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Artificial Intelligence and ChatGPT: Friend or foe to the legal profession?

By CNA

ChatGPT is a natural language-based processing tool via a chat bot that allows users to obtain answers to questions and to gain assistance drafting written communications of all sorts. Additional benefits of ChatGPT include automating repetitive tasks and conducting comprehensive data searches within seconds.

For attorneys, a common stated concern is that they are about to be replaced, in whole or in part, by ChatGPT or other similar artificial intelligence (AI) programs, such as Bard, Bing and others that are not yet widely available. However, there are a host of more immediate practical concerns that lawyers need to weigh when contemplating the use of ChatGPT in their law practice. At a minimum, law firms should carefully balance the risks of employing ChatGPT against any expected benefits and obtain informed client consent before using such artificial intelligence on a client matter.

Use ChatGPT in Client Matters Wisely, if at All

Rule 1.1 of the ABA Model Rules of Professional Conduct states, "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[1,2] Further, as the Comments to Rule 1.1 indicate, a lawyer is required to have a basic understanding of the benefits and risks associated with relevant technology and must keep abreast of changes in the law and its practice regarding this technology. As this Rule relates to artificial intelligence and ChatGPT, the challenges of its use must be considered.

First, the technology itself must be evaluated. Attorneys need to have an understanding about what the technology can and cannot provide. This means having basic insight on how artificial intelligence works, knowing the benefits and risks of using the technology, and evaluating how/if its use would be beneficial to the client. While ChatGPT can potentially be used to provide some modest, basic legal research assistance, document drafting, and contract analysis tools that can save lawyers a significant amount of time, it is far from perfect as of the date of this article. The results are often inaccurate, cannot provide attribution[3], and does not yet work well for novel or complex legal issues. Further, ChatGPT has

acknowledged that there is a potential for misinformation, bias, or the possibility for impersonation and creation of false content. In addition, at the start, and similar to a conflicts checking systems, its ability to understand and manipulate the information entered and then to respond is only as reliable as the original data it received. As part of an attorney's duty of technological competence, one needs to learn about the platform so that educated and ethical decisions can be made as to whether and how to use it in a law practice.

Second, vigilance and attentiveness to the results is part of an attorney's duty of competence. ChatGPT itself reminds users that it is their responsibility to verify any information generated by the platform. Remember…it is a machine-learning system and does not have the same level of understanding, analysis, and judgment as a human being when it comes to multifaceted interpretation and evaluation of legal precedent or ascertaining the nuances or complexities of certain legal arguments and principles. Further, ChatGPT does not always provide the most current, accurate, or relevant information. Reliance on potentially inaccurate or incomplete guidance may lead to potential errors or misstatements having real legal significance and consequence to clients, not to mention disciplinary or legal malpractice issues for counsel. Further, just because artificial intelligence (AI) may have generated work product that required little or no editing on one project does not mean you can rely on the same result for a different one. Verifying the accuracy of the information generated by ChatGPT before filing that motion or making that argument is crucial. Finally, this technology is constantly evolving. Given the state of this technology, every statement of law and citation will need to be independently researched and verified. Lawyers must be aware of the latest developments with this technology so that it can advise clients as to whether or not ChatGPT and similar artificial intelligence programs would provide helpful assistance in their legal matters.

Protect Confidential Client Information When Using ChatGPT

As with any other tech product or service utilized in the legal profession, attorneys must assess the benefits and risks associated with using. AI and ChatGPT in particular, is no

different. Inherent in the use of ChatGPT is the input of information in order to generate a desired response from the generative or "conversational" AI. In short, users may type in requests through the ChatGPT website, and in response, the AI powered chatbot will provide surprisingly human-like answers. For lawyers, that can translate into the ability to assist with legal research, email responses, social media posting, document generation and drafting, and beyond. And as this and similar large language models continue to rapidly develop, their applicability to the practice of law seems almost limitless. However, the impacts of ChatGPT's use amongst lawyers must be weighed and assessed specifically in conjunction with lawyers' duties to maintain client confidentiality.

Model Rule 1.6 prohibits lawyers from voluntarily revealing client information, absent informed consent or under certain circumstances. The Rule requires that lawyers take all reasonable measures to protect against disclosure of their clients' information. Comment [2] emphasizes that this duty of confidentiality, in conjunction with other protections such as the attorney-client privilege and the work-product doctrine, is a "fundamental principle in the client-lawyer relationship" which supports the necessity of full and frank communications between lawyers and their clients. Comment [18] to Model Rule 1.6 provides that lawyers are required to "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure…" and refers to related duties owed under Model Rules 1.1 (competence), 5.1 (supervisory responsibilities), and 5.3 (nonlawyer assistance). Further, Comment [19] directs lawyers to take "reasonable precautions to prevent [client] information from coming into the hands of unintended recipients."

Read in the context of ChatGPT and other generative AI, that means first reviewing ChatGPT's terms of use, assessing the type of information prior to inputting it into the chatbot, and avoiding disclosure, both intentional and inadvertent, to the chatbot of confidential and/or privileged information, absent client consent. Such potential disclosure should also be assessed for implications beyond this rule, particularly the implications on (and likely loss of) attorney-client privilege or work-product protection. In that regard, the initial consensus is that entering client information into ChatGPT will waive privilege.[4] Although AI continues to progress, ChatGPT currently lacks the adequate safeguards that form the bedrock foundation of confidentiality.[5] Thus even with their clients' informed consent to use ChatGPT, lawyers should proceed with caution when using generative AI to assist in client matters, and should continually re-assess their use until and even when additional safeguards are in place.

Discuss ChatGPT with Clients and Obtain Their Informed Consent to its Use

In the context of AI and ChatGPT, lawyers should strongly consider how its use and implementation within their firm should be discussed with clients. Model Rule 1.4 addresses lawyers' duties to communicate with their clients. Specifically, Model Rule 1.4(a)(2) requires lawyers to "promptly inform the client of any decision or circumstance with response to which the client's informed consent…is required by these Rules[.]" Further, subsection (a)(2) states that lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished[.]"

Combined, these two establish a duty not only to communicate certain elements of the representation with clients, but to also obtain their informed consent prior to engaging in certain actions. Given the confidentiality concerns described above, lawyers should, at a minimum, consider discussing if, how and when generative AI/ChatGPT may or will be used in the course of the representation. In addition to simply communicating the use of such programs with clients, lawyers should also obtain the informed consent of clients before engaging the use of ChatGPT, given the potential that confidential, privileged, or otherwise protected information may be disclosed outside the attorney-client relationship. In practice, lawyers might consider including provisions or addendums to their engagement agreement regarding their use of generative AI or ChatGPT, which, at a minimum, may help place their clients on notice that such programs will be used, as well as regularly re-assessing the use and protections offered by AI programs and communicating those conclusions with clients.

Supervise ChatGPT as You Would Any Other Non-Lawyer Assistance

Model Rules of Professional Conduct 5.1 and 5.3 address an attorney's obligation to supervise lawyers and nonlawyer assistance to ensure that their conduct complies with the professional obligations of a lawyer. When a lawyer uses nonlawyer assistance, such as artificial intelligence-powered legal research or ChatGPT, that lawyer is bound by Rule 5.3. You may not have thought of it in this manner, but nonlawyers in this context also means non-human, artificial intelligence that must be supervised.

To put it another way, ChatGPT, unlike you, is not licensed to practice law or provide legal services. Comment [3] of that Rule cautions "[w]hen using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."[6] Although the Comment does not specify what constitutes reasonable efforts, attorneys need to perform certain due diligence in order to understand the product's limitations and capabilities, and also to determine whether the use of the technology may result in a violation of the attorney's obligations (e.g., competence, confidentiality, diligence, etc.). As a result of a failure to perform this investigation and appropriately supervise, the firm's lawyers may be vicariously responsible for violation of the Rules caused by the associate's or nonlawyer assistance.

There are a few steps a supervisory lawyer can take to ensure adequate supervision of these non-human, nonlawyers. The supervisor may want to retain an IT expert to vet the artificial intelligence product being contemplated for use by the firm, to look at the firm's current IT capabilities as well as the education and training needed for all staff to effectively use the platform. A supervisory attorney, or any attorney for that matter, must review and vet any content generated by AI that will be included in a motion, pleading, contract, or other document or communication being sent outside the law firm. In addition, as mentioned previously, gaining an understanding of what the platform can and cannot do, understanding the limitations of artificial intelligence-generated documents, and verifying the accuracy of the output, rather than blind reliance, are key in complying with these two Rules.

Conclusion

The true impact of artificial intelligence and ChatGPT on the legal profession is still being written. For now, attorneys must be aware of how the use of ChatGPT would impact their practice, client matters and the ethical concerns that may lead to allegations of legal malpractice.

As with any technology, attorneys must understand how it works in order to be able to explain to clients how their information would be used and maybe even compromised by

using ChatGPT as part of the representation. Attorneys must understand what tasks may be appropriate for ChatGPT and those that should be left to the educated, licensed and well-functioning mind of the attorney. ◼

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[1] *See Steven Lohr, "A.I. Is Coming for Lawyers, Again," New York Times, April 23, 2023; Jenna Greene, "Will ChatGPT Make Lawyers Obsolete? (Hint: Be Afraid)," Reuters, December 9, 2022.*

[2] *Rule 1.1 of the ABA Model Rules of Professional Conduct.*

[3] *ChatGPT has not quite mastered legal citation and may, in fact, include fake cases or case citations. See, https://directory.lawnext.com/ library/ai-and-the-bluebook-why-chat-gpt-falls-short-of-traditional-algorithms-for-bluebook-legal-citation-formatting/. Further, AI has also been found to create "hallucinations" or wild stories that bear no relation to facts or reality. See, https://www.nytimes.com/2023/03/29/technology/ai-chatbots-hallucinations.html*

[4] *See Sayers, F., "ChatGPT and Ethics: Can Generative AI Break Privilege and Waive Confidentiality?", January 26, 2023.*

[5] *ChatGPT's inadequate safeguards have been demonstrated recently through the discovery that users' information and chats with the chatbot were viewable to other uses and were not, in fact, private. See Derico, B., ChatGPT Bug Leaked Users' Conversation Histories. BBC News (Mar. 23, 2023).*

[6] *Comment [3] of Rule 5.3 of the ABA Model Rules of Professional Conduct.*