

HEY SIRI: DRAFT MY CONTRACT

MAY (OR SHOULD) LAWYERS USE ARTIFICIAL INTELLIGENCE IN LEGAL WRITING?¹ BY DANIELLE LEWIS

On November 30, 2022, OpenAI launched a new artificial intelligence (AI) chatbot known as ChatGPT.² This “smart chat” program became quickly and widely known for its ability to generate, within a matter of minutes or even seconds, coherent and natural-sounding responses to almost any prompt. Where previous chatbot programs generated content that seemed awkward and artificial, ChatGPT’s responses sound articulate and credible – as if a live human had written them.

Of course, universities (and law schools) quickly became concerned about students using ChatGPT on take-home exams, projects, and various assignments. Many schools have already taken or are taking steps to address that issue.³ But what about practicing lawyers? May (or should) lawyers use ChatGPT to start basic legal documents or perform simple legal research? This article explores the practical and ethical implications of lawyers using AI in the practice of law, particularly as programs like ChatGPT become better and more accessible.

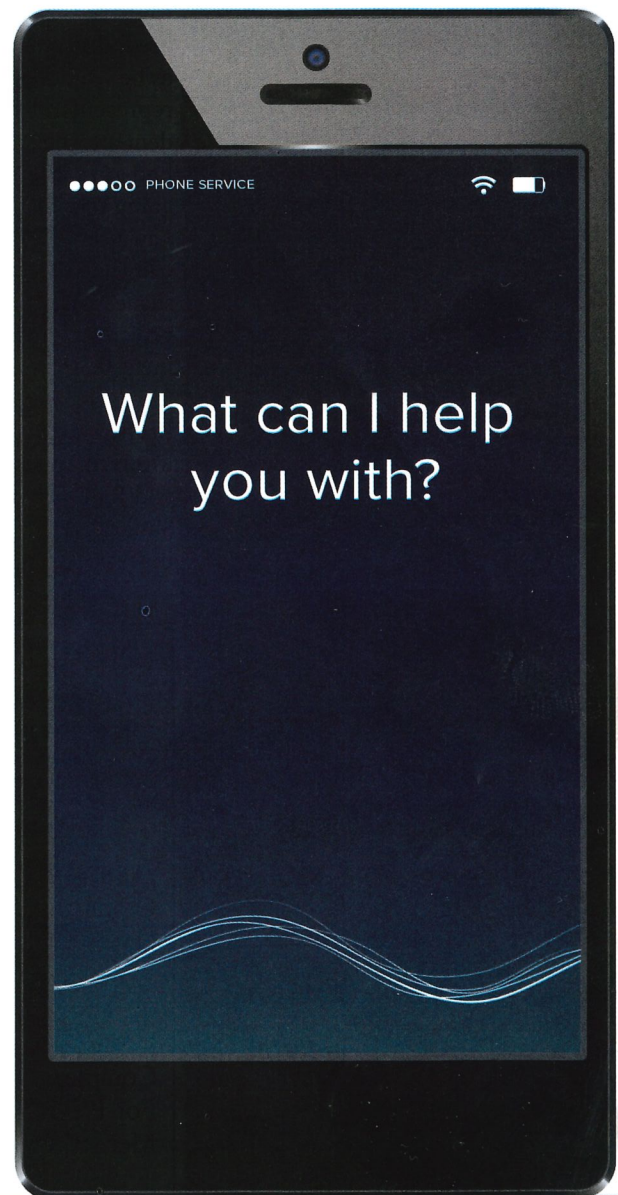
FIRST, WHAT DOES CHATGPT DO?

Chat GPT is a generative language model based on the transformer architecture.⁴ Programs like ChatGPT are “trained” on a large amount of text,⁵ which teaches the model to perform natural language processing tasks and generate coherent, well-written text.⁶ Once the model is trained, it can be used to perform a wide range of tasks.⁷ ChatGPT in particular is capable of processing large amounts of text and performing natural language processing tasks very effectively.⁸

As of the writing of this article, ChatGPT is free to any user willing to provide a working email address and phone number to set up an account.⁹ Once an account is established, ChatGPT allows the user to ask any question or provide any prompt,¹⁰ which ChatGPT will then use to generate a response. Users are asked to provide feedback on the responses, which OpenAI indicates will be used to improve ChatGPT’s capabilities.¹¹

DOES IT ACTUALLY WORK?

Yes and no. One afternoon, I posed several basic legal questions to ChatGPT in order to gauge the quality and accuracy of the responses. My overall takeaway: ChatGPT can produce answers which sounds convincing but may not actually be accurate.



First, I asked ChatGPT to explain the standard for summary judgment in Kentucky. In less than a minute, ChatGPT generated a response which accurately explained that summary judgment is a procedural device governed by Kentucky Civil Rule 56, used by

courts to grant judgment in favor of a moving party who demonstrates there is no genuine issue of material fact which would prevent judgment being issued in his or her favor. So far so good.

Next, I asked ChatGPT to explain the requirements for proving adverse possession of real property under Kentucky law. Again, the response accurately summarized the five essential elements of an adverse possession claim under Kentucky law (open; continuous; exclusive; hostile; and for the requisite time period, which ChatGPT told me was 15 years in Kentucky). Then I asked ChatGPT to provide citations to caselaw for these principles. [After all, lawyers need to be able to provide citations for legal rules and propositions.]

This is where things began to fall apart. ChatGPT responded, “When discussing adverse possession in Kentucky, you may wish to cite the following cases, which have helped to shape the law in this area:

1. *Lee v. Gadd*, 954 S.W.2d 755 (Ky. 1997) – This case clarified the requirement that the possession must be open and notorious, and held that “open and notorious” means that the possession must be visible and apparent, not hidden or secret.
2. *Tingle v. Cox*, 50 S.W.3d 832 (Ky. 2001) - This case clarified the requirement that the possession must be continuous, and held that a break in the continuity of possession will defeat a claim of adverse possession.
3. *Bullard v. Taylor*, 102 S.W.3d 615 (Ky. 2003) - This case clarified the requirement that the possession must be hostile, and held that a claim of adverse possession is only hostile if it is adverse to the true owner’s rights and is made without the true owner’s permission.
4. *Blankenship v. Bowling*, 136 S.W.3d 586 (Ky. 2004) - This case clarified the requirement that the possession must be exclusive, and held that exclusive possession means that the person claiming adverse possession must occupy the property to the exclusion of all others, including the true owner.”¹²

ChatGPT added this disclaimer at the end: “These cases provide a good starting point for discussions about adverse possession in Kentucky, but it is important to note that the law in this area is constantly evolving and that there may be other cases that are relevant to your specific situation. Additionally, these cases may be superseded by later decisions, and the specific details of each case may not apply to every situation. **It is always a good**

idea to consult a qualified attorney to determine how the law applies to your specific circumstances.” (Emphasis added.)

The disclaimer should have said, “These cases may or may not be accurate, and may or may not actually exist.” A quick Lexis search revealed that none of the above citations were correct. In fact, none of the citations ChatGPT provided led to cases from Kentucky, or cases about adverse possession.¹³ Where did ChatGPT get these citations, and why did it think these cases should be cited in a discussion about adverse possession in Kentucky? That is not clear.

Last but not least, I asked ChatGPT to draft a divorce petition for a fictitious Kentucky client (providing some made-up dates and information). Instead of a complaint or petition, ChatGPT drafted a letter to the Judge asking for entry of a divorce decree. Although the letter did reference a relevant statute, KRS § 403.140, the end product was not even close to being ready for filing.

As programs like ChatGPT evolve (based in part on feedback from users), these issues may improve. But even setting aside the issue of accuracy, a lawyer’s use of AI like ChatGPT will likely pose other ethical concerns.

ETHICAL IMPLICATIONS FOR A LAWYER’S USE OF CHATGPT

There are not yet any Kentucky Ethics Opinions specifically discussing a lawyer’s use of AI like ChatGPT. However, there are several

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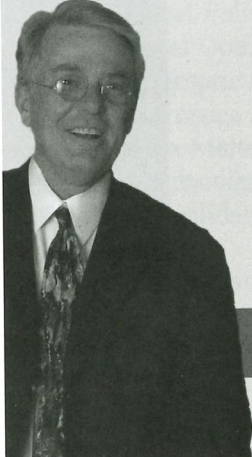
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opinions dealing with similar questions involving a lawyer's use of or reliance upon technology.¹⁴ It is also not hard to imagine how the use of ChatGPT (or similar programs) could implicate several different Rules of Professional Conduct.

First, SCR 3.130(1.6) requires that a lawyer keep client information confidential except when disclosure is permitted under narrow circumstances not relevant here. KBA Ethics Opinions make clear that lawyers have a duty to specifically consider and anticipate breaches of this rule by way of technology.¹⁵ ChatGPT itself warns that information provided by the user will not be kept confidential: "Conversations may be reviewed by our AI trainers to improve our systems. Please don't share any sensitive information in your conversations."¹⁶ Thus, it appears obvious that a lawyer should not provide any client information to ChatGPT.

SCR 3.130(1.1) also requires a lawyer provide "competent representation" to all clients, which the Rule explains means "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." As KBA E-437 explains, Comment 6 to SCR 3.130(1.1) notes that a lawyer must "keep abreast of changes in the law and practice." In 2012, the ABA amended its version of this comment to state specifically that the duty of competence includes the duty to keep abreast of technology. KBA E-437 adds, "While the ABA comment is not controlling, it is helpful."

Interestingly, this Rule could be viewed as requiring lawyers to be aware of, and able to use, technology which may best serve a client's interests. However, the very real possibility of getting false information from programs like ChatGPT means that a lawyer would not be acting as a competent advisor, as required by SCR 3.130(2.1), if he or she relies upon information obtained from ChatGPT which turns out to be inaccurate. The lawyer would also violate SCR 3.130(3.3) and/or SCR 3.130(4.1) if he or she provided the ChatGPT-generated information to the court or a third party, even if the lawyer did not actually realize the information was false. In other words, "ChatGPT told me it was true" will never be a valid excuse.

Additionally, most clients would likely object to the idea that their lawyer – hired and paid to provide adequate legal advice and representation – would simply outsource legal research and writing to a chatbot like ChatGPT. Thus, a lawyer's use of ChatGPT (and other similar programs) seems to present more problems and a greater risk of malpractice claims, at least for now.

ChatGPT apparently acknowledges the limitations of its program, providing the following disclaimer to new users: "While we have safeguards in place, the system may occasionally generate incorrect or misleading information and produce offensive or biased content. It is not intended to give advice."¹⁷ Thus, two things seem reasonably clear for now. First, lawyers should not rely upon ChatGPT for legal research or drafting, nor should they provide any client information to ChatGPT as part of any prompt. Second, AI programs like ChatGPT are not (yet) able to provide accurate legal analysis or advice, meaning that the lawyers of the Commonwealth should not be out of a job anytime soon.

ABOUT THE AUTHOR

DANIELLE J. LEWIS is a Visiting Assistant Professor and Director of Trial and Appellate Advocacy Programs and the Interim Director of the Field Placement Program at Northern Kentucky University Salmon P. Chase College of Law. She is a former partner and Of Counsel in the Louisville, Ky., office of Reminger Co., LPA. She graduated *magna cum laude* from Chase and spent more than a decade as a civil litigator before she began to teach at Chase as an adjunct professor in 2020. She currently teaches Basic Legal Skills – Legal Writing I and II, Legal Methods I and II, the Field Placement and Advance Field Placement seminars, and Judicial Process. Lewis lives in Oldham County with her husband, Ben, and their two children.



ENDNOTES

- 1 The author would like to extend her sincere appreciation to Sheldon ("Shelly") Gilman, a District 4 representative for the KBA Ethics Hotline, for generously sharing his time and valuable insight regarding the ethical implications of lawyers using AI.
- 2 "GPT" stands for Generative Pre-training Transformer.
- 3 This article will not address the use of ChatGPT by students, as that topic is and should be governed by the Student Code of Conduct and applicable policies at each school.
- 4 Atria Innovation, *How does ChatGPT Work?*, January 5, 2023, available at: <https://www.atriainnovation.com/en/how-does-chat-gpt-work/> (last visited February 12, 2023).
- 5 For example, the GPT-3 model was trained using more than 8 million documents and 10 billion words.
- 6 *How does ChatGPT Work?*, *supra*.
- 7 *Id.*
- 8 *Id.*
- 9 See <https://openai.com/blog/chatgpt/> (last visited February 12, 2023).
- 10 ChatGPT's website notes in multiple places that it is "trained to decline inappropriate requests." *Id.*
- 11 See *id.* ("We are excited to introduce ChatGPT to get users' feedback and learn about its strengths and weaknesses. During the research preview, usage of ChatGPT is free.")
- 12 The responses discussed in this article were generated by ChatGPT on or about February 12, 2023.
- 13 The first citation leads to a case from the Court of Appeals of Tennessee (*Werne v. Sanderson*, 954 S.W.2d 742 (Tenn. Ct. App. 1997)), discussing a stockholder dispute and fraud case; the second citation leads to an auto negligence case from the Court of Appeals of Missouri (*Grose v. Nissan N.Am., Inc.*, 50 S.W.3d 825 (Mo. Ct. App. 2001)); the third citation takes one to an opinion from the Court of Appeals of Tennessee (*Slaughter v. Duck River Elec. Mbrshp. Corp.*, 102 S.W.3d 612 (Tenn. Ct. App. 2002)) in a workers compensation/negligence case; and the last citation leads to another opinion from the Court of Appeals of Missouri in a criminal case relating to conviction for possession of a controlled substance (*State v. Clark*, 136 S.W.3d 582 (Mo. Ct. App. 2004)).
- 14 For example, KBA E-437 (2014) discusses a lawyer's use of cloud computing to store confidential client information; KBA E-442 (2017) discusses when and how a lawyer may "reply all" to an email string which includes an opposing party and his counsel; KBA E-446 (2018) addresses what measures a lawyer must take against potential cybersecurity attacks and whether/how a lawyer should advise clients of a potential breach; and KBA E-447 (2019) considers when and how a lawyer may reveal information about a past or current client via social media.
- 15 See e.g., KBA E-437 (2014); KBA E-446 (2018); KBA E-447 (2019).
- 16 Disclaimer provided at: <https://openai.com/blog/chatgpt/> (last visited February 12, 2023).
- 17 Disclaimer provided at: <https://openai.com/blog/chatgpt/> (last visited February 12, 2023).