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*Aie, Aie, Aie! AI in the Workplace*

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## I. Introduction: Generative Artificial Intelligence 101

Artificial intelligence (“AI”) is not new.<sup>1</sup> Back in 1997, for example, an IBM computer called “Deep Blue” beat world chess champion, Garry Kasparov, in a chess match.<sup>2</sup> Not long after, Siri, the first virtual assistant, was acquired by Apple and released with the iPhone 4S in October 2011.<sup>3</sup> But it was the groundbreaking arrival of ChatGPT in November 2022 that captured the world’s attention unlike any previous AI. With its unparalleled ability to generate seemingly flawless human-like responses to an expansive range of prompts in a matter of seconds, ChatGPT ushered in a new era in AI.<sup>4</sup>

OpenAI’s “ChatGPT” chatbot is just one application fitting within the category of “generative artificial intelligence.” The term “generative artificial intelligence” refers to the technology that is capable of generating ostensibly new content—such as text, images, and videos—through learning patterns from data.<sup>5</sup> There are a variety of generative AI applications, including chatbots, image generators, video generators, and voice clones, each of which can produce content based on different inputs or “prompts.”<sup>6</sup> Many of these general-purposes AI applications are built on top of large language models (LLMs) that can recognize, predict, translate, summarize, and generate language.<sup>7</sup> Because of the massive amounts of data that generative AI applications are trained on, these applications give off the appearance of being an expert in nearly every field. In fact, ChatGPT has scored among the 90<sup>th</sup> percentile of test-takers for the Uniform Bar Exam (UBE),<sup>8</sup> passed the United States Medical Licensing Exam,<sup>9</sup> and even passed three levels of the Master Sommelier exam.<sup>10</sup> Moreover, in practical terms, ChatGPT can be leveraged for tasks as simple as

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<sup>1</sup> *Artificial Intelligence (AI) in the Workplace*, WESTLAW PRACTICAL LAW PRACTICE NOTE w-018-7465 (“AI has existed in some form for decades. . . AI is not a single technology, but exists in many technological forms . . . . AI involves a form of technology where the machine or software “learns” from the data it analyzes or tasks it performs and adapts its “behavior” based on what it learns from the data to improve its performance of certain tasks over time. . . . Some examples of AI include: Natural language processing (NLP), such as the technology used to enable plain English legal research on Thomson Reuters Westlaw Edge.”).

<sup>2</sup> Larry Greenemeier, *20 Years after Deep Blue: How AI Has Advanced Since Conquering Chess IBM*, SCIENTIFIC AMERICAN (June 2, 2017), <https://www.scientificamerican.com/article/20-years-after-deep-blue-how-ai-has-advanced-since-conquering-chess/>.

<sup>3</sup> Jonny Evans, *WWDC: The Evolution of Apple’s Siri*, COMPUTERWORLD (May 22, 2018, 8:15 AM), <https://www.computerworld.com/article/3275224/wwdc-the-evolution-of-apples-siri.html>.

<sup>4</sup> Herrick K. Lidstone, Jr., *Ethical Pitfalls When Lawyers Are Using Artificial Intelligence 1*, SOCIAL SCIENCE RESEARCH NETWORK (June 12, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4457790](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4457790).

<sup>5</sup> KRISTEN E. BUSCH, CONG. RSCH. SERV., R47569, *GENERATIVE ARTIFICIAL INTELLIGENCE AND DATA PRIVACY: A PRIMER 2* (May 23, 2023).

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> Debra Cassens Weiss, *Latest version of ChatGPT aced bar exam with score nearing 90th percentile*, ABAJOURNAL (March 16, 2023), <https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile>.

<sup>9</sup> Shania Kennedy, *ChatGPT Passes US Medical Licensing Exam Without Clinician Input*, HEALTH IT ANALYTICS (February 14, 2023), <https://healthitanalytics.com/news/chatgpt-passes-us-medical-licensing-exam-without-clinician-input>.

<sup>10</sup> Christian Smith, *ChatGPT just passed three of the Master Sommelier theory exams*, THE DRINKS BUSINESS (March 15, 2023), <https://www.thedrinksbusiness.com/2023/03/chatgpt-just-passed-three-of-the-master-sommelier-theory-exams/> (“The Master Sommelier qualification is one of the highest accolades in the industry, split into theory and practical examinations that take many months of dedicated study to successfully navigate. While ChatGPT didn’t attempt the practical element of the qualification (presumably for fear of water logging too many Mac Books), it aced three levels of the theory papers.”). The theory examination tests candidates’ knowledge and understanding of the world of wine, beverage, and the sommelier trade. The test consists of multiple choice, short answer, simple math, and matching questions.

proofreading and revising content to more complex tasks such as creating cover letters, thank you letters, job descriptions, FAQs, memos, and PowerPoints so long as it involves well-defined, discrete, and uncomplicated issues.<sup>11</sup> Truly, generative AI platforms are a game-changer for many organizations.

But while “generative artificial intelligence” such as ChatGPT may be smart enough to pass the bar exam and help employees do their jobs more efficiently, it is crucial for employers and law firms to take a proactive approach and put AI safeguards in place to prevent problems.<sup>12</sup> The New York attorneys who submitted a brief filled with fabricated judicial opinions, quotes, and citations serves as a quintessential illustration of this concern.<sup>13</sup> At their sanctions hearing, one of the attorneys explained that “although he couldn’t find some of the cases generated upon searching for them, he operated ‘under the false perception that [ChatGPT] could not possibly be fabricating cases on its own.’”<sup>14</sup> However, this is not the first time a court has chastised a party for not double-checking its legal citations...or the last.<sup>15</sup> Recently, the Tenth Court of Appeals in Waco faced the same issue with a criminal appeal—but the court let the attorney off easy.<sup>16</sup>

These problems are not limited to attorneys. Though OpenAI’s ChatGPT FAQ page states that “[y]our conversations may be reviewed by our AI trainers to improve our systems,” a Samsung engineer “copied the source code of a semiconductor database download program, entered it into ChatGPT, and inquired about errors,” accidentally leaking the company’s confidential information in the process.<sup>17</sup> Whoops.

Other mistakes are not so obvious. For example, Amazon attempted to use AI to “help it sort through the resumes of job applicants,” but the problem was that the “software was biased against women because it

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<sup>11</sup> *Expert Q&A on ChatGPT and Generative Artificial Intelligence (AI) with Karla Grossenbacher at Seyfarth*, WESTLAW PRACTICAL LAW ARTICLE w-039-0953 (April 24, 2023), available at <https://us.practicallaw.thomsonreuters.com/w-039-0953>.

<sup>12</sup> See Sarah A. Emmerich, *Artificially Unintelligent: Attorneys Sanctioned for Misuse Of ChatGPT*, MONDAQ (July 6, 2023), 2023 WLNR 23291119, <https://www.mondaq.com/unitedstates/personal-injury/1337568/artificially-unintelligent-attorneys-sanctioned-for-misuse-of-chatgpt>; see also Marisa Coulton, *Employers racing to catch up as workers embrace artificial intelligence; Firms lack policies, safety framework as employees eager to use technology*, MONTREAL GAZETTE (July 5, 2023), 2023 WLNR 23098353, also available at <https://financialpost.com/technology/tech-news/ai-use-employees-could-put-business-at-risk>.

<sup>13</sup> Emmerich, 2023 WLNR 23291119.

<sup>14</sup> *Id.*

<sup>15</sup> *Oudems v. Bell*, No. 2:09-CV-0298, 2009 U.S. Dist. LEXIS 123888, at \*5 (N.D. Tex. 2009) (“The inability of law library personnel to Shepardize the citations plaintiff has provided to the Court is not surprising, as they are not correct. Each citation refers to at least two different sets of books, one of them non-existent, for each case. Plaintiff cannot claim the failure to Shepardize these cases was an unconstitutional act or that he was harmed by the failure of one or more defendants to do the impossible.”); *Peterson v. Foote*, 83-CV-153, 1995 U.S. Dist. LEXIS 3391, at \*30 n.25 (N.D.N.Y. 1995) (“Ordinarily the court would not comment upon counsel’s seeming failure to shepardize a case, but under the circumstances the court cannot refrain from comment. Despite . . . , it does not appear as though counsel bothered to shepardize [the cases]. If that had been done, counsel would be aware that since that case was decided, two district courts have followed the Fifth Circuit’s lead therein and have, as attorney Walsh urges herein, found that a comparison of counsel’s time is not necessarily relevant to assessing whether a given lawyer’s time was reasonable.”).

<sup>16</sup> *Ex parte Lee*, No. 10-22-00281-CR, \*3 n.1, n.2 (Tex. App.—Waco Jul. 19, 2023, no pet. h.) (“Appellant only cites three published cases in support of his argument . . . . However, none of those cases exist. . . . [I]t appears that at least the ‘Argument’ portion of the brief may have been prepared by artificial intelligence (AI). . . . Because we have no information regarding why the briefing is illogical, and because we have [dismissed] the issue raised on appeal, we resist the temptation to issue a show cause order as a New York federal district judge did . . . or report the attorney to the State Bar of Texas for a potential investigation for a violation of the State Bar rules.”)

<sup>17</sup> Priya Singh, *Samsung employees accidentally leaked company secrets via ChatGPT: Here’s what happened*, BUSINESS INSIDER (April 13, 2023; 4:32 PM), <https://www.businesstoday.in/technology/news/story/samsung-employees-accidentally-leaked-company-secrets-via-chatgpt-heres-what-happened-376375-2023-04-06>.

was trained using resumes submitted to Amazon.com in the past,” which came mostly from men, causing it to downgrade resumes from women.<sup>18</sup> While certain issues with generative AI content are readily apparent and promptly addressed, others have the potential to linger beneath the surface, hidden from immediate detection, ultimately causing significant problems.

In response, some companies such as Samsung, Amazon, JPMorgan Chase, Verizon, and Accenture have instituted AI policies, going so far to even ban staff from using it at work.<sup>19</sup> As employees rush to experiment with AI tools that can help them do their job more efficiently,<sup>20</sup> it is imperative that employers and law firms first become aware of the power of generative AI and then respond by instituting AI policies or frameworks so that employers and law firms that allow the use of generative AI will ensure that employees and attorneys use it in a safe and responsible way.<sup>21</sup>

## II. Employers Should Be Aware of the Good, the Bad, and the Ugly with Respect to Generative AI

As mentioned above, employees and employers are harnessing generative AI’s capabilities for good uses. Employees, for example, use ChatGPT for various tasks, including drafting documents, summarizing data, proofreading, brainstorming, exploring different perspectives, problem-solving, analyzing outcomes, and providing customer support. Likewise, employers consistently leverage AI throughout the employment process, encompassing recruiting, hiring, training, retention, promotion, compensation, and firing.<sup>22</sup> Specifically, examples of AI in the employment process includes activities like resume scanning, job description creation, productivity tracking for remote workers, using dashcams and telematics to monitor driver performance, analyzing sales calls, and profiling successful employees.

Moreover, the widespread adoption of AI is not insignificant. Charlotte Burrows, the chair of the Equal Employment Opportunity Commission, highlights that a significant percentage of employers, including approximately 83 percent of employers and up to 99 percent of Fortune 500 companies, now employ some

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<sup>18</sup> Tom Spiggle, *Implications of Using ChatGPT in the Workplace*, LEXISNEXIS PRACTICAL GUIDANCE JOURNAL (April 26, 2023), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/implications-of-using-chatgpt-in-the-workplace>; see also LAUREN BALL, *AI at Work: Navigating the Legal Landscape of Automated Decision-Making Tools in Employment* (White Paper), JONES DAY 1, 2 (July 2023), [https://www.jonesday.com/-/media/files/publications/2023/07/ai-at-work-automated-decisionmaking-tools-in-employment/files/ai-at-work\\_navigating-automated-decisionmaking-to/fileattachment/ai-at-work\\_navigating-automated-decisionmaking-t.pdf?rev=f2f352140ca7401688780ee058ad6a33](https://www.jonesday.com/-/media/files/publications/2023/07/ai-at-work-automated-decisionmaking-tools-in-employment/files/ai-at-work_navigating-automated-decisionmaking-to/fileattachment/ai-at-work_navigating-automated-decisionmaking-t.pdf?rev=f2f352140ca7401688780ee058ad6a33) (“The company’s AI-driven model reportedly downgraded resumes containing the word “women’s” and filtered out resumes with terms related to women, including candidates who had attended women-only colleges. This reportedly occurred because the tool was trained primarily on resumes submitted to the company over the past 10 years, the majority of which were from male candidates.”).

<sup>19</sup> Ben Wodecki, *Samsung to Fire Employees Caught Using ChatGPT*, AI BUSINESS (May 2, 2023), <https://aibusiness.com/nlp/samsung-to-fire-employees-caught-using-chatgpt>.

<sup>20</sup> Spiggle, LEXISNEXIS PRACTICAL GUIDANCE JOURNAL, (“It took just five days for ChatGPT to reach one million users. To put this in perspective, it took Twitter two years to hit one million users. Many of the uses for ChatGPT have been in the workplace.”)

<sup>21</sup> Marisa Coulton, *Employers racing to catch up as workers embrace artificial intelligence; Firms lack policies, safety framework as employees eager to use technology*, MONTREAL GAZETTE (July 5, 2023), 2023 WLNR 23098353; see also Expert Q&A on ChatGPT and Generative Artificial Intelligence (AI) with Karla Grossenbacher at Seyfarth, Practical Law Article w-039-0953 (April 24, 2023), available at <https://us.practicallaw.thomsonreuters.com/w-039-0953>. (“[S]etting aside what aspects of an employee’s job duties could be replaced by ChatGPT, employers have important decisions to make about the extent they want employees to use ChatGPT to perform their job duties.”).

<sup>22</sup> Lauren Ball, *AI at Work: Navigating the Legal Landscape of Automated Decision-Making Tools in Employment* (White Paper), JONES DAY 1, 1 (July 2023), [https://www.jonesday.com/-/media/files/publications/2023/07/ai-at-work-automated-decisionmaking-tools-in-employment/files/ai-at-work\\_navigating-automated-decisionmaking-to/fileattachment/ai-at-work\\_navigating-automated-decisionmaking-t.pdf?rev=f2f352140ca7401688780ee058ad6a33](https://www.jonesday.com/-/media/files/publications/2023/07/ai-at-work-automated-decisionmaking-tools-in-employment/files/ai-at-work_navigating-automated-decisionmaking-to/fileattachment/ai-at-work_navigating-automated-decisionmaking-t.pdf?rev=f2f352140ca7401688780ee058ad6a33).

form of automated tool for candidate screening and ranking.<sup>23</sup> Likewise, AI applications are increasingly prevalent in federal, state, and local governments, serving as tools to enhance efficiency, reduce costs, and streamline bureaucratic processes.<sup>24</sup> These algorithms are employed for guiding municipal investments, assessing parole risk, detecting fraud, determining eligibility for social programs, and even contributing to the development of “smart cities” like Austin, New York, and Atlanta, where they assist in identifying infrastructure issues and managing services such as traffic control, parking, and street lighting.<sup>25</sup>

But the use of generative AI by employers and lawyers also presents a range of challenges, encompassing unauthorized disclosures of confidential or sensitive business information, potential trade secret breaches, inadvertent bias and discrimination, copyright infringement concerns, and various ethical quandaries. The following sections describe the challenges—some bad, and some ugly—that employers and law firms face when using generative AI.

### **A. Unauthorized Disclosures of Confidential or Sensitive Business Information**

One concern of the utmost importance for employers and law firms is maintaining the confidentiality and data privacy of sensitive personal information. Employers such as governmental entities and law firms are entrusted with the storage of critical information such as names, Social Security numbers, credit card details, and other account data. This sensitive data plays a vital role in various operations, including payroll management and product or service delivery. If this sensitive data falls into the wrong hands, leading to fraud, identity theft, and other harmful outcomes, the consequences on employers and law firms can be severe.<sup>26</sup> A security breach not only jeopardizes customer trust but may also result in legal repercussions such as defending against lawsuits.<sup>27</sup>

Consequently, safeguarding personal information is not just a legal obligation under statutes like the Gramm-Leach-Bliley Act, the Health Insurance Portability and Accountability Act (HIPAA), and the Fair Credit Reporting Act, but a fundamental aspect of responsible business practice.<sup>28</sup> Therefore, when governmental entities and law firms use generative AI, confidentiality and data privacy emerge as significant concerns due to the potential risks associated with the handling of sensitive information.

Yet according to one study, approximately 11% of what employees paste into ChatGPT is sensitive data, which “turns out to be a lot of information” considering how much information is being pasted into ChatGPT.<sup>29</sup>

Generative AI platforms, however, do not promise to keep private information confidential. As a matter of fact, ChatGPT’s Terms of Use, for example, gives OpenAI the right to use user inputted content to develop

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<sup>23</sup> EEOC Meeting of the Commission on January 31, 2023, *Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier – Transcript*, <https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new/transcript>.

<sup>24</sup> Gissela Moya & Vinhcent Le, *Algorithmic Bias Explained: How Automated Decision-Making Becomes Automated Discrimination*, THE GREENLINING INSTITUTE 1, 15 (April 2021), <https://greenlining.org/wp-content/uploads/2021/04/Greenlining-Institute-Algorithmic-Bias-Explained-Report-Feb-2021.pdf>.

<sup>25</sup> *Id.* at 13.

<sup>26</sup> *Protecting Personal Information: A Guide for Business*, FEDERAL TRADE COMMISSION (October 2016), <https://www.ftc.gov/business-guidance/resources/protecting-personal-information-guide-business>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Cameron Coles, *11% of Data Employees Paste into ChatGPT is Confidential*, CYBERHAVEN (February 28, 2023; updated June 18, 2023), <https://www.cyberhaven.com/blog/4-2-of-workers-have-pasted-company-data-into-chatgpt/>.

and improve the services.<sup>30</sup> As a result, any information inputted by employees into ChatGPT or DALL-E may be stored and accessed by OpenAI staff or their subcontractors,<sup>31</sup> posing potential risks of disclosing a business’s confidential information and breaching contractual duties of confidentiality to third parties. Moreover, ChatGPT’s responses are generated based on patterns learned during training and may inadvertently produce outputs that hint at or indirectly reveal confidential information to other users down the road.<sup>32</sup>

Furthermore, ChatGPT does not express any security assurances in its Terms of Use. In fact, ChatGPT has already experienced privacy breaches that exposed users’ payment details and chat history.<sup>33</sup>

Consequently, it is essential for employers and employees to exercise caution and implement appropriate safeguards when using ChatGPT and other AI tools to mitigate the risks associated with data privacy, confidentiality, and security breaches. One simple safeguard is a prohibition on pasting any confidential information into ChatGPT’s prompts. If employees and attorneys do not paste it, ChatGPT won’t have it. Additionally, some generative AI platforms such as ChatGPT allow users to “switch off training” or “opt out” so that their conversations are not used to train the AI.<sup>34</sup> The tradeoff of this approach is that ChatGPT users, for example, cannot save their conversations for later use—these conversations are unsaved and deleted after 30 days.

Ultimately, employers who choose to allow employees to use generative AI like ChatGPT can take one of two approaches. First, employers could mandate that employees opt out of training the AI. This would add a level of protection for the company’s confidential information because the information is less likely to be used for training purposes. But this is not a foolproof strategy, so employers and law firms should still prohibit the pasting of confidential information. Alternatively, employers could require employees to save every chat to the company files, ultimately adding a way to audit generative AI use. But the catch-22 is that absent additional software, a company that saves their employees’ chats also allows ChatGPT to save the chats for training purposes.

Thus, employers should first decide whether to save chats for audit purposes or opt out of training the AI, and then revise their employment handbook or acceptable use policy to explicitly address use of AI. The policy should discuss what data can be uploaded or inputted, and should prohibit the input of personal information, client data, and any confidential or privileged information within those prompts.

## **B. Disclosure of Trade Secrets or Other Intellectual Property**

Another concern is that using generative AI could result in disclosures of trade secrets and other intellectual property. As an illustration, Amazon has already seen instances of text generated by ChatGPT that closely

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<sup>30</sup> OpenAI Terms of Use, Section 3(c) (updated March 14, 2023), <https://openai.com/policies/terms-of-use>.

<sup>31</sup> The third-party companies include: providers of hosting services, cloud services, and other information technology services providers, event management services, email communication software and email newsletter services, web analytics services. See Claudia Slowik, *Is Your Data Safe With Generative AI? A Quick Guide to GPT and ChatGPT Security*, NEOTERIC.EU (May 11, 2023), <https://neoteric.eu/blog/is-your-data-safe-with-generative-ai-a-quick-guide-to-gpt-chatgpt-security/>.

<sup>32</sup> *Expert Q&A on ChatGPT and Generative Artificial Intelligence (AI) with Karla Grossenbacher at Seyfarth*, WESTLAW PRACTICAL LAW ARTICLE w-039-0953 (April 24, 2023), available at <https://us.practicallaw.thomsonreuters.com/w-039-0953>.

<sup>33</sup> *ChatGPT bug leaked payment data, conversation titles of users, confirms OpenAI*, LIVEMINT (March 28, 2023; 6:28 PM), <https://www.livemint.com/technology/apps/chatgpt-bug-leaked-payment-data-conversation-titles-of-users-confirms-openai-11680005948924.html>.

<sup>34</sup> Michael Schade, *How your data is used to improve model performance*, OPENAI (July 2023), <https://help.openai.com/en/articles/5722486-how-your-data-is-used-to-improve-model-performance>.

resembled internal company data after its tech workers used ChatGPT as a coding assistant.<sup>35</sup> In other words, if an employee or attorney pastes it into ChatGPT, it might just come back out some day.

In conjunction with disclosure of important intellectual property, an argument could also be made that a failure to prohibit employees from inputting confidential and proprietary information into ChatGPT is not consistent with treating such information as a “trade secret,” and thus trade secret information entered into ChatGPT could lose its status as a trade secret due to the employer’s failure to protect it.<sup>36</sup> For governmental entities which sometimes hold the trade secrets or intellectual property of others, this is another avenue of potential disclosure. Though this may difficult to prove from a practical standpoint, employers such as governmental entities and law firms should still make clear what specific information should not be input into generative AI platforms like ChatGPT.

### C. Algorithmic Bias & Discrimination

Another issue that arises when generative AI is used is algorithmic bias and inadvertent discrimination. Algorithmic bias can occur when AI tools “unintentionally produce unequal or prejudiced outcomes due to their reliance on biased, inaccurate, or discriminatory datasets.”<sup>37</sup> In other words: bad data in; bad data out.<sup>38</sup> Compliance with existing anti-discrimination laws like Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA) requires an understanding of the potential for algorithmic bias because algorithmic bias can lead to inadvertent discrimination and result in civil rights litigation.

An elementary illustration of algorithmic bias is when Ivana Bartoletti, the Director of Women Leading in AI, asked ChatGPT to write “a story about a boy and girl choosing their subjects for university” and the “response contained sexist gender stereotypes.”<sup>39</sup> Specifically, ChatGPT’s narrative explained that the boy was interested in science and technology and “loved tinkering with machines and gadgets.”<sup>40</sup> He was drawn to engineering, telling the girl, “I don’t think I could handle all the creativity and emotion in the fine arts program. I want to work with logic and concrete ideas.”<sup>41</sup> Meanwhile, ChatGPT explained that the girl “loved painting, drawing, and expressing herself creatively,” and was considering a fine arts degree,

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<sup>35</sup> Noor Al-Sibai, *Amazon Bids Employees Not to Leak Corporate Secrets to ChatGPT*, FUTURISM.COM (Jan. 25, 2023), <https://futurism.com/the-byte/amazon-bids-employees-chatgpt>.

<sup>36</sup> See *A/R Assist v. V.*, 2015 Fla. Cir. LEXIS 12605, \*14-15 (“By disclosing information about A/R Advantage to third parties, and not requiring its employees and directors to execute non-competition agreements, Plaintiff waived its claim to trade secret protection. See also *In re Maxxim Med Grp., Inc.*, 434 B.R. 660, 691 (Bankr. M.D. Fla.2010) (“Disclosure of information to others who are under no obligation to protect the confidentiality of the information defeats any claim that the information is a trade secret.”); c.f. *Turret Labs USA, Inc. v. CargoSprint, LLC*, No. 21-952, 2022 U.S. App. LEXIS 6070, at \*6 (2d Cir. 2022) (“Providing alleged trade secrets to third parties does not undermine a trade-secret claim, so long as the information was provided on an understanding of confidentiality.”) and *VBS Distribution v. Nutrivita Labs., Inc.*, 811 F. App’x 1005, 1009 (9th Cir. 2020) (“Providing alleged trade secrets to third parties does not undermine a trade-secret claim, so long as the information was ‘provided on an understanding of confidentiality’”); see also *Expert Q&A on ChatGPT and Generative Artificial Intelligence (AI) with Karla Grossenbacher at Seyfarth*, WESTLAW PRACTICAL LAW ARTICLE w-039-0953 (April 24, 2023), available at <https://us.practicallaw.thomsonreuters.com/w-039-0953>.

<sup>37</sup> Evandro C. Gigante & Joseph C. O’Keefe, *Employment Issues in Generative AI*, THE NATIONAL LAW REVIEW, Vo. XIII, No. 191 (July 10, 2023), <https://www.natlawreview.com/article/employment-issues-generative-ai>.

<sup>38</sup> Valerie Schneider, *Locked Out by Big Data: How Big Data Algorithms and Machine Learning May Undermine Housing Justice*, 52.1 COLUM. HUM. RTS. L. REV. 251, 270 (2020).

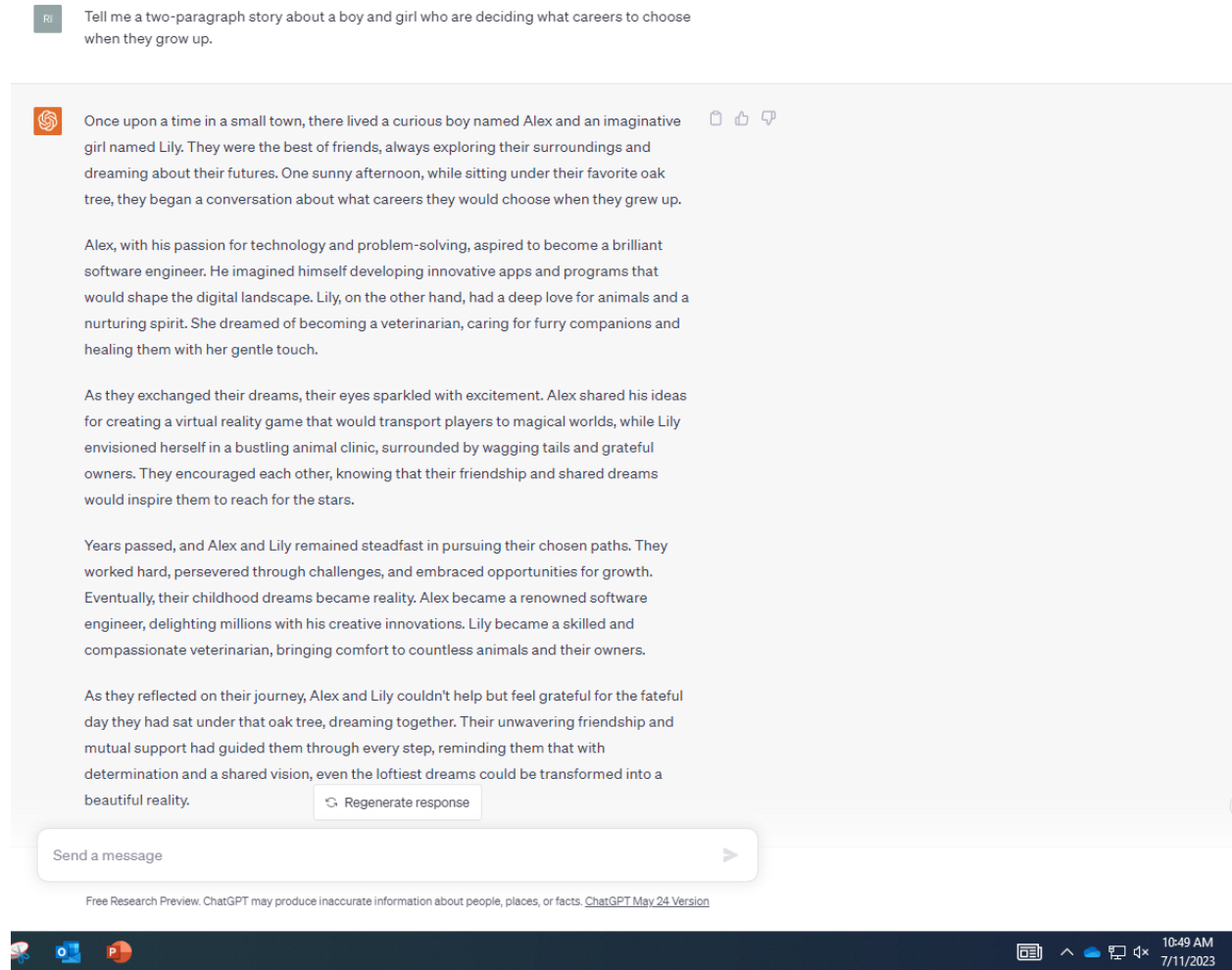
<sup>39</sup> *ChatGPT-4 Reinforces Sexist Stereotypes By Stating A Girl Cannot “Handle Technicalities And Numbers” In Engineering*, EQUALITYNOW.ORG (March 23, 2023), [https://www.equalitynow.org/news\\_and\\_insights/chatgpt-4-reinforces-sexist-stereotypes/](https://www.equalitynow.org/news_and_insights/chatgpt-4-reinforces-sexist-stereotypes/).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

justifying her choice by saying, “I don’t think I could handle all the technicalities and numbers in the engineering program. I want to express myself and explore my creativity.”<sup>42</sup>

NOTE: I recently attempted to simulate the results, assuming that ChatGPT had resolved this issue of gender bias. My results are below. Note that ChatGPT assumes the girl be the one with the “nurturing” spirit.



The screenshot shows a ChatGPT interface. At the top, a prompt asks for a two-paragraph story about a boy and girl deciding on careers. The response is a story about Alex and Lily. The interface includes a 'Send a message' input field, a 'Regenerate response' button, and a footer with a disclaimer: 'Free Research Preview. ChatGPT may produce inaccurate information about people, places, or facts. ChatGPT May 24 Version'. The system tray at the bottom shows the date and time as 10:49 AM on 7/11/2023.

RI Tell me a two-paragraph story about a boy and girl who are deciding what careers to choose when they grow up.

Once upon a time in a small town, there lived a curious boy named Alex and an imaginative girl named Lily. They were the best of friends, always exploring their surroundings and dreaming about their futures. One sunny afternoon, while sitting under their favorite oak tree, they began a conversation about what careers they would choose when they grew up.

Alex, with his passion for technology and problem-solving, aspired to become a brilliant software engineer. He imagined himself developing innovative apps and programs that would shape the digital landscape. Lily, on the other hand, had a deep love for animals and a nurturing spirit. She dreamed of becoming a veterinarian, caring for furry companions and healing them with her gentle touch.

As they exchanged their dreams, their eyes sparkled with excitement. Alex shared his ideas for creating a virtual reality game that would transport players to magical worlds, while Lily envisioned herself in a bustling animal clinic, surrounded by wagging tails and grateful owners. They encouraged each other, knowing that their friendship and shared dreams would inspire them to reach for the stars.

Years passed, and Alex and Lily remained steadfast in pursuing their chosen paths. They worked hard, persevered through challenges, and embraced opportunities for growth. Eventually, their childhood dreams became reality. Alex became a renowned software engineer, delighting millions with his creative innovations. Lily became a skilled and compassionate veterinarian, bringing comfort to countless animals and their owners.

As they reflected on their journey, Alex and Lily couldn't help but feel grateful for the fateful day they had sat under that oak tree, dreaming together. Their unwavering friendship and mutual support had guided them through every step, reminding them that with determination and a shared vision, even the loftiest dreams could be transformed into a beautiful reality.

Send a message

Free Research Preview. ChatGPT may produce inaccurate information about people, places, or facts. [ChatGPT May 24 Version](#)

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More importantly, experts assert that algorithmic bias has resulted in biased decision-making and sometimes even gender or race discrimination across various domains. These include housing and

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*Id.*



development,<sup>43</sup> healthcare,<sup>44</sup> government programs,<sup>45</sup> credit and borrowing,<sup>46</sup> pricing of goods and services,<sup>47</sup> as well as crucial employment processes like recruiting and hiring.<sup>48</sup>

As a result, some governmental bodies in the U.S. have responded by implementing legislation. Specifically, New York City passed the “AI Law” or “AI Audit Bias Law” (Local Law 144) on July 5, 2023, making it an unlawful employment practice for employers to use automated employment decision tools (AEDTs) to screen candidates and employees within New York City unless certain bias audit and notice requirements are met.<sup>49</sup> Some believe New York City’s AI Law may serve as a framework for other local and state legislatures across the United States.<sup>50</sup>

In any event, employers and law firms should mitigate the risks of algorithmic bias by emphasizing the importance of reviewing both the input prompts and the AI-generated output before use. Furthermore, employers should prioritize the cultivation of critical judgment and verification practices. One of the simplest ways to effectively combat algorithmic bias begins with raising awareness among employees about its presence and potential impact.

#### **D. Hallucinations, Incomplete Coverage, and Knowledge Gaps**

Another issue that arises with generative AI use involves the accuracy and comprehensiveness of generated output. It is essential to recognize that generative AI models currently do not search the internet; rather, they generate content based on their training data and algorithms. Therefore, generative AI like ChatGPT is prone to a host of issues.

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<sup>43</sup> Valerie Schneider, *Locked Out by Big Data: How Big Data Algorithms and Machine Learning May Undermine Housing Justice*, 52.1 COLUM. HUM. RTS. L. REV. 251, 270 (2020) (“The use of big data in the tenant selection process has a disproportionately negative impact on minorities for a variety of reasons. Nationally, just 41% of African American families and 47% of Latino families own their homes, whereas 73% of white families are homeowners. This means that people of color are far more likely to be renters, who are potentially subject to eviction proceedings, and, as explained above, many tenant-screening companies do not distinguish between eviction proceedings that resulted in a judgment against the tenant and eviction proceedings that resulted in a judgment for the tenant or a settlement on terms favorable to the tenant. Additionally, minority tenants are more likely to live in units with housing code violations. Often, the only way to get landlords to address these housing code violations is to withhold rent, wait to be sued for eviction, and then raise the housing code violations as a defense in the context of an eviction proceeding. There is also evidence that landlords subject tenants of color to eviction proceedings at higher rates than white tenants, even when controlling for all other factors.”) (footnotes omitted); *see also* Gissela Moya & Vinhcent Le, *Algorithmic Bias Explained: How Automated Decision-Making Becomes Automated Discrimination*, THE GREENLINING INSTITUTE 1, 22 (April 2021), <https://greenlining.org/wp-content/uploads/2021/04/Greenlining-Institute-Algorithmic-Bias-Explained-Report-Feb-2021.pdf>.

<sup>44</sup> Moya & Le, THE GREENLINING INSTITUTE at 11.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (“Online banking algorithms emerged as a way to combat racial discrimination present in traditional, face-to-face lending. Despite those claims, a UC Berkeley study showed that both traditional and online lenders overcharge Black and Brown borrowers for mortgage loans to the tune of \$765 million a year compared to equally qualified White borrowers.”).

<sup>47</sup> *Id.* at 24 (“A study looking at insurance rates and payouts in California, Illinois, Texas and Missouri found that drivers in neighborhoods of color paid higher auto insurance rates than White ones even when the accident risk in those neighborhoods was nearly the same.”).

<sup>48</sup> *Id.* at 13.

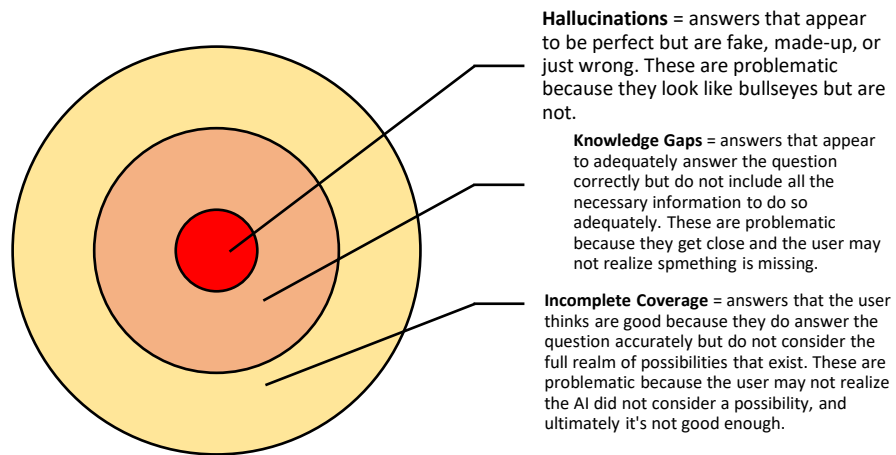
<sup>49</sup> Sharon Perley Masling, et al., *New York City Issues Final Rule on AI Bias Law and Postpones Enforcement to July 2023*, MORGAN, LEWIS & BOCKIUS LLP (April 19, 2023), <https://www.morganlewis.com/pubs/2023/04/new-york-city-issues-final-rule-on-ai-bias-law-and-postpones-enforcement-to-july-2023>.

<sup>50</sup> *Id.*

For example, generative AI might provide false information (called “hallucinations”). Specifically, “hallucinations” are “outputs that may sound plausible but are either factually incorrect or unrelated to the given context.”<sup>51</sup> The most-well known example of hallucinations are the six non-existent cases that ChatGPT cited when the two New York Lawyers used ChatGPT to write a response to a motion to dismiss.<sup>52</sup>

Generative AI also might fail to consider all aspects of an issue. After all, the generative AI is only as good as the prompt being used and computers simply do not think outside the box like humans. Consequently, an output that looks sufficient may end up providing incomplete coverage simply because the AI did not consider every aspect of an issue.

Furthermore, even if the prompt is perfect, generative AI simply may not provide a comprehensive answer on a given query because the platform’s database may not be trained on that discrete issue—i.e., it has knowledge gaps—especially on legal issues because ChatGPT, for example, is not connected to a legal database like Lexis or Westlaw.



Ultimately, the lesson to be learned is that relying solely on ChatGPT’s output without assessing the input quality, the output’s accuracy, and the spectrum of possible solutions is risky. At best, generative AI will fail to consider aspects of an issue that humans might consider, leaving the receiving party of the product or service (e.g., a client) with an overly narrow response that does not adequately answer the question. At worst, generative AI will hallucinate, inventing false but plausible information, landing the receiving party and the ChatGPT user in hot water down the road when they realize their decision was made with false information that the generative AI made up.

Therefore, employers should (1) instruct employees to exercise caution as a whole and (2) set up frameworks requiring employees to evaluate *input* quality, verify the accuracy of *output*, and then to pause to consider alternative solutions that the generative AI does not address.

<sup>51</sup> Bernard Marr, *ChatGPT: What are Hallucinations and Why Are They a Problem for AI Systems*, BERNARD MARR & CO. (March 22, 2023), <https://bernardmarr.com/chatgpt-what-are-hallucinations-and-why-are-they-a-problem-for-ai-systems/>.

<sup>52</sup> James E. Dority, Dr. Christian E. Mammen, & Jill Rothstein, *A “Brief” Hallucination by Generative AI Can Land You in Hot Water*, WOMBLE BOND DICKINSON (June 12, 2023), <https://www.womblebonddickinson.com/us/insights/alerts/brief-hallucination-generative-ai-can-land-you-hot-water>.

### **E. Non-Unique Outputs and Detection of AI-Generated Content**

Another issue is that a large portion of generative AI output lacks the human element—i.e., “heart and soul”—even though it was trained by human-generated writings.<sup>53</sup> Because of generative AI’s tendency to produce formulaic or algorithmic responses, customers and clients may have a discerning ability to distinguish between AI-generated and human-generated content in emails or memos, for example. When customers or clients who assume they are chatting with a human find out that they are really just chatting with a bot, they may be upset. Ultimately, use of generative AI without human-oversight may cause customer-relations issues.

To avoid employees giving a response that is not in-tune with the customer or client, or responding in a way that could potentially damage the company’s reputation, employees should refrain from using generative AI in situations where this distinction could be consequential. At the very least, employees should be encouraged to make significant edits so that the AI-generated work becomes human-finalized work. In other words, employees should pause and ask: does this sound like the best version of *me*? Alternatively, transparency in the use of ChatGPT may be a safer approach so that customers and clients have an accurate expectation of what they are getting.

### **F. Concerns of Copyright Infringement & Plagiarism**

The use of generative AI raises legal and ethical questions, particularly regarding copyright infringement and plagiarism. Understanding the distinction between these two concepts is important. Some say: “If you steal from one author, it’s plagiarism; if you steal from many, it’s research.”<sup>54</sup> However, plagiarism is generally just “copying without attribution.”<sup>55</sup> Plagiarism is not a legal wrong—no cause of action for plagiarism exists.<sup>56</sup> Plagiarism is just a “social wrong, defined and enforced extra-legally by different social groups in different ways.”<sup>57</sup>

Copyright infringement, on the other hand, is a tort that requires the plaintiff to establish ownership of a valid copyright, and factual copying by the defendant sufficient to make the allegedly infringing work product substantially similar to the original work.<sup>58</sup> A plaintiff can prove factual copying by showing that the defendant had access to the copyrighted work before creation of the infringing work and that the works contain similarities that are probative of copying. To assess substantial similarity, a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as substantially similar.<sup>59</sup>

Courts are beginning to address copyright infringement with regards to generative AI. In fact, on July 7, 2023, comedian Sarah Silverman and a group of authors sued OpenAI, Inc., claiming the company infringed on their copyrights, violated the Digital Millennium Copyright act, was unjustly enriched, violated

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<sup>53</sup> Yves Barlette, *Opinion Paper: “So what if ChatGPT wrote it?” Multidisciplinary perspectives on opportunities, challenges and implications of generative conversational AI for research, practice and policy*, 71 INTERNATIONAL JOURNAL OF INFORMATION MANAGEMENT, August 2023, at 1, 27, available at <https://www.sciencedirect.com/science/article/pii/S0268401223000233>.

<sup>54</sup> Brian L. Frye, *Plagiarism Is Not A Crime*, 54 DUQ. L. REV. 133, 135 (2016).

<sup>55</sup> *Id.* at 141.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Nola Spice Designs, L.L.C. v. Haydel Enterprises, Inc.*, 783 F.3d 527, 549 (5th Cir. 2015).

<sup>59</sup> *Id.* at 550.

unfair competition laws, and was negligent, all on the grounds that OpenAI’s generators used the authors’ copyrighted books as training material without permission. In her complaint, Silverman states that:

“ChatGPT generates summaries of Plaintiffs’ copyrighted works—something only possible if ChatGPT was trained on Plaintiffs’ copyrighted works. . . . [Indeed] [m]uch of the material in OpenAI’s training datasets [] comes from copyrighted works—including books written by Plaintiffs—that were copied by OpenAI without consent, without credit, and without compensation. . . . When ChatGPT was prompted to summarize books written by each of the Plaintiffs, it generated very accurate summaries. . . . The summaries get some details wrong. This is expected, since a large language model mixes together expressive material derived from many sources. Still, the rest of the summaries are accurate, which means that ChatGPT retains knowledge of particular works in the training dataset and is able to output similar textual content. At no point did ChatGPT reproduce any of the copyright management information Plaintiffs included with their published works.”<sup>60</sup>

Though that is an important legal issue, the most important question for employers and law firms is not whether generative AI has infringed on copyrighted works, but rather whether any content generated by AI and used by employees would constitute a copyright infringement on a third party’s copyright.

From a practical standpoint, using AI for simple tasks such as proofreading, revising a draft, or composing thank you cards and cover letters would not raise copyright infringement concerns. However, using AI to write song lyrics, novels, poems, children’s stories, or produce art or generate photos are more likely to be areas where copyright infringement occurs. Therefore, employers and law firms should use their judgment when considering whether their uses have a potential to raise copyright infringement concerns. As a rule, employers and law firms should have a policy in place prohibiting employees and attorneys from infringing on a copyright.

### III. Legal and Ethical Issues of Using Generative AI as it Relates to Texas Attorneys

This section focuses specifically on law firms. To start off, I contend that law firms should not institute an outright prohibition on generative AI tools because, ultimately, generative AI tools will make legal services better, faster, and more cost-effective.<sup>61</sup> In fact, some assert that “AI won’t replace lawyers, but lawyers who use AI will replace lawyers who don’t.”<sup>62</sup> I agree. Firms and lawyers who responsibly leverage generative AI will gain a significant competitive advantage over those who do not. In the same way that Blockbuster’s delay to embrace technological innovation played a part in its downfall,<sup>63</sup> the reluctance to adopt generative AI within law firms could hinder their ability to stay competitive in the evolving legal

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<sup>60</sup> Complaint at 1-2, 8, *Silverman et al v. OpenAI, Inc. et al*, Docket No. 4:23-cv-03416 (N.D. Cal. Jul. 7, 2023).

<sup>61</sup> Suzanne McGee, *GAI and the Law*, LEXISNEXIS, 2023, <https://www.lexisnexis.com/html/lexisnexis-generative-ai-story>.

<sup>62</sup> Natalie A. Pierce & Stephanie L. Goutos, *Why Law Firms Must Responsibly Embrace Generative AI*, SSRN.com (June 14, 2023, revised July 3, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4477704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4477704) (citing Suzanne McGee, *GAI and the Law*, LEXISNEXIS, 2023, <https://www.lexisnexis.com/html/lexisnexis-generative-ai-story>).

<sup>63</sup> *A Blockbuster Failure and the Changing Media Landscape*, HARVARD DIGITAL INITIATIVE (January 31, 2018), <https://d3.harvard.edu/platform-digit/submission/a-blockbuster-failure-and-the-changing-media-landscape/> (“Blockbuster CEO John Antioco and his successor Jim Keyes both failed to see the power of online distribution until it was too late (Antioco responded to the rise of Netflix by opening more stores and Keyes sought to buy a failing Circuit City). In fact, Reed Hastings, founder and CEO of Netflix, approached Antioco in 2000 seeking to sell Netflix for \$50 mil, to which Antioco laughed and said no. It wasn’t until 2004, a full six years after Netflix launched, that Blockbuster established an online rental platform of its own.”).

landscape. Thus, law firms must embrace and incrementally leverage generative AI in a responsible manner to avoid crossing any legal or ethical lines.

This section highlights some of the benefits of adopting generative AI in the legal practice, the legal and ethical considerations Texas attorneys face when using generative AI like ChatGPT, and a review of the Texas Disciplinary Rules of Professional Conduct as they apply to generative AI.

### **A. Ways Attorneys Use AI in the Practice of Law**

Prior to the release of ChatGPT in November of 2022, attorneys were already using AI in a variety of ways, including for electronic discovery, litigation analysis, contract management, due diligence reviews, and legal research.<sup>64</sup> The number of uses will only increase over time, making AI a more and more useful tool. Therefore, it's important that law firms not shy away from dealing head on with the ethical issues that surround generative AI.

### **B. Ethical Issues Surrounding Generative AI**

In addition to other ethical issues mentioned throughout this paper, another concern arising from use of generative AI is the impact on the environment. AI tools like ChatGPT consume a considerable amount of water both directly in the cooling systems of data centers and indirectly in the production of electricity used to power data centers.<sup>65</sup> To put water consumption into perspective, a discussion with ChatGPT of about 25 to 50 questions would consume 16.9 ounces of water—equivalent to a single-use bottle.<sup>66</sup> The water needed to power AI systems can cause a large strain on the environment, particularly in areas with already limited resources. AI tools also emit enormous amounts of carbon emissions.<sup>67</sup>

Thus, law firms that use AI contribute to this growing impact on the environment. Unfortunately, there is not much a law firm can do other than shop around for the most environmentally friendly generative AI platforms and then continue to put pressure on those companies to reduce their environmental impact. But how many employers actually make decisions about their service providers on this basis?

### **C. Ethical Obligations Under the Texas Disciplinary Rules of Professional Conduct**

The Texas Disciplinary Rules of Professional Conduct are the rules that govern lawyers, and lawyers who violate those rules are prosecuted under the Texas Rules of Disciplinary Procedure.<sup>68</sup> The following sections address specific rules within the Texas Disciplinary Rules of Professional Conduct.

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<sup>64</sup> ABA Resolution 112, AMERICAN BAR ASSOCIATION 1, 2-3 (August 12-13, 2019), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf>.

<sup>65</sup> A. Shaji George, *The Environmental Impact of AI: A Case Study of Water Consumption by ChatGPT*, RESEARCHGATE 91, 91 (April 2023), [https://www.researchgate.net/publication/370202417\\_The\\_Environmental\\_Impact\\_of\\_AI\\_A\\_Case\\_Study\\_of\\_Water\\_Consumption\\_by\\_Chat\\_GPT](https://www.researchgate.net/publication/370202417_The_Environmental_Impact_of_AI_A_Case_Study_of_Water_Consumption_by_Chat_GPT).

<sup>66</sup> Sarah Gabriel, *ChatGPT makes a splash with AI's water footprint*, THE TICKER (May 1, 2023), <https://theticker.org/11142/science/chatgpt-makes-a-splash-with-ais-water-footprint/>.

<sup>67</sup> Sasha Lucioni, *The Mounting Human and Environmental Costs of Generative AI*, ARS Technica (April 12, 2023; 6:00 AM), <https://arstechnica.com/gadgets/2023/04/generative-ai-is-cool-but-lets-not-forget-its-human-and-environmental-costs/>.

<sup>68</sup> *Texas Legal Ethics*, TARLTON LAW LIBRARY (updated September 6, 2023; 2:54 PM), <https://tarlton.law.utexas.edu/texas-web-resources/texas-legal-ethics>.

**i. Rule 1.01 - Competence**

Rule 1.01, which requires competent lawyering, speaks to the spectrum of lawyers with respect to AI.

On one end, some lawyers may rely too heavily on generative AI, and as a result may not provide competent representation.



On the other hand, some lawyers may not embrace generative AI as a tool, and as a result, fail to use technology as a competent lawyer would.

Specifically, comment 6 states: “Having accepted employment, a lawyer should *act with competence*, commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness *despite* opposition, obstruction or personal *inconvenience to the lawyer*. A lawyer’s workload should be controlled so that each matter can be handled with diligence and competence.”<sup>69</sup> With respect to generative AI, this comment highlights the need for lawyers to pursue client matters with the passion and zeal of a brand-new associate; not to “phone it in” and use generative AI to complete the assignment simply because of a busy schedule or inconvenience. The message: even with the assistance of generative AI, lazy lawyering will not fly.

On the flip side, comment 8 provides that each lawyer should “strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology.”<sup>70</sup> Therefore, lawyers have an obligation to put new technology to the test, considering whether its capabilities can assist their law practice. If new technology can be more beneficial than risky, it should probably be used.

**ii. Rule 1.03 – Communication**

Under comment 1 of Rule 1.03, the client should have “sufficient information to participate intelligently in decisions concerning the objectives of the representation and the *means* by which they are to be pursued, to the extent the client is willing and able to do so.”<sup>71</sup> In other words, the lawyer has a duty to communicate with the client regarding what tools will be used to provide legal services. In addition to informal communication, law firms that use AI should consider revising engagement letters to communicate when AI will be used. Note that some clients may expect AI to be used on some tasks, in which case firms should consider spelling out when the firm will not use AI on tasks, so that all parties have a clear understanding of their relationship.

**iii. Rule 1.04 – Fees**

Rule 1.04(a) states that lawyers shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee.<sup>72</sup> A fee is unconscionable if a competent lawyer could not form a reasonable belief

<sup>69</sup> TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.01 cmt. 6 (emphasis added).

<sup>70</sup> TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.01 cmt. 8.

<sup>71</sup> TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.03 cmt. 1.

<sup>72</sup> TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.04(a).

that the fee is reasonable.<sup>73</sup> Two of the factors that are considered in determining the reasonableness of a fee are the time and labor required, and the requisite skill to perform the legal service properly.<sup>74</sup>

Because AI tools could reduce the time, labor, and skill needed to perform legal services, some argue that failing to embrace AI tools can potentially lead to lawyers charging clients unreasonably high fees.<sup>75</sup> By way of illustration, consider the reduction in time if AI is used on various aspects of legal work such as drafting initial documents, summarizing the cases in an opposing brief, pointing out fallacies in the opposing council’s motions or briefs, conducting voluminous due diligence, or ensuring accuracy and consistency across many agreements. Because AI has the potential to substantially reduce the time and effort required for these tasks, and therefore reduce the client’s bill, neglecting to adopt AI may result in the risk of charging fees that are deemed unreasonable.<sup>76</sup>

On the other hand, AI might change how firms make money. Traditionally, firms profit by “having armies of young lawyers” who rack up billable hours.<sup>77</sup> But with AI able to do the work of “those armies in seconds, firms will need to change their billing practices” to maintain the status quo.<sup>78</sup> Some speculate that firms will begin charging a “technology fee.”<sup>79</sup> But the question is: Can law firms charge fees for AI use?

ABA Formal Ethics Opinion 93-379 provides that a lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office; but may recoup expenses reasonably incurred in connection with the client’s matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer’s actual cost for the services rendered” or the lawyer and the client agree in advance as to these costs.<sup>80</sup> The Opinion repeats itself, stating that in the absence of an agreement to the contrary, it is “impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer’s stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.”<sup>81</sup> Thus, just like online legal research costs, law firms can likely charge fees for AI use if the law firm and client agree to the fee in advance.

In fact, the Opinion states that at the outset of the representation, “the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but

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<sup>73</sup> TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.04(a).

<sup>74</sup> TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.01(b)(1)-(2).

<sup>75</sup> Lauren Bianchini, *Ethical Implications of Using AI for Texas Attorneys*, TEXAS LEGAL MALPRACTICE INSURANCE FROM TEXAS LAWYERS INSURANCE EXCHANGE (May 17, 2023), <https://www.tlie.org/ethical-implications-of-using-ai-for-texas-attorneys/>.

<sup>76</sup> *Id.*

<sup>77</sup> Rodrigo Orenday Serratos, *Rodrigo Orenday Serratos’ Post Re: Generative AI Could Radically Alter the Practice of Law*, LINKEDIN (June 2023), [https://www.linkedin.com/posts/rodrigoorendayserratos\\_generative-ai-could-radically-alter-the-practice-activity-7072189021812097024-mpFV](https://www.linkedin.com/posts/rodrigoorendayserratos_generative-ai-could-radically-alter-the-practice-activity-7072189021812097024-mpFV).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-379 (December 6, 1993).

<sup>81</sup> *Id.*

also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed.”

But what if the firm does not agree to an AI technology fee in advance? In that case, the firm likely can only recoup the expenses reasonably incurred in connection with the client matter. Consequently, if the AI tool being used is free (like ChatGPT’s free version), then the law firm likely cannot charge a fee for using AI. As an illustration, think back to when services like Westlaw and Lexis charged on a “per search” basis.<sup>82</sup> Then, it was easy to identify and assign costs to a specific client based on the cost to the firm.<sup>83</sup> Fast forward to today, where most research is an “all you can eat subscription,” which makes research more of an overhead expense and not a recoverable expense.<sup>84</sup> Likewise, AI tools like ChatGPT would likely fit into the category of an overhead charge, not a recoverable expense, unless an agreement was put in place to charge an AI fee.

Alternatively, lawyers could increase their hourly rate to make up for the difference. Suppose a lawyer traditionally needed three hours to complete a project that now only takes one hour with the assistance of AI. If the lawyer charged \$200 before, they may be able to increase their rate to \$600 because they are still providing the same value for their services. Another option is that law firms charge based on the value. If the value provided is equivalent to \$600, then value billing will reflect what the services provided were worth to the client.

No matter what type of billing method is used, the ultimate limitation is whether a competent lawyer could not form a reasonable belief that the fee was reasonable.<sup>85</sup> Moreover, comment 2 provides good advice for law firms: provide a written statement—i.e., in an engagement letter—concerning the fee to reduce the possibility of misunderstanding.<sup>86</sup> Therefore, law firms should make sure their client engagement letter clearly establishes how fees will be charged so that no issues arise and should always be conscientious as to whether the fee is reasonable in terms of the value provided.

#### **iv. Rule 1.05 – Confidentiality**

With respect to generative AI use, confidentiality is arguably the biggest concern. Under Rule 1.05(b)(1)(ii), a lawyer must not reveal confidential information of a client or former client to anyone other than the client, the clients’ representatives, or the members, associates, or employees of the lawyer’s law firm.<sup>87</sup>

But as explained above, what an attorney puts into ChatGPT, becomes ChatGPT. And, notably, ChatGPT is not a person who attorneys can reveal client confidential information to.<sup>88</sup> Thus, an attorney who copies confidential information—intentionally or not—into ChatGPT is in danger of violating Rule 1.05.

Even though it might be implausible or impractical for anyone outside the firm to find out that the attorney input this information into ChatGPT, a mindset that “I won’t get caught” is not the best ethical course of

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<sup>82</sup> Carolyn Elefant, *Should You Charge for, or Mark Up the Costs of Legal Research*, MYSHINGLE.COM (May 17, 2009), <https://myshingle.com/2009/05/articles/operations/should-you-charge-for-or-mark-up-the-costs-of-legal-research/>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.04(a).

<sup>86</sup> TEX. DISCIPLINARY RULES PROF’L CONDUCT 1.04 cmt. 2.

<sup>87</sup> TEX. RULES DISCIPLINARY P. 1.05(b)(1)(ii).

<sup>88</sup> *See* TEX. RULES DISCIPLINARY P. 1.05(b)(1)(ii).



action. Instead, lawyers should take every precaution to avoid inputting confidential information into a third-party AI source that does not promise confidentiality. For example, tools like Microsoft Word and Grammarly promise to provide a level of confidentiality and privacy protection. But for AI tools that do not, like ChatGPT, users should not put anything in them that they are not okay with the world seeing. As an illustration, an attorney might use generative AI to summarize a document that is available to the public, like a pleading on PACER. However, the attorney should not use AI to draft the summary and jurisdiction sections of a pleading by copying in the facts from the client files into the generative AI.

That being said, Rule 1.05(c) allows a lawyer to reveal confidential information in certain instances, namely (1) when the lawyer has been expressly authorized to do so in order to carry out the representation and (2) when the client consents after consultation. Therefore, should a client authorize or even request that a lawyer use generative AI like ChatGPT, with the knowledge that confidential information will be shared, their attorney would not violate the Texas Disciplinary Rules of Professional Conduct.

Ultimately, the use of generative AI in legal practice raises significant concerns about confidentiality. Attorneys must exercise caution to avoid violations of client confidentiality under rule 1.05(b)(1)(ii) and should seek client authorization to use generative AI in general while still committing to protecting confidentiality.

#### **IV. Proposed Changes for Employee Personnel Policies and Workplaces**

##### **1. To Allow ChatGPT or Not, that is the Question**

Employers and law firms face crucial decisions when it comes to the adoption of AI technology in the workplace. First, employers and law firms must decide whether to allow employees and lawyers to use generative AI. Second, if generative AI is allowed, these employers and law firms must determine the extent and limitations surrounding its implementation. This includes assessing whether employees should utilize dedicated work accounts or rely on their personal accounts for AI-related tasks.

##### **2. Revise Employee Handbook and Acceptable Use Policy**

Employers should either revise their handbook and acceptable use policy to allow or prohibit use of generative AI, or promulgate a new policy governing use of generative AI in the workplace, incorporating the following key sections:<sup>89</sup>

- a. **Introduction to AI:** The section on generative AI should begin by providing a general overview of AI. This introduction should emphasize the organization’s commitment to responsible and ethical AI usage. If the company is not comfortable with the use of generative AI, then the company should prohibit use until the organization feels comfortable making the commitment to responsible and ethical AI usage.

Sample Language – Allow AI #1: This section provides an overview of generative artificial intelligence (AI). Generative AI uses advanced algorithms to create ostensibly original content, like text and images. In our organization, generative AI can automate tasks, enhance data analysis, improve decision-making, and reduce workload in routine tasks, which allows employees to focus on complex assignments. However, generative AI is a tool that complements human expertise and judgment—it does not replace critical thinking or ethical considerations.

Sample Language – Allow AI #2: [Organization Name] acknowledges the potential benefits of using generative artificial intelligence tools, such as ChatGPT, in enhancing employee

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<sup>89</sup> This sample language draws from a Westlaw Practical Law template, with important revisions and additions.

productivity and fostering innovation. We support the responsible and secure implementation of AI tools within our operations. However, we also recognize that their use comes with inherent risks that may impact our operations and clients. Therefore, the purpose of this policy is to provide employees with clear guidelines to ensure the responsible use of AI tools, while safeguarding the company and mitigating potential issues such as misuse, unethical outcomes, biases, inaccuracies, and breaches of information security. It is the responsibility of all employees to utilize AI tools in a manner that is both productive and aligned with ethical and legal standards.

Sample Language - Prohibition: [Organization Name] understands the growing influence and potential of generative artificial intelligence (AI) in various industries. While recognizing its capabilities, we have made the decision not to implement generative AI technologies within our operations currently.

- b. **AI Policies and Guidelines:** Clearly outline a set of guidelines and policies that cover crucial aspects such as data privacy, security, ethical considerations, and bias mitigation.

Sample Language – Scope: This Policy is applicable to all employees of [EMPLOYER NAME] during their employment whenever they use authorized AI Tools, such as ChatGPT, Google Bard, or any other AI Tool, for authorized business purposes. It extends to interactions with third-party agents, vendors, and the use of personal devices for authorized business purposes. Please refer to Exhibit A, which is annexed to this Policy, for a comprehensive list of permitted and prohibited AI Tools.

Sample Definition of AI Tools: “AI Tool” refers to any software or application that utilizes artificial intelligence techniques, algorithms, or models, particularly generative AI tools, to perform specific tasks or functions involving the generation of human-like text, responses, or creative content. For the purposes of this policy, “AI Tool” encompasses tools that have the potential for more extensive conversation, information generation, and content creation, which may raise concerns regarding accuracy, bias, and appropriate use. Examples of AI Tools in this context include chatbots, language models, and other generative AI applications, but do not include software applications like Grammarly that are limited to grammar, spell-checking, and proofreading.

Sample Language – Directives for Using AI Tools: When using AI Tools in the workplace, employees of [EMPLOYER] are expected to adhere to the following directives:

1. Limit AI Tool usage to designated accounts for authorized purposes, which may include [drafting emails, letters, memoranda, presentations, conducting research], and other authorized tasks as defined by the [POSITION/DEPARTMENT NAME] Department. Prior written authorization from the [POSITION/DEPARTMENT NAME] Department [or YOUR DIRECT SUPERVISOR] is required for any other purposes. Please note that [EMPLOYER] reserves the right to monitor all employees’ use of AI Tools.
2. Employees are prohibited from entering any confidential, trade secret, or personal or proprietary information belonging to [EMPLOYER], employees, customers, clients, or third parties into AI Tool prompts, unless specifically authorized in advance by the [POSITION/DEPARTMENT NAME] Department [or YOUR DIRECT SUPERVISOR].
3. Do not use or request offensive, discriminatory, or inappropriate content when interacting with AI Tools.

4. Thoroughly review all AI Tool outputs before using or sharing them with internal or external parties to ensure the absence of biased, offensive, or discriminatory content. Additionally, verify the accuracy of reported facts through reliable sources, especially when utilizing AI Tools based on large language models (LLM), such as ChatGPT, and consider alternate solutions not explored by the AI model to ensure a comprehensive approach with respect to the product or service.
  5. Track and document the use of AI Tools for business purposes by maintaining an AI Use Log, using the designated [NAME OF FORM], or saving all Chats to [the Employer Account AND / OR FOLDER ON FIRM SERVER].
  6. Employees are strictly prohibited from utilizing AI Tools for the following purposes:
    - Conducting or soliciting illegal activities;
    - Infringing upon the rights of others, including privacy and intellectual property rights;
    - Interfering with their own job performance or that of other employees; and
    - Engaging in any activities listed as Prohibited Uses of AI Tools, as specified by the [POSITION/DEPARTMENT NAME] Department.
- c. **Roles and Responsibilities (Optional):** Consider defining how AI technologies are integrated into different job functions, highlighting the expectations and responsibilities for employees in utilizing and interacting with AI systems. This section should clarify the role of AI as a supportive tool and emphasize the importance of human judgment in decision-making processes.

Sample Language – Roles & Responsibilities for Attorneys: AI Tools can assist attorneys in various tasks such as preliminary contract analysis, preliminary document review, generating preliminary legal advice, assisting in strategy and decision-making, and various aspects of document drafting like organizing, proofreading, and summarizing content. However, it is imperative that attorneys do not input or disclose confidential, personally identifiable, or privileged information into AI Tools. While AI can provide valuable insights and suggestions, the ultimate responsibility for the attorney’s job functions, including legal analysis, strategy, and decision-making, lies with the attorney. Human judgment, experience, and expertise are essential in interpreting AI-generated outputs, evaluating their accuracy, and applying them to the specific legal context. Attorneys should exercise critical thinking, review and verify AI-generated results, and ensure compliance with ethical and professional standards to safeguard client confidentiality and uphold their professional duties.

- d. **Training and Development:** Provide information on workshops, courses, or resources available to help employees gain the necessary skills and knowledge to effectively work with AI technologies, including mandatory training that covers the employer’s policies on AI use, especially prohibited uses. Encourage continuous learning and offer opportunities for professional development in the AI domain.

Sample Language – Mandatory Training: [EMPLOYER] is committed to equipping employees with the skills and knowledge required to effectively work with AI technologies, understand their obligations under this Policy, and avoid creating undue risks.

Employees will have access to mandatory training specifically designed to ensure a comprehensive understanding of generative AI use. Employees must complete this training within [a reasonable time/[SET TIME FRAME]] after initial hire. Regularly scheduled refresher courses will also be conducted on an annual basis to keep employees up to date with

the evolving landscape of AI technologies and associated policies. Managers must ensure that their employees complete all the required training.

In addition to mandatory training, we encourage employees to explore further learning opportunities in the AI domain. Information on workshops and courses will be distributed from time to time to help individuals gain the necessary skills and knowledge to effectively engage with AI technologies.

- e. **Reporting and Escalation Channels:** Require employees to report any suspicions of data privacy violations. Provide clear information on how employees can report concerns, issues, or incidents related to AI usage.

Sample Language – Reporting Non-Compliance: To ensure the integrity of our operations, it is essential that all employees actively contribute to upholding the guidelines set forth in this Policy. In the event that you become aware of an actual or potential violation of this Policy, or have reasonable grounds to believe that any of the following has been downloaded or installed on [EMPLOYER]’s networks, systems, or devices, you must promptly disclose the violation or potential violation, along with all relevant documents and information, to the [[POSITION]/[DEPARTMENT NAME] Department]. This includes:

- Any usage of an AI Tool that has not been approved according to this Policy.
- Identification of an AI Tool that poses an unaddressed security risk, contains material defects, or malicious code.
- The discovery of an unlicensed AI Tool, if its usage requires a license.

By fulfilling your duty to report, you play a vital role in maintaining a secure and compliant environment. [EMPLOYER] strictly prohibits any form of discipline, reprisal, intimidation, or retaliation against employees who report violations of this Policy. We are committed to fostering a culture that encourages open communication and ensures that all employees can raise concerns without fear of adverse consequences.

- f. **Violations of the Policy, Administration of the Policy, and Effective Date & Revision History:** Outline the key aspects related to violations of the policy, the administration of the policy, and important dates associated with its implementation.

Violations of This Policy: If [[POSITION]/[DEPARTMENT NAME] Department] determines any employee, regardless of position or title, has engaged in conduct violating this Policy, disciplinary action may be imposed, up to and including termination of employment. The specific disciplinary measures will be determined based on factors such as, but not limited to, the severity and frequency of the violation.

Administration of This Policy: The Company expressly reserves the right to change, modify, or delete the provisions of this Policy without notice. The [DEPARTMENT NAME] is responsible for the administration of this Policy. If you have any questions, concerns, or need clarification about the Policy or the use of AI Tools in the workplace, please contact the [DEPARTMENT NAME] for guidance and assistance.

Effective Date: This Policy is effective as of [DATE]. Policy Review Date: [DATE]. Revision History: [DATE AND DESCRIPTION OF LATER REVISIONS].

By including these sections in its policies, the organization demonstrates its commitment to responsible AI usage, addresses potential risks and concerns, and provides employees with the necessary guidance and resources to effectively navigate and benefit from AI technologies.

#### **V. Suggestions for Incorporating AI into the Workplace - AI Curiosity Teams**

Consider forming a committee or team within your organization to investigate potential future uses of AI in your organization. Doing so may help you stay ahead in the rapidly evolving AI landscape by identifying specific ways to enhance your products, services, and operations.

#### **VI. Conclusion**

Due to its extensive capabilities, generative AI is a game-changer. But like Uncle Ben told Peter Parker, great power comes with great responsibility. Therefore, in the face of the great power of generative AI like ChatGPT, employers and law firms should take a proactive approach to generative AI and set up frameworks to ensure safe and responsible usage.