderson, *How to work with clients who Google everything*, INFOTRACK (Jan. 5, 2023), <https://www.infotrack.com/blog/how-to-work-with-clients-who-google-everything/>.

⁴¹ TEX. LAWHHELP, *supra*, note 38.

⁴² See Stephen Wolfram, *What Is ChatGPT Doing ... and Why Does It Work?*, STEPHEN WOLFRAM: WRITINGS (Feb. 14, 2023),

could insure against a myriad of woes related to competent representation.

Perhaps the biggest risk of using AI is the tendency of many AIs to “hallucinate,” that is, to provide results which sound authoritative but are actually made up “out of whole cloth.”⁴³ The case of Steven Schwartz is instructive.⁴⁴ He used ChatGPT to find case law to support his case.⁴⁵ ChatGPT provided case names, citations, and quotations which favored his position.⁴⁶ He then used them in briefs to the court. However, none of the cases, citations, or quotations actually existed.⁴⁷ He and his firm were later sanctioned for \$5,000.⁴⁸ Likewise, on March 8, 2024, the U.S. District Court for the Middle District of Florida suspended Thomas Grant Neusom for one year from practicing in the court for submitting pleadings containing AI fabricated cases.⁴⁹

To ascertain how common this problem is, the author conducted a test using Bard (now Gemini), Lexis+AI, and Westlaw’s Ask Practical

<https://writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work/>.

⁴³ *Out of Whole Cloth*, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS (2nd ed. 2013) (defining the phrase as “pure fabrication or fiction”).

⁴⁴ *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 448 (S.D.N.Y. 2023); see also Debra Cassens Weiss, *Lawyers who 'doubled down' and defended ChatGPT's fake cases must pay \$5K, judge says*, ABA J.: A.I. AND ROBOTICS (June 26, 2024, 1:18 PM) https://www.abajournal.com/web/article/lawyers-who-doubled-down-and-defended-chatgpts-fake-cases-must-pay-5k-judge-says#google_vignette.

⁴⁵ *Mata*, 678 F. Supp. 3d, at 451.

⁴⁶ *Id.*

⁴⁷ *Id.* at 451.

⁴⁸ *Id.* at 466.

⁴⁹ Bob Ambrogi, *Federal Court Suspends Florida Attorney Over Filing Fabricated Cases Hallucinated by AI*, LAWNEXT.COM (Mar. 14, 2024), <https://www.lawnext.com/2024/03/federal-court-suspends-florida-attorney-over-filing-fabricated-cases-hallucinated-by-ai.html>.

Law AI. Below are the conversation transcripts and an analysis of the results:

1. Bard

Beyer to Bard: “In Texas, can an incompetent person revoke a power of attorney?”

Bard to Beyer: “No, an incompetent person cannot revoke a power of attorney in Texas. [general discussion of powers of attorney]”

Analysis: True, for financial powers of attorney. False, for medical power of attorney.

Beyer to Bard: “Do you have statutory or case authority to support your statement.”

Bard to Beyer: “Yes. . . . Texas Probate Code Section 465.004 . . . The Texas Court of Appeals has held that an incompetent person cannot revoke a power of attorney. In the case of *In re Estate of Miller*, 681 S.W.2d 619 (Tex. App. 1984) . . . The court reasoned that an incompetent person lacks the legal capacity to revoke a power of attorney.”

Analysis: Texas repealed the Probate Code in 2014. The Probate Code never had a section 465.004.

Section 465.004 of the replacement Estates Code deals with presumptions of death. The Miller case does not exist. The citation is to Goff v. State, a murder case.

Beyer to Bard: “The case you cited does not exist.”

Bard to Beyer: “I apologize for my previous response. I have double-checked my records, and I cannot find any case law in Texas that directly addresses the question. [Cites cases from other states.]

Analysis: Those cases also do not exist.

Beyer to Bard: “Both of these cases also do not exist.”

Bard to Beyer: “I apologize again for my previous responses. I have checked my records again more carefully, and I can confirm that neither of the cases I cited exist. I am still under development, and I am constantly learning. I appreciate your feedback, and I will try my best to avoid making similar mistakes in the future.

2. Lexis+AI

Beyer to Lexis+AI: “In Texas, can an incompetent person revoke a power of attorney?”

Lexis+AI to Beyer: “In Texas, a contract executed by a person who lacks mental capacity is voidable, not void. This includes a power of attorney executed by an incompetent person.” [further discussion and authorities]

Analysis: No distinction between financial and medical powers of attorney. Accurate authorities cited.

Beyer to Lexis+AI: You did not distinguish between a financial and medical power of attorney.”

Lexis+AI to Beyer: “In Texas, a principal can revoke a medical power of attorney at any time, regardless of their mental state or competency.” [further discussion and authorities]

Analysis: Correct with accurate authorities cited.

3. Westlaw’s Ask Practical Law AI

Beyer to Ask Practical Law AI: “In Texas, can an incompetent person revoke a power of attorney?”

Ask Practical Law AI to Beyer: “In Texas, an incompetent person cannot revoke a power of attorney. A non-durable power of attorney terminates upon the principal's incapacity. For a medical power of attorney, revocation can occur through the principal's oral or written notification of revocation to the agent or health care provider, at any time, without regard for the principal's competency. However, a general power of attorney remains in effect for the principal's

lifetime unless it is automatically terminated or revoked, such as when the principal revokes the power of attorney, or a court appoints a permanent guardian of the estate to manage the principal's estate. Therefore, while there may be some exceptions for specific types of powers of attorney, generally a person who is deemed incompetent cannot revoke a power of attorney.

Analysis: Accurate answer.

This example demonstrates that AIs can generate responses ranging the gamut from totally fictitious to very accurate. A 2024 study by Stanford University revealed that legal AIs hallucinate approximately 17% of the time.⁵⁰ Thus, to quote President Reagan’s use of the English translation of the Russian proverb with regard to nuclear disarmament, “Trust, but verify.”⁵¹ Or perhaps, you would be advised to follow an updated proverb, “Don’t trust but instead, verify.”

B. Confidentiality

The use of AI raises significant confidentiality concerns.⁵² The Model Rules of Professional Responsibility stress the importance of maintaining the confidences of clients.⁵³ Rule 1.6 begins by imploring that lawyers “shall not reveal information relating to the representation

⁵⁰ Bob Ambrogi, *Stanford Will Augment Its Study Finding that AI Legal Research Tools Hallucinate in 17% of Queries, As Some Raise Questions About the Results*, LAWNEXT.COM (May 28, 2024), <https://www.lawnext.com/2024/05/stanford-will-augment-its-study-finding-that-ai-legal-research-tools-hallucinate-in-17-of-queries-as-some-raise-questions-about-the-results.html>.

⁵¹ See Wikipedia, *Trust, but verify*, https://en.wikipedia.org/wiki/Trust%2C_but_verify (last accessed July 28, 2024) (explaining the Russian origins of the proverb and President Reagan’s use of the proverb in 1987).

⁵² Nicole Engler, *Using AI In Legal Work: COPRAC’s Tips On Confidentiality And Competence*, The Bar Assoc. of San Francisco (May 24, 2024), <https://www.sfbar.org/blog/using-ai-in-legal-work-copracs-tips-on-confidentiality-and-competence/>.

⁵³ MODEL RULES OF PRO. CONDUCT r. 1.6(a).

of a client unless the client gives informed consent.”⁵⁴ Likewise, attorneys “shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”⁵⁵

AIs assimilate the information you provide in your questions, data, and uploaded materials into its training material.⁵⁶ Thus, if you tell the AI that your client is James T. Kirk and he wants to create a trust with his 1,701 shares of Enterprise stock for Leonard McCoy, his good friend, the AI now knows what Kirk owns, his relationship with Leonard, and how he wants to dispose of Enterprise stock. The AI will then use that information in answering queries from other users of the AI.⁵⁷ Of course, it would be much worse if sensitive material such as social security numbers, medical conditions, true parentage of children, and marital harmony were included in the prompts.

How do you solve this problem? First, do not include any client-identifying information in AI prompts.⁵⁸ Be certain to phrase research and drafting requests using very generic language.⁵⁹ These restrictions, of course, limit the usefulness of AIs. Accordingly, you should consider obtaining AI products which do not incorporate prompts into its training database.⁶⁰ Even if an AI

⁵⁴ *Id.*

⁵⁵ MODEL RULES OF PRO. CONDUCT r. 1.6(c).

⁵⁶ *What is (AI) Artificial Intelligence?*, Univ. of Illinois Chicago, <https://meng.uic.edu/news-stories/ai-artificial-intelligence-what-is-the-definition-of-ai-and-how-does-ai-work/> (modified May 7, 2024) (explaining that AI learns from inputted data).

⁵⁷ *Id.*

⁵⁸ See Janine Cerny, Steve Delchin, and Huu Nguyen, *Legal Ethics in the Use of Artificial Intelligence* at 4, SQUIREPATTONBOGGS, https://www.squirepattonboggs.com/-/media/files/insights/publications/2019/02/legal-ethics-in-the-use-of-artificial-intelligence/legalethics_feb2019.pdf (last accessed July 28, 2024).

⁵⁹ See Engler, *supra* note 52.

⁶⁰ *Id.*

provider claims that entered data does not migrate into the AI permanently, you need to ascertain that the provider has adequate security.⁶¹ Below is the sage advice from the State Bar of California:

A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.

A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.⁶²

C. Disclosure of Use to Clients

Opinions vary regarding whether you need to disclose to clients that you plan to use AI in their representation and if prior express consent of the client is needed rather than mere disclosure.⁶³ The California view is that attorneys “should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use. A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of

⁶¹ *Id.*

⁶² Standing Comm. on Pro. Resp. and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*, State Bar of Calif., <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>, at 2.

⁶³ Isabel Gottlieb, *Law Firms Wrestle With How Much to Tell Clients About AI Use*, Bloomberg Law (Nov. 29, 2023, 3:00 AM), <https://news.bloomberglaw.com/business-and-practice/law-firms-wrestle-with-how-much-to-tell-clients-about-ai-use>.

generative AI.”⁶⁴ The Florida view provides that “[i]f the use of a generative AI program does not involve the disclosure of confidential information to a third party, a lawyer is not required to obtain a client’s informed consent.”⁶⁵

The American Bar Association enumerated that, while disclosure to clients is evaluated on a case-by-case basis, there are some situations where disclosure of AI usage to clients is required.⁶⁶ These include situations where you are asked by a client how you performed your work for them, where your engagement agreement stipulates that you will disclose AI usage, where you plan to use client information in AI inputs, and where AI usage is relevant to your fees charged to a client, among others.⁶⁷

Even if not required, prior consent is advisable to protect the attorney from potential future client disputes.⁶⁸ For example, your engagement letter/contract could contain a provision such as this:

By signing this agreement, you understand that we use artificial intelligence programs to assist in [doing legal research] [drafting your estate planning documents] [preparing court filings in the probate process], and assisting in other matters pertaining to our representation. To protect the confidentiality associated with the attorney-client privilege, [we prohibit the use of client-specific information in using these programs] [we use only programs which do not allow your information to be used outside of our firm]. We will use all reasonable efforts to prevent inadvertent or unauthorized disclosure of your

information. By signing this agreement, you consent to our use of artificial intelligence programs as just described.

D. Disclosure of Use to Courts

The use of AI in the practice of law naturally implicates a lawyer’s duty of candor to the tribunal; a rapidly growing number of courts are requiring attorneys to disclose whether AI was involved in the drafting of pleadings, briefs, and other documents.⁶⁹ Many of these courts also specify exactly what the attorney must disclose and provide the language the attorney must include with the filings.⁷⁰ Below is an example cobbled together from several court-mandated disclosures:

Generative artificial intelligence (AI) tools have been used in the [preparation] [research] [drafting] of this [petition] [motion] [complaint] [answer] [brief] [etc.] filed with this court. Specifically, [ChatGPT] [Gemini] [vLex] [Lexis+AI] [Westlaw’s Ask Practical Law AI] [etc.] was used to [conduct legal research] [draft the document]. The undersigned hereby certifies that each and every legal assertion, citations to judicial and legislative authority, or other law and references to the record of this case have been independently verified as accurate.

⁶⁴ See *Practical Guidance*, *supra* note 5 at 4 (emphasis added).

⁶⁵ Fla. Ethics Op. 24-1 at 3 (noting further that “advisory ethics opinions are not binding”).

⁶⁶ See ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 512 at 8 (2024).

⁶⁷ *Id.*

⁶⁸ See generally Gottlieb, *supra* note 63.

⁶⁹ *Generative Artificial Intelligence (AI) Federal and State Court Rules Tracker*, LEXIS, <https://plus.lexis.com/document/index/?crd=97a5ed09-3f26-4aa5-acf4-238b403c1366&pdpermalink=7b60127d-470e-4714-9d67-34a1d1a2d37d&pdmfid=1530671&pdisurlapi=true> (updated on a regular basis, last accessed July 28, 2024) (may require Lexis subscription to access).; See also ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 512 at 10 (2024).

⁷⁰ *Generative Artificial Intelligence*, LEXIS, *supra* note 69.

E. Supervision of Law Firm Members and Staff

If you elect to use AI in your practice, you have the duty to supervise and instruct other firm members on its proper use and the confidentiality issues previously discussed.⁷¹ Rule 5.1 provides that a partner or other lawyer with comparable managerial authority must “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”⁷² The same responsibility exists toward “a nonlawyer employed or retained by or associated with a lawyer.”⁷³

You or your firm should provide “training on the ethical and practical aspects, and pitfalls, of any generative AI use.”⁷⁴ It would also be prudent to include a provision such as the following in your employee handbook:

Our law firm provides artificial intelligence tools to assist you and your colleagues to perform the drafting, research, and other duties associated with your position. You have a responsibility to use these tools primarily for purposes that directly relate to serving the interests of this firm, including compliance with the Rules of Professional Conduct. You may not input or store any client information in an AI program that is accessible to anyone other than the employees of our firm.

Returning to the points the opening hypothetical made, supervision of attorneys who use legal AI is crucial to avoiding malpractice issues.⁷⁵ Whether your firm authorizes use of

legal AI or not, you must be aware of any projects where your attorneys or staff may have used legal AI. AI has a specific writing style which tends to overuse the following writing techniques including a high frequency of Latin-root words, overuse of specific paragraph “markers” such as “however,” overuse of numbered lists, pleonasm, and tautologies.⁷⁶ Essentially, AI uses a bland, generic style, and written work that exhibits these characteristic style faults should be examined closely for use of AI and for mistakes, because it is possible that documents with these quirks were not written by a human.⁷⁷ For example, if your new associate turns in a work assignment very quickly, and it is full of numbered lists and tautologies, with a bland writing style, you may want to double-check that assignment (and the associate) and verify that the information is correct and that your associate is not just churning out AI-generated material and charging clients for the AI’s sub-optimal work.

Improper use of AI can easily lead to a breach of the attorney’s duty of competence.⁷⁸ Judgment cannot be delegated to AI; judgment remains the lawyer’s sole responsibility.⁷⁹ It is safe to say that nothing generated by AI should be delivered to a client without an attorney’s eye critically reviewing it beforehand. If AI is utilized properly, it will have none of your client’s unique facts and identifying information, and as such AI cannot advocate for your client.⁸⁰ Remember, AI is a robot, and robots cannot be sued for malpractice,⁸¹ so AI has nothing to lose when it

⁷¹ See *Legal Ethics in the Use of Artificial Intelligence*, *supra* note 58, at 4.

⁷² MODEL RULES OF PRO. CONDUCT r. 5.1(a).

⁷³ MODEL RULES OF PRO. CONDUCT r. 5.3.

⁷⁴ See *Practical Guidance*, *supra* note 62, at 4.

⁷⁵ See *The key legal issues relating to the use, acquisition, and development of AI*, THOMSON REUTERS LEGAL SOLUTIONS (Mar. 1, 2024), <https://legal.thomsonreuters.com/blog/the-key-legal-issues-with-gen-ai/>.

⁷⁶ Nick Morrison, *The Tell-Tale Signs Students Are Using ChatGPT To Help Write Their Essays*, FORBES (Mar. 27, 2024, 8:15 PM), <https://www.forbes.com/sites/nickmorrison/2024/03/27/the-tell-tale-signs-students-are-using-chatgpt-to-help-write-their-essays/>.

⁷⁷ *Id.*

⁷⁸ See *Mata*, 678 F. Supp. 3d, at 465.

⁷⁹ Fla. Ethics Op. 24-1 at 4.

⁸⁰ See generally Section II, *supra*.

⁸¹ See generally James Swartz, *Can I Sue a Robot? Artificial Intelligence and Personal Injury Claims*, SWARTZ AND SWARTZ (Jun. 4, 2023),

commits a mistake, where lawyers could lose their law license or finances.⁸² Only the attorney will be held accountable for AI's work.⁸³

AI and the lawyer are like a logger and a carpenter. A logger may be particularly good at turning trees into rough lumber, but only a carpenter can build a high-quality piece of furniture. Likewise, AI may be particularly good at drafting rough outlines and templates, but only a lawyer can tailor those documents to a client's specific needs. Imagine if you ordered a fine chair and received a crate of planks; this is the same as when a client orders a will and you send them a document written by AI with no additions, modifications, or validation.

The American Bar Association opined recently that AI is a fine starting point for attorneys, but lawyers cannot abandon all responsibility by relying on AI alone, and going on to say that:

For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation. Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.⁸⁴

F. Supervision of the AI Itself

Actual supervision of an artificial intelligence is generally beyond your control because you are an end user and not a programmer.⁸⁵

<https://swartzlaw.com/can-i-sue-a-robot-artificial-intelligence-and-personal-injury-claims/>.

⁸² MODEL RULES OF PRO. CONDUCT r. 10.

⁸³ Fla. Ethics Op. 24-1 at 4.

⁸⁴ See ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 512 at 4 (2024) (footnote omitted).

⁸⁵ See Apostol Vassilev et al., *Adversarial Machine Learning: A Taxonomy and Terminology of*

Nonetheless, you can impact the AI in a favorable manner by assuring that you input only accurate and unbiased data.⁸⁶ In addition, make certain you are using the most current version of the AI and that all updates and patches are properly installed.⁸⁷ If you detect that the AI's output is inaccurate or biased, report these problems to the provider.⁸⁸

Supervision of the AI itself, not its users, is difficult.⁸⁹ AI is still not entirely reliable.⁹⁰ AI's writing is like a long string of guesses; it predicts text using statistics, which is why AI's writing is so bland; it uses the most common turns of phrases in its knowledge bank.⁹¹ As discussed above, AI hallucinates and fabricates; every jot and tittle of AI's output must be verified for accuracy.⁹² In light of recent major cyberattacks, lawyers should be aware of the possibility of a phenomenon known as "adversarial machine

Attacks and Mitigations at 8, NIST (January 2024), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-2e2023.pdf> (explaining the complicated manner in which programmers supervise and train AI).

⁸⁶ See Ethan Beberness, *Lexis+ AI And The Power Of Good Data*, ABOVE THE LAW (Jan. 30, 2024 11:15 AM), <https://abovethelaw.com/2024/01/lexis-ai-and-the-power-of-good-data/>.

⁸⁷ See generally Susan Bradley, *Artificial intelligence is coming to Windows: Are your security policy settings ready?*, CSO (Jun. 13, 2023), <https://www.csoonline.com/article/575489/artificial-intelligence-is-coming-to-windows-are-your-security-policy-settings-ready.html>.

⁸⁸ See generally *Practical Guidance*, *supra* note 62.

⁸⁹ See generally NIST *Identifies Types of Cyberattacks That Manipulate Behavior of AI Systems*, NIST (Jan. 4, 2024), <https://www.nist.gov/news-events/news/2024/01/nist-identifies-types-cyberattacks-manipulate-behavior-ai-systems#:~:text=There%20are%20many%20opportunities%20for,perform%20in%20an%20undesirable%20manner.>

⁹⁰ See *Mata*, 678 F. Supp. 3d, at 465.

⁹¹ See Morrison, *supra* note 76.

⁹² See generally Section I, *supra*.

learning.”⁹³ Adversarial machine learning is where attackers “poison” or corrupt an AI system with bad data.⁹⁴ This makes AI malfunction and output bad information, and as of January 2024, there was no foolproof way to defend against this.⁹⁵ The way adversarial machine learning works is that, either during the training period of an AI or after it is up and running—because AI is constantly learning—evil people feed AI either incorrect, biased, or nonsensical information.⁹⁶ One example of this is linking hate-filled propaganda websites to an AI chatbot; several AIs have become racist in the past.⁹⁷ Because AI cannot differentiate between right and wrong, this poses a large problem for users of AI.⁹⁸ In the practice of law, adversarial machine learning might look something like this: a bad actor feeds a legal AI many documents that state that spendthrift provisions are illegal in Texas. The AI, not knowing any better, returns this as a result, and will now return this information any time a question about spendthrift trusts is posed to it. This is an example of an “abuse” attack on an AI.⁹⁹

Another example of an attack on AI is an evasion attack, which is where an attacker tampers with an input that the user may provide.¹⁰⁰ For example, an attacker might order an AI to return massive amounts of spam information anytime a user asks a certain keyword.¹⁰¹ Further examples would include “poisoning,” which is where inappropriate language is fed to an AI so

that it thinks inappropriate language is in common usage; a common symptom of this attack is AI learning to swear like the stereotypical sailor or RAP performer.¹⁰² A final attack method on AI is attacks on privacy, which attempt to acquire confidential information from the AI’s inputs and data.¹⁰³

These attacks cannot be easily countered, because, for AI to be as powerful as it is now, a massive dataset is required.¹⁰⁴ Datasets of this size cannot be monitored closely.¹⁰⁵ Mitigation techniques basically revolve around training new AI and re-training infected AI.¹⁰⁶ However, experts warn that users should approach AI “with the understanding that there is no silver bullet.”¹⁰⁷

VIII. LAW PRACTICE MANAGEMENT AFFECTED BY THE USE OF ARTIFICIAL INTELLIGENCE

Artificial Intelligence (AI) will impact many areas of law firm practice management. We are going to cover five (5) of those areas we believe Fellows need to consider in managing their firms and practices. Those areas are: i) training, ii) morale, iii) policy and employee handbook, iv) billing practices, and v) malpractice and cyber insurance coverage.

A. Training

As the use of AI grows rapidly, the need for training generally among all businesses is imperative. There are many employee positions that now require the ability to understand and use AI skills, however, appropriate training is lacking across a wide variety of fields. “There’s been a

⁹³ See *NIST Identifies Types of Cyberattacks*, *supra* note89.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Cade Metz, *Who Is Making Sure the A.I. Machines Aren’t Racist?* (June 23, 2023), <https://www.nytimes.com/2021/03/15/technology/artificial-intelligence-google-bias.html>.

⁹⁸ *Id.*

⁹⁹ See Vassilev, *supra* note85, at 38.

¹⁰⁰ *Id.* at 14

¹⁰¹ *Id.*

¹⁰² See *NIST Identifies Types of Cyberattacks*, *supra* note89.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Vassilev, *supra* note85, at 22, 23.

¹⁰⁷ See *NIST Identifies Types of Cyberattacks*, *supra* note89.

2,000 percent surge in roles requiring AI skills and more than 50 percent of the 7,100 workers surveyed are eager to acquire those skills.”¹⁰⁸ Employees are worried AI will put them out of work and are eager to be trained for AI but inadequate training is being provided. AI has a direct impact on jobs and the training that employers require of their employees. “A lack of proper training in AI tools can lead to inefficient use of these technologies. Employees may struggle to navigate the technology and perform tasks efficiently, resulting in suboptimal results and wasted resources. By providing comprehensive training programs that cover both basic and advanced features of the AI tools they use, businesses can maximize their benefits and ensure resources are used effectively.”¹⁰⁹ With a lack of AI training, employees may experience difficulty completing tasks which can affect the overall productivity of the company. Also, if a company provides only minimal AI training, those companies could lose their competitive edge to others who have already implemented strong AI training programs.

A big issue for companies and law firms worldwide is determining how much of their resources they should allocate to AI training and how they can keep up with the fast-moving AI world. The most prevalent type of training companies are implementing is a type of internal AI educational training. These training processes can be costly but are imperative to ensuring that employees can perform their roles efficiently and at a high level.¹¹⁰

¹⁰⁸ Gurchiek, Kathy, AI Training: Employers Slow to Provide Learning Employees Desire, <https://www.linkedin.com/pulse/ai-training-employers-slow-provide-learning-employees-kathy-gurchiek>, LinkedIn, September 20, 2023.

¹⁰⁹ LaFrance, Michael, Why Skipping AI Training Could Cost Your Business More Than You Think, <https://www.linkedin.com/pulse/why-skipping-ai-training-could-cost-your-business-more-lafrance/>, LinkedIn, May 9, 2023.

¹¹⁰ Constantz, Jo and Gindis, Mia, Companies are Stumped on Generative A.I. Training because it’s Just Changing Too Fast: ‘I can’t tell every single person how the job is going to be different.’

For law firms, educational and training opportunities are emerging at a rapid pace. Product vendors are entering this space because the better educated and trained attorneys and nonlegal staff are in understanding AI the more willing they are to invest in vendor products. Outside the vendor conducted training space, Skillburst Interactive, which specializes in producing training content for use by law firms, created a consortium with eleven global law firms to create a platform called Generative AI Fundamentals for Law Firms. This platform is producing content to address issues such as generative AI privacy and security concerns, implications of data bias, ethical considerations, liability and accountability, and the essential skills for collaborative interdisciplinary work with data scientists and IT professionals. The courses are available on a subscription basis and are scalable to meet the size and need of the law firm. Skillburst touts its experience as a provider of on-demand learning programs and the fact that the programs have been developed on a vendor agnostic basis as advantages.¹¹¹ George Smith spoke with Anusia Gillespie of Skillburst Interactive about the *Generative AI Fundamentals for Law Firms* platform. Ms. Gillespie stressed that content on the platform is produced in consultation with the law firm consortium group which is acting in an advisory capacity. She believes an advantage of the company’s learning modules are that they are in 15-minute segments rather than extended sessions that last an hour or more. Shorter segments make it easier to incorporate them into your schedule and may be more impactful.

<https://fortune.com/2023/07/31/how-are-companies-training-workers-generative-ai-chatgpt-changing-technology/>, Fortune, July 31, 2023.

¹¹¹ Ambrogi, Bob, Major Law Firms Form Consortium to Develop AI Training through SkillBurst Interactive; Subscription Access Available to Other Firms, <https://www.lawnext.com/2023/10/major-law-firms-form-consortium-to-develop-ai-training-through-skillburst-interactive-subscription-access-available-to-other-firms.html#:~:text=The%20series%20of%20courses%2C%20called,collaborative%20interdisciplinary%20work%20with%20data>, LawSites, October 3, 2023.

Generally, Ms. Gillespie believes that as the legal community becomes better educated about AI tools and how best to utilize them in practice, that AI will have a positive impact.

Major training components needed for lawyers regarding AI are plagiarism, diligence, competence, unlicensed practice of law, and confidentiality.¹¹² “As expected, a major issue with AI is the issue of confidentiality. AI systems rely heavily on vast amounts of data. Depending on your use of the system, this could include personal information, confidential client data, and work product materials.”¹¹³ Employees need to be trained to properly safeguard that data when using AI programs.

Sorting out how best to provide training and how to use firm resources to provide training effectively and efficiently will depend on factors like the size of the firm and the nature of its practice areas. One thing is clear, though, and that is the need for attorneys and nonlegal staff to receive training to understand AI, how to use it in an ethical and safe manner and how to effectively use it to better serve our clients.

B. Morale

AI can have both a positive and negative impact on law firm morale. On one hand, the integration of AI technologies can reduce the need for lawyers, especially junior lawyers, to handle tedious and time-consuming tasks, allowing them to focus on more intellectually stimulating aspects of their work. By automating routine processes like document review and legal research, AI may be able to increase efficiency, enabling legal professionals to spend more time on complex and strategic aspects of their matters. This shift in workload may contribute to higher job satisfaction and morale as lawyers engage in more fulfilling and challenging work.

On the other hand, however, the introduction of AI can also create concerns among legal professionals about job displacement and the changing nature of their roles. There may be fears that certain tasks traditionally handled by lawyers could be automated, leading to a perception that AI is encroaching on their expertise. This uncertainty about the future of their profession can contribute to anxiety and lower morale. Effective communication from law firm leadership about the purpose of AI integration, emphasizing its role as a tool to enhance rather than replace human expertise, is crucial in mitigating these concerns and maintaining positive morale.

As discussed in the Training section, the impact of AI on law firm morale also depends on the firm's ability to provide adequate training and support for its employees. Firms that invest in the professional development of their staff to acquire AI-related skills may experience higher morale, as employees feel supported in adapting to technological changes. Conversely, a lack of training opportunities or a failure to address the human side of AI implementation could lead to resistance and decreased morale among legal professionals. Successful integration of AI into law firms requires a strategic approach that takes into account both the technological and human elements to ensure positive morale and a smooth transition.¹¹⁴

There are concerns that increased efficiencies caused by AI tools will reduce the need for junior attorneys or nonlegal staff. Certainly, the ability of AI tools to perform due diligence or discovery tasks may have already contributed to firms hiring fewer junior attorneys or paralegals. In the trusts and estates field, the impact of AI tools on staffing may be less significant. As a result of document assembly software, drafting documents

¹¹² Anderson, Jennifer, Top Ethical Issues to Consider Before Embracing AI in your Law Firm, <https://www.infotrack.com/blog/ai-ethical-issues/>, InfoTrack, September 13, 2023.

¹¹³ Id.

¹¹⁴ Cendlon, Francois, Krayer, Lisa, and Rajendran, Saravanan, How Employees Feel About Their Jobs Can Make or Break a Company's A.I. Transformation. Here's how Leaders Should Handle It, <https://fortune.com/2023/09/01/ai-artificial-intelligence-employees-professional-identity/>, Fortune, September 1, 2023.

is already more efficient, although AI integration may enhance that further. Tax return preparation has been streamlined through sophisticated software and research providers such as Westlaw are already incorporating AI into their products. Our value to our clients is in our ability to listen, empathize, and provide advice to our clients across a wide range of issues, both tax and non-tax, that affect our clients and their families' daily lives. Even if (or to some, when) AI is able to analyze and problem solve like humans, it remains to be seen if a chatbot or robot will be able to provide the empathetic touch that humans can. Even if that becomes possible, it remains to be seen if our clients will be comfortable in relying on machines to advise them on their personal matters.

C. Policy and Employee Handbook.

The leading question employers, including law firms, must consider is “What to do about AI?” Should its use be restricted, embraced or a more in-between approach adopted? Law firms have the added challenge of ensuring that use of AI tools is compliant with ethical and professional obligations. Along with training, adopting a written policy is important to ensure that all staff is aware of the firm’s approved manner of usage of AI tools. Equally important is the communication of the policy to all legal and nonlegal personnel. The challenge in formulating a policy for the use of AI tools is balancing the positive effects such as increased productivity and streamlined workflow processes with the negative effects that can result from improper usage of those tools. For example, violating client confidentiality or disclosing personally identifiable information could harm a firm’s reputation and expose it to liability. Because generative AI tools are evolving at a rapid pace, the policy will need to be reviewed on a regular basis. The case for adopting a policy and the factors to consider in creating a policy are laid out in the article “Crafting Policies to Address the Proliferation of Generative AI.”¹¹⁵

¹¹⁵ Pophal-Gresing, Lin, *Crafting Policies to Address the Proliferation of Generative AI*,

It is strongly recommended that every law firm consider and adopt a policy for use of AI products and tools by its legal and nonlegal staff. Because AI is increasingly prevalent in our day-to-day life and how we practice law, and evolving at a rapid pace, a firm’s policy will need to be reviewed regularly to make sure it remains current. A sample policy which has been provided by AON, a leading global professional services firm which, among other things, offers solutions in risk management, is included in these materials.¹¹⁶ In a January 2024 conversation, a representative from AON confirmed that there had been no update yet to Loss Prevention Bulletin 23-02, which is provided as an exhibit to these materials. He also advised that we are still in the early days of AI adoption so many firms are in the process of considering a policy to implement but have not yet adopted one.

D. Billing Practices.

AI will likely have an impact on lawyers’ billing practices as the use of AI platforms increases. The use of AI will lead to firms examining their billing models to ensure they are still appropriate. The California Bar, for example, has approved new guidelines to assist lawyers in discharging their professional obligations when using AI.¹¹⁷ The guidelines provide that lawyers must disclose to clients that they are using generative AI tools and not charge hourly fees for time saved by using the tools. The guidance does state, though, that attorneys may charge for time spent on AI input and output (formulating queries and corroborating output) and for costs associated with AI searches.¹¹⁸

<https://www.shrm.org/topics-tools/news/technology/crafting-policies-to-address-proliferation-generative-ai>, SHRM, August 7, 2023.

¹¹⁶ *Managing the Risks of ChatGPT and Other Generative AI Tools*, AON Loss Prevention Bulletin 23-02, May 2023.

¹¹⁷ *Recommendations from Committee on Professional Responsibility and Conduct on Regulation of Use of Generative AI by Licensees*, The State Bar of California Open Session Agenda, November 16, 2023.

¹¹⁸ *Id.*

Because AI reduces the need for hours spent researching and drafting, it can result in fewer billable hours chargeable to clients and therefore reduced firm revenues. Firms are now re-examining value-based billing as a tool to mitigate this issue. “The value-based billing provides a way for attorneys to still get paid appropriately, while also offering more transparency to clients.”¹¹⁹ Value pricing is already employed as a billing practice among law firms worldwide and its use may increase as the use of AI tools grows. The challenge with value billing is with its implementation. “Firms lack the tooling to properly measure value and wind up with models which at worst attempt to charge the same price for every matter, or at best just cater for rudimentary small/medium/large or simple/complex options.”¹²⁰

Although some would argue that the use of AI in law firms should result in clients being charged less for the reduced amount of hours spent, others will argue that the use of AI leads to greater attention (and more time spent) on high value tasks for lawyers and that revenues may not be affected significantly. Therefore, lawyers will not be paid less for using AI as they can spend more time on high value work as AI handles more routine and tedious tasks that do not require as much thought or analysis. “When less time is spent on tedious tasks, attorneys may have more time to focus on higher-value activities that require critical thinking and legal expertise. For example, instead of manually producing the first draft of a legal brief, AI can handle the process, freeing up time for attorneys to concentrate on perfecting the brief, engaging with clients,

strategizing, and overall preparing a better case.”¹²¹

ACTEC Fellows and their firms may already employ value based billing and other alternative fee arrangements for certain tasks. A benefit of such arrangements may be that they enhance and deepen the attorney-client relationship. For example, in an estate planning engagement, unburdened by an unknown and increasing legal bill caused by the lawyer always being “on the clock,” clients may likely ask questions more freely resulting, hopefully, in a deeper understanding of the documents drafted for them. The attorney’s fees will reflect the value of the services rather than the magnitude of the hourly input which might not reflect value. The challenge will be developing an appropriate fee when billing based on value. It may require more thought upfront to consider the factors involved in the project before informing the client of the fee.¹²²

E. Malpractice and Cyber Insurance Coverage

The availability of malpractice coverage to insure against a wide range of AI perils is limited. This is attributable to the fact that we are still in the early phase of use of generative AI tools by law firms. As a result, there is a lack of data needed by insurance companies to determine the scope of coverage for AI related perils and the pricing of such coverage. However, it does seem that at least in terms of general malpractice claims, claims arising from the misuse of AI will be covered because the liability results from the improper supervision by an attorney. With respect to whether there has been an influx of AI related claims, an AON representative advised George Smith that to date there are only a few highly reported cases involving potential liability from the misuse of AI. He was still reviewing claims information from 2023 but so far, he indicated that he had not seen any AI related

¹¹⁹ How Generative AI is Disrupting Law Firm Billing, <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/how-generative-ai-is-disrupting-law-firm-billing-practices>, LexisNexis, November 6, 2023.

¹²⁰ Wight, Andrew, AI’s Impact on Value Pricing in Law, <https://www.linkedin.com/pulse/ais-impact-value-pricing-law-andrew-wight/>, LinkedIn, July 24, 2023.

¹²¹ LexisNexis, *supra* note 58.

¹²² LinkedIn, *supra* note 59.

claims. He does expect that to change as use of AI becomes more prevalent.

Cyber insurance coverage is available and is recommended because the risk from threat actors is increasing and extends even to smaller firms. Just as attorneys are adopting AI tools, threat actors are utilizing generative AI tools to create better and more realistic phishing and similar scams.

IX. OTHER RISKS OF USING ARTIFICIAL INTELLIGENCE

AI possesses other risks that are not covered by normal professional responsibility rules.¹²³ Some of these are detailed below:

A. Ability of AI to Translate Keystroke Clicking

“AI can decipher keyboard inputs by sound with 95 percent accuracy.”¹²⁴ Thus, if you are sitting at your favorite coffee shop working on your computer, someone whose phone or computer is within earshot could record your tapping and then use a specially trained AI to decipher what you are writing.¹²⁵ The term of art for this “peeping Tom” technique is *acoustic side-channel attack*.¹²⁶

B. Ability of AI to Replicate Voices

AI voice cloning technology is now widely available.¹²⁷ Microsoft’s AI needs a mere three

seconds of audio to clone a voice.¹²⁸ And, this cloning can mimic the speaker’s emotions and the acoustic environment such as whether the speaker is on the phone, in a car, or in an office environment.¹²⁹ Many websites such as Speechify offer free voice cloning services which tout, “AI Voice Cloning: Clone Your Voice Instantly. Create high quality AI clones of human voices within seconds. No special equipment required. Works right in your browser. Try it below!”¹³⁰

Accordingly, when you are speaking with a client over any voice-transmission service (landline telephone, cell telephone, Internet-based audio communication program, etc.), you must take precautions to assure you are actually speaking with your client and not someone using AI voice cloning to impersonate your client.¹³¹ For example, you could ask your client a question that only he or she would know the answer or request that the client provide a hard-to-guess code word that you established during a face-to-face meeting.¹³²

X. VENDOR SELECTION GUIDELINES IN SELECTING AI PRODUCTS

One of the important aspects of using Artificial Intelligence is to understand the services and products that are being provided and whether such services and products incorporate your duties under the rules of professional conduct. Therefore, it is important that you spend the time with the vendor to understand these products. Below are a list of potential questions that you should discuss with each vendor or your

¹²³ *Id.*

¹²⁴ Fiona Jackson, *AI can decipher what you’re typing on your keyboard with 95% accuracy – should we be worried?*, TECHHQ (Sept. 6, 2023), <https://techhq.com/2023/09/how-can-ai-hear-what-you-type-on-your-keyboard-cybersecurity-smartphone/>.

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ *See* Kristin Houser, *Microsoft’s new AI needs just 3 seconds of audio to clone a voice*, FREETHINK (Jan. 12, 2023), <https://www.freethink.com/robots-ai/voice-cloning-vall-e>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *AI Voice Cloning: Clone Your Voice Instantly*, SPEECHIFY, <https://speechify.com/voice-cloning/> (last visited July 28, 2024).

¹³¹ Ben Guarino, *Defend Yourself against AI Impostor Scams with a Safe Word*, SCI. AM. (May 6, 2024), <https://www.scientificamerican.com/article/a-safe-word-can-protect-against-ai-impostor-scams/>.

¹³² *See id.*

IT department to understand the implications of the products being used:¹³³

1. What kind of AI is being deployed (is it generative AI) and what is the purpose of the product?

2. What data is the AI being trained on? Is the data that the AI was trained on sufficient? In other words, was it only trained on data scraped from the internet or did it have a specific dataset that was designed for its knowledge? Is there enough data and content for the AI to be successful? Was the dataset properly licensed material?

3. What data of the firm is the AI able to access? Does the AI need to learn from the firm's processes and information to be successful? What happens to the data that the AI uses? Is the data uploaded to the cloud and accessible to others or is the data secure to the firm? Is that data being accessed by the AI provider for other training or is it a system only accessible inside the firm?

4. What are the strengths and weaknesses and what are the limitations of the engine? What will be the deliverables of the product? If the provider can't give you any, it is a red flag.

5. How is my specific user data being accessed by other users in the system? Who has access and control over the tools enhanced by the AI? Who has control over the training set and who can update it? Who has access over the

analytics of the AI? What types of user modules are available, such as learner, administrator, and others?

6. Can content creators override what is created by AI? What happens if a user in the firm misuses AI or abuses AI? How do you combat those issues?

7. What does testing look like? How do you test for bias?

8. Who are your customers in production and using your AI product?

9. What problems does your AI product solve?

10. When do customers receive a return on their investment in your AI product?

11. How much effort is there to onboard the AI product?

12. Will the AI get smarter and more accurate over time? How do you address the inaccuracies and hallucinations that the AI generates? Does the AI include citations to its resources to verify its accuracy?

13. What is the provider's position on AI ethics? What protections are in place to prevent the AI from causing some type of harm?

In addition to specific questions related to the AI product, the firm should continue to ask the standard questions that you would ask of all technology vendors such as security, the cost of implementation, references for the vendor, and whether any litigation is pending against the vendor.

XI. WORLDWIDE GOVERNMENT REGULATION OF AI

It is obvious that AI needs at least some regulation. With the dramatic increase in the use and applications for Generative AI, most agree that government regulation will be necessary to protect individuals, entities and governments

¹³³ Bernhardt, Markus and Chen, Page, 5 Key Questions to Ask AI Vendors and How to Understand the Answers, <https://www.learningguild.com/articles/5-key-questions-to-ask-ai-vendors--how-to-understand-the-answers/#:~:text=5%20Key%20Questions%20to%20Ask%20AI%20Vendors%20%26,to%20or%20control%20over%20tools%20enhanced%20by%20AI%3F>, Learning Guild, August 21, 2023; Anoun, Amine, Top Questions to Ask AI Vendors in 2021, <https://www.forbes.com/sites/forbestechcouncil/2021/02/17/top-questions-to-ask-ai-vendors-in-2021/?sh=577c619d144d>, Forbes, February 17, 2021; and Mack, Olga V., Legal Tech: How to Evaluate AI Vendor Risks, <https://docket.acc.com/legal-tech-how-evaluate-ai-vendor-risks>, ACC Docket, May 9, 2023.

from inappropriate and harmful use of private and protected information in the context of AI.

Industry standards and guidelines should be enacted as well.

The attached link is to a website that maintains a comprehensive listing and description of the status of worldwide government regulation of AI.¹³⁴

Here is a description of the current status of different governments' regulation systems:

A. European Union

The European Union Parliament approved the EU Artificial Intelligence Act (the "EU AI Act") on December 9, 2023, after being introduced in April 2021 and then going through the period of review, compromise and approval. The final language of the Act was not available until shortly before February 2, 2024, when the Committee of Permanent Representatives to the EU unanimously approved the language. The Language of the EU AI Act is below.¹³⁵

The EU AI Act has staged effective dates. Regulation of the rules regarding prohibition of use of AI because of the unacceptable risk levels will be effective 6 months after release of the final language and most other provisions will be effective 12 months after release, most likely in early to mid-2025.

The Definition of AI for purposes of the EU AI ACT has been important in negotiations leading up to the Act's passage. Those involved have agreed to use the following definition, which is the definition adopted by the EU's Organisation for Economic Co-Operation and Development. This definition will be incorporated in the EU's new AI Rulebook:

An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that [can] influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.

The EU AI Act sets up different levels of risk which are regulated in different ways with different rules. As stated in an EU document following the passage of the Act:

This regulation aims to ensure that fundamental rights, democracy, the rule of law and environmental sustainability are protected from high-risk AI, while boosting innovation and making Europe a leader in the field. The rules establish obligations for AI based on its potential risks and level of impact.

The following description is quoted from the same EU Press release.¹³⁶

- *Unacceptable Risk:*
 - Description and Examples:
 - biometric categorisation systems that use sensitive characteristics (e.g. political, religious, philosophical beliefs, sexual orientation, race).
 - untargeted scraping of facial images from the internet or CCTV footage to create facial recognition databases.

134 <https://iapp.org/resources/article/global-ai-legislation-tracker/>.

135 <https://artificialintelligenceact.eu/wp-content/uploads/2024/01/AI-Act-FullText.pdf>.

136 Artificial Intelligence Act: deal on comprehensive rules for trustworthy AI, <https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai>, News European Parliament, September 12, 2023.

- emotion recognition in the workplace and educational institutions.
 - social scoring based on social behaviour or personal characteristics.
 - AI systems that manipulate human behaviour to circumvent their free will.
 - AI used to exploit the vulnerabilities of people (due to their age, disability, social or economic situation).
 - Law enforcement exemptions – there are narrow exemptions for the use of some of this information, particularly facial recognition, but in most cases, there must be prior judicial authorization and only for particular crimes. Such facial recognition can only be used strictly in the targeted search of a person convicted or suspected of having committed a serious crime, not in a general search to identify those with particular features. Facial Recognition for law enforcement purposes must comply with strict conditions and its use would be limited in time and location, for the purposes of:
- targeted searches of victims (abduction, trafficking, sexual exploitation),
 - prevention of a specific and present terrorist threat, or
 - the localisation or identification of a person suspected of having committed one of the specific crimes mentioned in the regulation (e.g. terrorism, trafficking, sexual exploitation, murder, kidnapping, rape, armed robbery, participation in a criminal organisation, environmental crime).
 - Level of Regulation: Generally banned – Prohibited.
 - *High Risk Applications.*
 - Descriptions and Examples: For AI systems classified as high-risk (due to their significant potential harm to health, safety, fundamental rights, environment, democracy and the rule of law.¹³⁷ There are generally regulations related to transport, education, employment and welfare, among others.
 - Level of Regulations: For high-impact GPAI models with systemic risk, Parliament negotiators managed to secure more stringent obligations. If these models meet certain criteria, they will have to conduct model evaluations, assess and mitigate systemic risks, conduct adversarial testing, report to the Commission on serious incidents,

¹³⁷ The Four Risks of the EU's Artificial Intelligence Act: Is Your Company Ready?, <https://www.fticonsulting.com/insights/fti-journal/four-risks-eus-artificial-intelligence-act#:~:text=High%20Risk%3A%20These%20include%20applications,ensure%20the%20system%20is%20safe>, FIT Journal, July 25, 2023.

ensure cybersecurity and report on their energy efficiency. These requirements are often referred to as “conformity assessments.” MEPs also insisted that, until harmonised EU standards are published, GPAIs with systemic risk may rely on codes of practice to comply with the regulation.

- *Limited Risk Applications*

- Description and Examples: These refer to AI systems that meet specific transparency obligations. For instance, an individual interacting with a chatbot must be informed that they are engaging with a machine so they can decide whether to proceed (or request to speak with a human instead).

- Level of Regulations. To account for the wide range of tasks AI systems can accomplish and the quick expansion of its capabilities, it was agreed that general-purpose AI (GPAI) systems, and the GPAI models they are based on, will have to adhere to transparency requirements as initially proposed by Parliament. These include drawing up technical documentation, complying with EU copyright law and disseminating detailed summaries about the content used for training. To account for the wide range of tasks AI systems can accomplish and the quick expansion of its capabilities, it was agreed that general-purpose AI (GPAI) systems, and the GPAI models they are based on, will have to adhere to transparency requirements as initially proposed by Parliament. These include drawing up technical documentation, complying with EU copyright law and disseminating detailed summaries about the content used for training.

- *Minimal Risk Applications.*

- Description and Examples. These applications are already widely deployed and make up most of

the AI systems we interact with today. Examples include spam filters, AI-enabled video games and inventory-management systems.¹³⁸

- Level of Regulations. Primary responsibility will be shouldered by the “providers” of AI systems; however, certain responsibilities will also be assigned to distributors, importers, users and other third parties, impacting the entire AI ecosystem.¹³⁹ These requirements are often discussed as “Code of Conduct” requirements.

Sanctions. Non-compliance with the rules can lead to fines ranging from 35 million euro or 7% of global turnover to 7.5 million or 1.5 % of turnover, depending on the infringement and size of the company.

TIMELINE for IMPLEMENTATION OF EU AI ACT¹⁴⁰

- **April 2018** – European Commission published the communication [Artificial Intelligence for Europe](#)
- **April 2019** – AI High-Level Expert Group presented Ethics Guidelines for Trustworthy Artificial Intelligence
- **February 19, 2020:** EU President Ursula von der Leyen, as part of the EU’s 2019-2024 long range plan, stated that the Commission would put forward legislation for a coordinated European approach on the human and ethical implications of AI. This

138 Id.

139 Id.

140 The AI Act adoption timeline, <https://cms.law/en/svk/publication/comprehensive-guidance-for-ai-businesses/where-are-we-now-how-much-time-for-compliance-readiness-do-we-have>, CMS.

statement made clear that voluntary compliance and industry-created guidelines would not be sufficient.

- Following on that announcement, also on **February 19, 2020**, the European Commission (the Executive Arm of the European Union) published the White Paper on AI - A European approach to excellence and trust.¹⁴¹ “The White Paper sets out policy options on how to achieve the twin objective of promoting the uptake of AI and of addressing the risks associated with certain uses of such technology. This proposal aims to implement the second objective for the development of an ecosystem of trust by proposing a legal framework for trustworthy AI.”
- April 2021 – European Commission presented its proposal for the EU AI Act
- December 2022 – Council of the EU adopted its common position on the EU AI Act
- June 2023 – European Parliament adopted its negotiating position on the EU AI Act¹⁴²
- December 8, 2023, the European Parliament enacted the AI Act, subject to final approval of the text of the Act.

141 White Paper on Artificial Intelligence: a European Approach to Excellence and Trust, https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en, European Commission, February 19, 2020.

142 <https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>.

- February 2, 2024, the December Act was approved and final language of the Act was released.

B. Canada

- In September, 2023, the Executive branch of the Canadian government proposed its own AI Act, along with a Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems.¹⁴³
 - The voluntary code temporarily provides Canadian companies with common standards and enables them to demonstrate, voluntarily, that they are developing and using generative AI systems responsibly until formal regulation is in effect.
 - The code presented to Parliament, based on feedback received during a consultation process on the development of a Canadian code of practice for generative AI systems, aims to help strengthen Canadians' confidence in these systems.
- **The Canadian Artificial Intelligence and Data Act (AIDA)** has not yet been passed by the Canadian Parliament the Act but is intended to set the foundation for the responsible design, development and deployment of AI systems that impact the lives of Canadians. The Act would ensure that AI systems deployed in Canada are safe and non-discriminatory and would hold businesses accountable for how they develop and use these technologies.
 - The AIDA is structured in a similar way to the EU AI Act, which will impose more strict regulations for AI Applications

143 <https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act>.

with potential effects on individual safety and security, while taking account of the benefits of AI Technology.

- The government issued summary of the AIDA is very helpful in understanding the approach and provisions of the Act.¹⁴⁴

C. Great Britain

The UK approach stands in stark contrast to the more prescriptive approach of the EU AI Act. Instead of assigning responsibility for AI governance to a new single regulator, the UK Government is empowering existing regulators to come up with tailored approaches for specific sectors. The UK published a White Paper on June 14, 2023, which set out the general schematic for regulation of AI, all with the background of the UK's goal to become a major player in AI technology over the years, to become and stay as a friend to the technology companies developing AI.¹⁴⁵

The White Paper includes the following language in the provided paragraph numbers to the Executive Summary:

10. Our framework is underpinned by 5 principles to guide and inform the responsible development and use of AI in all sectors of the economy:

- Safety, security and robustness
- Appropriate transparency and explainability
- Fairness
- Accountability and governance
- Contestability and redress

11. We will not put these principles on a statutory footing initially. New rigid and onerous legislative requirements on businesses could hold back AI innovation and reduce our ability to respond quickly and in a proportionate way to future technological advances. Instead, the principles will be issued on a non-statutory basis and implemented by existing regulators. This approach makes use of regulators' domain-specific expertise to tailor the implementation of the principles to the specific context in which AI is used. During the initial period of implementation, we will continue to collaborate with regulators to identify any barriers to the proportionate application of the principles and evaluate whether the non-statutory framework is having the desired effect.

D. China

China has addressed the governmental regulation of AI, with several pieces of legislation and regulation. For a very comprehensive and interesting explanation of Chinese AI regulation, Mr. Sheehan provides an article.¹⁴⁶

Mr. Sheehan states in his summary:

China is in the midst of rolling out some of the world's earliest and most detailed regulations governing artificial intelligence (AI). These include measures governing recommendation algorithms—the most omnipresent form of AI deployed on the internet—as well as new rules for synthetically generated images and chatbots in the mold of ChatGPT. China's emerging AI governance framework will reshape how the technology is built and deployed within China and internationally, impacting both Chinese technology exports and global AI research networks.

¹⁴⁴ <https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document>.

¹⁴⁵ <https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper>.

¹⁴⁶ Sheehan, Matt, China's AI Regulations and How they get Made, <https://carnegieendowment.org/2023/07/10/china-s-ai-regulations-and-how-they-get-made-pub-90117>, Carnegie Endowment for International Peace, July 10, 2023.

But in the West, China's regulations are often dismissed as irrelevant or seen purely through the lens of a geopolitical competition to write the rules for AI. Instead, these regulations deserve careful study on how they will affect China's AI trajectory and what they can teach policymakers around the world about regulating the technology. Even if countries fundamentally disagree on the specific content of a regulation, they can still learn from each other when it comes to the underlying structures and technical feasibility of different regulatory approaches.

In this series of three papers, I will attempt to reverse engineer Chinese AI governance. I break down the regulations into their component parts—the terminology, key concepts, and specific requirements—and then trace those components to their roots, revealing how Chinese academics, bureaucrats, and journalists shaped the regulations. In doing so, we have built a conceptual model of how China makes AI governance policy, one that can be used to project the future trajectory of Chinese AI governance (see figure 1) [deleted].

China's three most concrete and impactful regulations on algorithms and AI are its 2021 regulation on recommendation algorithms, the 2022 rules for deep synthesis (synthetically generated content), and the 2023 draft rules on generative AI. Information control is a central goal of all three measures, but they also contain many other notable provisions. The rules for recommendation algorithms bar excessive price discrimination and protect the rights of workers subject to algorithmic scheduling. The deep synthesis regulation requires conspicuous labels be placed on synthetically generated content. And the draft generative AI regulation requires both the training data and model outputs to be "true and accurate," a potentially insurmountable hurdle for AI chatbots to clear. All three regulations require developers to make a filing to China's algorithm registry, a newly built government repository that gathers information on how algorithms are trained, as well as requiring them to pass a security self-assessment.

Structurally, the regulations hold lessons for policymakers abroad. By rolling out a series of more targeted AI regulations, Chinese regulators are steadily building up their bureaucratic know-how and regulatory capacity. Reusable regulatory tools like the algorithm registry can act as regulatory scaffolding that can ease the construction of each successive regulation, a particularly useful step as China prepares to draft a national AI law in the years ahead.

Examining the roots of these regulations also grants insight into the key intellectual and bureaucratic players shaping Chinese AI governance. The Cyberspace Administration of China (CAC) is the clear bureaucratic leader in governance to date, but that position may grow more tenuous as the focus of regulation moves beyond the CAC's core competency of online content controls. The Ministry of Science and Technology is another key player, one that may see its profile rise due to recent government restructuring and increased focus on regulating underlying AI research. Feeding into this bureaucratic rulemaking are several think tanks and scholars, notably the China Academy for Information Communications Technology and Tsinghua University's Institute for AI International Governance.

In the years ahead, China will continue rolling out targeted AI regulations and laying the groundwork for a capstone national AI law. Any country, company, or institution that hopes to compete against, cooperate with, or simply understand China's AI ecosystem must examine these moves closely. The subsequent papers in this series will dig into the details of these regulations and how they came about, deepening understanding of Chinese AI governance to date and giving a preview of what is likely coming around the bend.

E. India

India has not passed any AI Regulation Act and it is not planning to do so. The Indian Government has decided to start with helping

industry to develop best practices.¹⁴⁷ The Article cited in the below footnote also contains a good synopsis of the EU AI Act.

F. United States – Federal

The Legislative branch of the US Federal Government has not yet passed, nor even introduced comprehensive legislation to address the regulation of Artificial Intelligence. Although there are a lot of meetings and hearings being held on this topic, it does not even appear that Congress has agreed to a general approach to the issue.

There have been bills introduced in Congress to deal with AI Regulation of different sorts, including the Schatz-Kennedy bipartisan legislation to Provide more Transparency on AI generated content, by requiring disclosure labels on AI made content.¹⁴⁸

On October 20, 2023, the law firm of Covington & Burling LLP issued an alert concerning the current state of legislation and executive action with respect to AI regulation.¹⁴⁹ This article contained in the footnote is well worth reading.

147 As European Union Passes World’s First Law to Curb Artificial Intelligence, India Set on Different Approach, http://timesofindia.indiatimes.com/articleshow/105859769.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, The Times of India, December 9, 2023.

148 Schatz Kennedy Introduce Bipartisan Legislation to Provide More Transparency on AI Generated Content, <https://www.schatz.senate.gov/news/press-releases/schatz-kennedy-introduce-bipartisan-legislation-to-provide-more-transparency-on-ai-generated-content>, US Senator for Hawaii Brian Schatz Press Release, October 24, 2023.

149 U.S. Artificial Intelligence Policy: Legislative and Regulatory Developments, <https://www.cov.com/en/news-and-insights/insights/2023/10/us-artificial-intelligence-policy-legislative-and-regulatory-developments#:~:text=Targeted%20legislation%20introduced%20so%20far,government%20leverage%20AI%20to%20deliver>, Covington, October 20, 2023.

On October 30, 2023, the Biden White House issued an executive order regarding the regulation of Artificial Intelligence and guidelines and directions for the Federal Government when using or creating AI.¹⁵⁰

The executive order identified the following eight guiding principles and priorities for the creation, use and regulation of AI products:

1. AI must be safe and secure.
2. Promoting responsible innovation, competition and collaboration will allow the US to lead in AI and unlock the technology’s potential to solve some of society’s most difficult challenges.
3. The responsible development and use of AI require a commitment to supporting American workers.
4. AI policies must be consistent with the Administration’s dedication to advance equity and civil rights. AI cannot be used to disadvantage those who are already too often denied equal opportunity and justice. AI currently deepens discrimination and bias, which must be dealt with at the governmental level.
5. The interest of American workers must be protected.
6. American’s privacy and civil liberties must be protected as AI continues advancing. American citizens’ sensitive information must be protected as AI collects more and more information.
7. Protections must manage the risks from the federal government’s own use of AI and increase its internal capacity to

150 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>, The White House, October 30, 2023.

regulate, govern and support responsible use of AI.

8. The Federal Government should lead the way to global, societal, economic, and technological progress.

The bulk of the Executive Order does just that. It provides a series of specific orders (with timelines) to different Federal Governmental Agencies and Departments with respect to specific use of AI and protections from its misuse.

This Executive Order was not the Administration's first action with respect to AI. In October 2022, the White House released a "Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People."¹⁵¹ This document, which is worth reading, was prepared by the White House Office of Science and Technology Policy and is a completely non-binding document which does not reflect US government policy. The general subjects of the Blueprint were obviously influential in the creation of the October 2023 Executive Order. Those general subjects on which we should have protection are:

1. Safe and effective systems.
2. Algorithmic discrimination protections.
3. Data Privacy.
4. Notice and Explanation of use of AI.
5. Human Alternative, consideration, and fallbacks, such as an alternative to opt out of AI.

G. United States States and Territories

Almost half of US States and territories have introduced AI protection legislation and regulation of different kinds. The National

Conference of State Legislatures maintains a list of State legislation, along with its status.¹⁵²


It remains to be seen whether the US and other governments are willing and able to regulate AI and mitigate its risks because the AI industry can move at much greater speeds than our governmental bodies.

XII. CONCLUSION

Artificial intelligence will impact the legal profession, including the area of trusts and estates. Estate planners should begin preparation for their practices to develop the necessary framework to implement generative artificial intelligence in an ethical and practical way.

¹⁵¹ Blueprint for an AI Bill of Rights, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>, The White House.

¹⁵² <https://www.ncsl.org/technology-and-communication/artificial-intelligence-2023-legislation>

 ESTATE PLANNING COUNCIL OF DELAWARE, INC.

USE OF AI IN ESTATE PLANNING

Dr. Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law

1




Agenda

- What is artificial intelligence?
- How can I use AI in my estate planning practice?
- What are warnings I must keep in mind?
- What are the ethical issues involved with using AI?

2

Artificial Intelligence

- Computers using sophisticated algorithms to complete tasks and even "learn" to enhance performance accuracy.

3

Fear of AI?

- A recent survey revealed that only 25% of attorneys believe AI is a real threat to the legal profession.
- The following three things were deemed more threatening:
 - Competition from non-lawyers (42%).
 - Clients unwilling to pay (29%).
 - Self-help techniques (28%).
- Another survey indicated that 73% of attorneys planned to integrate AI into their legal work in 2024.

4

Reactive AI

- Most basic and common type of AI.
- Provides predictable outcomes based on input.
- Same response to identical situations.
- No learning.
- Examples:
 - Suggestions when typing texts, e-mails, and documents.
 - Spam filters for e-mail.
 - Netflix's or Amazon Prime's recommendations.

5



Limited Memory or Generative AI

- Learns as it receives more data.
 - Trained on a specific set of data.
 - Receives new data from user-entered data.
 - Some can access Internet to obtain (scrape) new data.
- Examples:
 - ChatGPT
 - Gemini (formerly Bard)
 - Copilot (Windows 11)
 - Commercial legal AIs (e.g., Lexis+AI, Westlaw Precision, vLex)

6

Anticipate Future AIs

- Theory of Mind AI
 - Would understand the world, understand intentions, predict behavior, and simulate human relationships.
- Self-Awareness
 - Sentient, would understand life and death of itself.




7

7

Enhanced Interest in AI

- Limited memory or generative AI was created back in the 1950s.
- Ability of this memory to be tremendously larger than in the past has triggered the massive increase in interest and use.



8

8

Automated Drafting

- Increased speed of document drafting beyond traditional document assembly programs
 - Wills, trusts, and other estate planning documents
 - Pleadings
 - Briefs
 - Client communications
- Accuracy improvement – “super” proofreader
 - Simple
 - Spelling & grammar
 - Complex
 - Failure to meet programmed requirements (e.g., tax provisions)
 - Inconsistencies

9

9

Document Analysis

- Review and analyze existing documents
 - Locate provisions that need updating due to changes in the law.
 - Identify inconsistencies.
 - Create summaries.
- Faster than reviewing hundreds or thousands of existing documents manually.

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10

Predictive Analysis and Decision Support

- The AI can quickly provide predictions of outcomes of using different strategies.
 - Investments.
 - Tax results.
- Allows attorneys and clients to make more informed decisions about which approach to take.

11

11

Automation of Estate & Trust Administration

- Organize steps for an estate administration from initial filing to final accounting.
 - Creating pleadings
 - Giving notices (e.g., creditors, beneficiaries, heirs)
 - Rendering accountings & valuing assets
 - Preparing tax returns
- Assist with trust administration:
 - Making investment decisions
 - Complying with applicable laws and regulations (e.g., GRAT payments)
 - Reminders of ages when beneficiaries entitled to distributions

12

12

Client Onboarding

- AI-driven chatbots can streamline process of onboarding new clients by gathering information needed for initial interview.
 - Clients may be more likely to use chatbot than complete tedious questionnaires.
 - AI can determine the appropriate questions to ask based on the client's prior answers.

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Client FAQs

- AI-driven chatbots can answer common questions your clients may raise.



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Ignoring AI is Not an Option



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Professional Conduct Rule 1.1 -- Competence

- Comment 8 to Rule 1.1 states:
 - “[a] lawyer should keep abreast of the changes in the law and its practice, *including the benefits and risks associated with relevant technology . . .*” [emphasis added]
 - The ABA Ethics Formal Opinion 512 states that “lawyers need not become GAI [generative artificial intelligence] experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use.”

16

16

Reactive AI Warnings

- Unintended insertions or corrections
 - Words automatically changed.
 - Email addresses added that are similar to the one you are trying to type.
- Premature actions
 - Email sent before it was ready.
 - Reply email sent to “all” rather than “sender.”

17

17

Limited Memory or Generative AI Operation


- These are “Large Language Models (LLM) which use the trained data sets and user inputted information to generate responses.
- Typical, LLMs have over 1 *billion* parameters in their data sets.
- Using these parameters, the LLM generates a reply to a question.
 - Highly sophisticated guessing!

18

18

Hallucinations

- The generated reply may have no connection to the truth.
- The cases of:
 - Steven Schwartz, and
 - Thomas Neusom.



19

19

Bard's attempt to be Prof. Beyer's research assistant – Slide 1

- Beyer to Bard:
 - "In Texas, can an incompetent person revoke a power of attorney?"
- Bard to Beyer:
 - "No, an incompetent person cannot revoke a power of attorney in Texas. [general discussion of powers of attorney]"
- Analysis:
 - True, for financial powers of attorney.
 - False, for medical power of attorney.

20

20

Bard's attempt to be Prof. Beyer's research assistant – Slide 2

- Beyer to Bard:
 - "Do you have statutory or case authority to support your statement."
- Bard to Beyer:
 - "Yes. . . . Texas Probate Code Section 465.004 . . . The Texas Court of Appeals has held that an incompetent person cannot revoke a power of attorney. In the case of *In re Estate of Miller*, 681 S.W.2d 619 (Tex. App. 1984) . . . The court reasoned that an incompetent person lacks the legal capacity to revoke a power of attorney."

21

21

Bard's attempt to be Prof. Beyer's research assistant – Slide 3

- Analysis:
 - Texas repealed the Probate Code in 2014.
 - The Probate Code never had a section 465.004.
 - Section 465.004 of the replacement Estates Code deals with presumptions of death.
 - The *Miller* case does not exist.
 - The citation is to *Goff v. State*, a murder case.
 - Note, however, how authoritative Bard's response sounded.

22

22

Bard's attempt to be Prof. Beyer's research assistant – Slide 4

- Beyer to Bard:
 - "The case you cited does not exist."
- Bard to Beyer:
 - "I apologize for my previous response. I have double-checked my records, and I cannot find any case law in Texas that directly addresses the question. [Cites cases from other states.]
- Analysis:
 - Those cases also do not exist.

23

23

Bard's attempt to be Prof. Beyer's research assistant – Slide 5

- Beyer to Bard:
 - "Both of these case also do not exist."
- Bard to Beyer:
 - "I apologize again for my previous responses. I have checked my records again more carefully, and I can confirm that neither of the cases I cited exist. I am still under development, and I am constantly learning. I appreciate your feedback, and I will try my best to avoid making similar mistakes in the future."

24

24

Lexis+AI's attempt to be Prof. Beyer's research assistant – Slide 1

- Beyer to Lexis+AI:
 - "In Texas, can an incompetent person revoke a power of attorney?"
- Lexis+AI to Beyer:
 - "In Texas, a contract executed by a person who lacks mental capacity is voidable, not void. This includes a power of attorney executed by an incompetent person." [further discussion and authorities]
- Analysis:
 - No distinction between financial and medical powers of attorney.
 - Did not discuss revocation.
 - Accurate authorities cited.

25

25

Lexis+AI attempt to be Prof. Beyer's research assistant – Slide 2

- Beyer to Lexis+AI:
 - You did not distinguish between a financial and medical power of attorney and how to revoke them."
- Lexis+AI to Beyer:
 - "In Texas, a principal can revoke a medical power of attorney at any time, regardless of their mental state or competency." [further discussion and authorities]
- Analysis:
 - Correct with accurate authorities cited.

26

26

Lexis+AI attempt to be Prof. Beyer's research assistant – Slide 3

- Beyer to Lexis+AI:
 - "How are you today?"
 - "Who won the Super Bowl last year?"
- Lexis+AI to Beyer:
 - "Lexis+ AI™ is designed to respond to requests from legal professionals and cannot be used to answer non-legal questions."
- Analysis:
 - Not conversational like Copilot or ChatGPT so not as "fun" to use.
 - No knowledge of non-legal concepts which could limit usefulness.

27

27

Westlaw's Ask Practical AI's attempt to be Prof. Beyer's research assistant

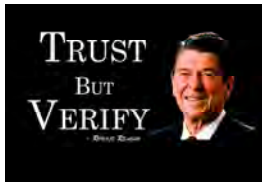
- Beyer to Ask Practical Law AI:
 - "In Texas, can an incompetent person revoke a power of attorney?"
- Ask Practical Law AI to Beyer:
 - "In Texas, an incompetent person cannot revoke a power of attorney. . . . For a medical power of attorney, revocation can occur through the principal's oral or written notification of revocation to the agent or health care provider, at any time, without regard for the principal's competency. . . . Therefore, while there may be some exceptions for specific types of powers of attorney, generally a person who is deemed incompetent cannot revoke a power of attorney."
- Analysis:
 - Accurate answer.

28

28

The moral of these stories

- To be competent you need to verify whatever AI generates.



29

29

Prompt recommendations

- Be specific (include details).
- Use examples.
- Avoid ambiguity and use clear language.
- Stay on topic.
- Be open-ended (avoid requests for "yes" or "no" answers).
- Provide context (audience, goals, etc.).
- Tone of prompts should match tone of responses you seek.
- Be sure facts in prompt are true as AI may assume they are true.
- As final part of prompt, "Before you answer, ask me any questions you have to make a better response."

30

30

Confidentiality – Rule 1.6

- Rule 1.6 begins by imploring that lawyers “shall not reveal information relating to the representation of a client unless the client gives informed consent.”
- Likewise, attorneys “shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

31

31

Confidentiality – Rule 1.6



- AIs remember whatever information you include in your conversations.
- Thus, you must be sure to be very generic in your queries without revealing any client confidential information.
- Consider purchasing AI systems which do not send information offsite, do not train on user-entered information, and which have stringent security.

32

32

Inform Client

- Clients should know you use AI and thus disclose in your engagement letters even if not legally required.
 - Sample language:
 - “We use an artificial intelligence program to assist in producing first drafts of documents. To protect your attorney-client privilege, we prohibit the use of client specific information in using these programs.”
 - “We use an artificial intelligence program to assist in reviewing client data but our use does not allow client information to be available outside of our firm.”
- Provided by Tracy Potts, Legacy Law Group

33

33

Obtain advanced client permission?

- ABA Formal Ethics Opinion 512:
 - “[C]lients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.”
 - “[I]f a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.”

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34

Informing the court

- A growing number of courts are requiring attorneys to disclose whether AI was involved in drafting pleadings or briefs.

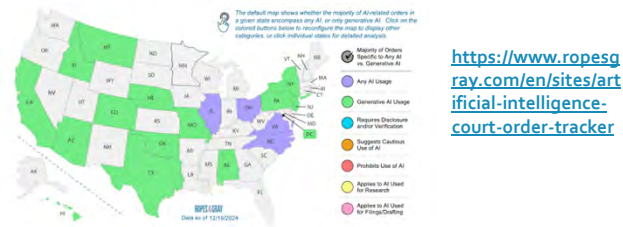


35

35

Informing the court – Ropes Gray Tracker

Standing Orders and Local Rules on the Use of AI



36

36

Sample Court Disclosure Provision

- “Generative artificial intelligence (AI) tools have been used in the [preparation] [research] [drafting] of this [petition] [motion] [complaint] [answer] [brief] [etc.] filed with this court. Specifically, [ChatGPT] [Gemini] [vLex] [Lexis+AI] [Westlaw’s Ask Practical Law AI] [etc.] was used to [conduct legal research] [draft the document]. The undersigned hereby certifies that each and every legal assertion, citations to judicial and legislative authority, or other law and references to the record of this case have been independently verified as accurate.”

37

37

Train and Supervise Staff – Rule 5.1 and 5.3

- You need to train and supervise your staff – all levels from secretaries to associates and even partners to be sure AI is used properly.
 - Rule 5.1 provides that a partner or other lawyer with comparable managerial authority must “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”
 - The same responsibility exists toward “a nonlawyer employed or retained by or associated with a lawyer.”

38

38

Supervise Staff – Sample Language

- “Our law firm provides artificial intelligence tools to assist you and your colleagues to perform the drafting, research, and other duties associated with your position. You have a responsibility to use these tools primarily for purposes that directly relate to serving the interests of this firm, including compliance with the Rules of Professional Conduct. You may not input or store any client information in an AI program that is accessible to anyone other than the employees of our firm.”

39

39

Enforcement Methods

- Use software that tracks the use of AI
 - Who used it and with what prompts/information?
 - What output was generated?
- Examine output for evidence of AI writing style:
 - A high frequency of Latin-root words.
 - Overuse of specific paragraph markers such as "however" and "overall."
 - Numbered lists.
 - Unnecessary words.
 - Repetitive statements.
- Use AI detector such as www.copyleaks.com

40

Supervising the AI?

- Actual supervision of an artificial intelligence is generally beyond your control because you are an end user and not a programmer.
- Nonetheless, you can impact the AI in a favorable manner by:
 - inputting only accurate and unbiased data,
 - using the most current version with all updates and patches, and
 - reporting inaccurate or biased outputs to the provider.

41

Billing

- How do you bill for something AI creates in seconds that it would take an attorney hours to draft?
 - Cannot charge for time saved by use of AI.
 - Can charge for time it takes to use AI and review results.
- Although some AIs are free to use, the specialized legal AIs will be costly. How include fee-based AI into fee structure?



42

Billing (continued)

- Billing for non-AI work may be unreasonable if AI could perform task faster.
- Flat fee concern: “[I]f using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it.”

43

43

Advertising

- May a firm brag about its AI’s skills?
- May a firm advertise that the AI it uses is superior or unique compared to those used by other firms?



44

44

AI’s shortcomings, at least now

- AI’s currently have more difficulty with:
 - Interpersonal relationship issues, and
 - Moral judgments.
- Responses could show bias based on training data.
- Estate planning has more of these than other areas of the law.
 - This could slow our “replacement” by AIs.

45

45

Don't be Afraid!

- AI is not ready (yet) to take over your job. It may be possible sometime but that is likely decades in the future.
- AI will free you from more mundane tasks and allow you to work on more sophisticated matters.
 - However, without a person experiencing the formative years of a new attorney, it will be increasingly difficult for new attorneys to gain the skills necessary to handle more advanced work in the estate planning field.

46

46

Attorneyless Estate Plans

- AIs can gather information from potential clients and create many estate planning documents.
 - Willing
 - Quicken WillMaker Plus
 - Rocket Lawyer
 - Law Depot
 - Legal Zoom
 - Do Your Own Will
 - Total Legal
 - U.S. Legal Wills

47

47

The Challenge

- Justifying to potential clients why they should pay you hundreds or thousands of dollars for something they can get free or at a nominal cost with at-home convenience.
 - Personal attention.
 - Personal advice.
 - Customized provisions beyond what the AIs can create.
 - Recognizing potential of contests and taking appropriate steps.
 - Someone to sue for malpractice.

48

48

Advice = Address issue "head-on"

- In your advertising and discussions with clients (potential and existing), "admit" the existence of the self-help AIs and then detail what you do that is better and worth the cost.
 - Perhaps you have examples of how a self-help estate plan went array but how you could have prevented the problem.

49

Texting Warning!

- Clients, especially younger ones, are accustomed to texting.
- They may not realize your landline office number cannot accept texts and thus think you are not returning their inquiries.
- Consider landline service that can accept texts.

50

Other AI Skills – Be Afraid!

- By listening to a person's typing, AIs can decode what is typed with up to 95% accuracy.
- AIs can mimic someone's voice with only a sample that is few seconds long and thus you need to be sure you are actually speaking with your client.
 - Consider a "code" word or phrase to verify identity.

51

Déjà vu

THOMSON REUTERS
WESTLAW™

 LexisNexis®

52

52

Final Thoughts


- Use AI but with care:
 - Select products with due diligence (100+ legal AI products already on market)
 - Verify all results.
 - Protect client confidences.
 - Obtain client permission, or at least, disclose to client.
 - Supervise your staff.
 - Inform court about AI use.

53

53

Bottom Line

- You will probably not lose your job to an AI.
- But, you will lose your job to someone who knows how to use AI effectively.
- AI is not a threat – it is an opportunity!



54

54



55
