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Friend or Foe – AI’s Invasion of the Legal Battlefield

BY KSENIA KHLYSTOVA-GOWDA / ON APRIL 17, 2023

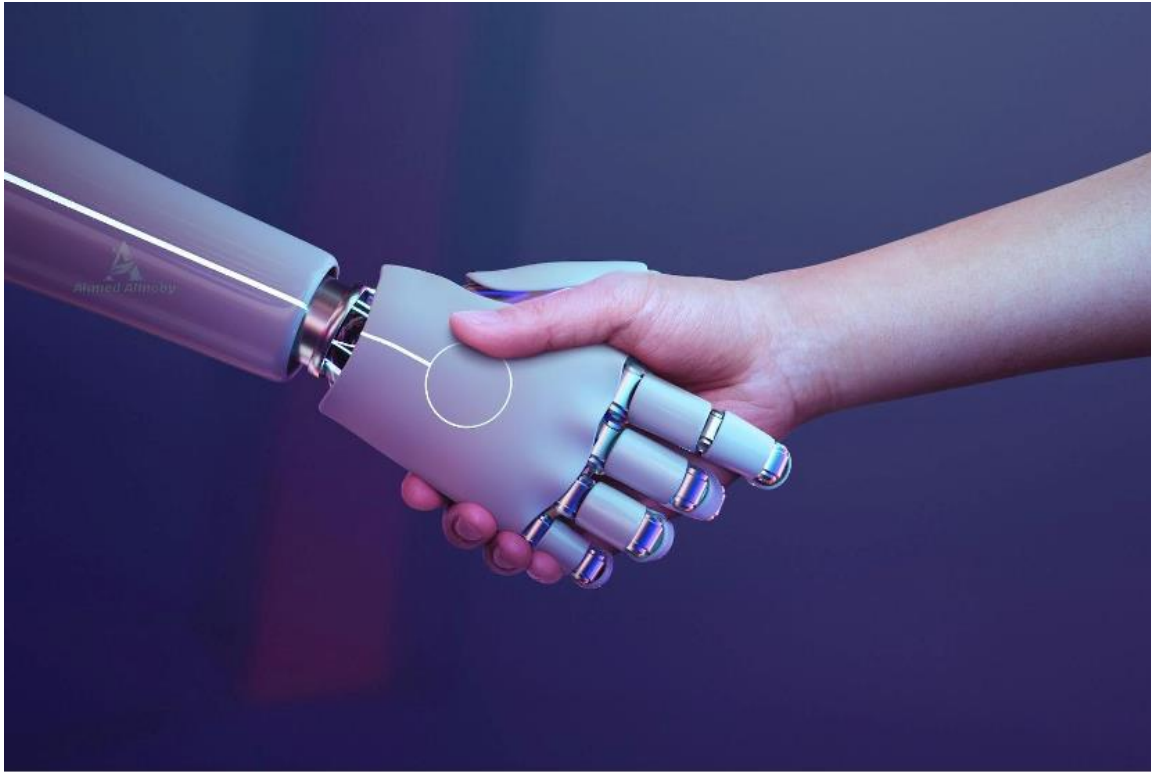


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A few decades ago, legal practitioners spent countless hours amidst towering piles of physical text, carefully drafting handwritten briefs for their clients. Since the late twentieth century, this old-fashioned practice has become modernized, beginning with the transition from typewriters to computers, the introduction of online legal research databases, and recently with the use of online court hearings during the COVID-19 pandemic ¹ Today, the legal profession is in the midst of its most recent technological booster, as artificial intelligence (“AI”) has become mainstream and begins its inevitable assimilation with the industry. However, AI technology presents different consequences and concerns due to its rapid development and a disconcerting fear of what it could ultimately mean for lawyers around the world.² Most recently, news of the first robot scheduled to appear in court received so much backlash, that its creator postponed the appearance due to fear of criminal prosecution.³ Moreover, one of ChatGPT’s latest iterations claims the ability to pass the Uniform Bar Exam (“UBE”), achieving a score in the 90th percentile of human test-takers.⁴

As the use of AI in legal settings raises significant ethical, legal, and technical concerns, it is imperative to provide a comprehensive account of the potential

issues in order to effectively address them. Certainly, there is a need for government intervention, to provide a democratically selected framework for AI.⁵ However, as with all other forms of technology, AI is a tool, so lawyers who adopt and perfect its early usage will surely find themselves ahead of the curve on what is likely to become the new norm for the legal industry.

Section 1 – Benefit to Clients – Access to Legal Services

In a nation with more than 330 million people, there are only 1.3 million lawyers,⁶The Unmet Need for Legal Aid, LSC Am.'s Partner for Equal Just., <https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid> [https://perma.cc/TY7N-E47T].^[/efn_note] Technology, and the internet, has played a role in reversing that discrepancy. One example is the rise of companies like Nolo and LegalZoom,⁷ which are designed to help users generate legal documents without the need, or the cost, of an actual lawyer.⁸ Some argue that this access is counterproductive and, in fact, not in the best interests of individual clients.⁹ After all, there is no personal connection in this situation, and certainly no attorney-client dynamic, much less is there any legal screening process.¹⁰

Quite plainly, the market these companies occupy is one that rightly belongs to and is safeguarded by those who attended law school and passed the relevant bar exam.¹¹ However, these companies are able to exist because of the low costs they offer.¹² Instead, imagine a future where legal professionals harness the power of AI to draft legal documents adroitly and affordably, with clients able to conveniently provide necessary information via secure online portals and opt for cost-effective review services before receiving the final product.¹³ Such a business model would only cost clients slightly more than the services provided by Nolo and LegalZoom.¹⁴ For clients seeking the invaluable combination of legal acumen and empathetic guidance in their representation, the slightly higher cost of retaining a human lawyer is a justifiable investment, as it affords a uniquely personalized and nuanced approach that transcends the limitations of automated chatbots.¹⁵ As clients engage in question-and-answer sessions, the potential for increased billable hours becomes more likely, exemplifying the “foot-in-the-door” sales tactic.¹⁶

This hypothetical is likely achievable with the assimilation of AI, as its use will allow lawyers to do work more efficiently, thereby spending less hours per client. Less time spent with each individual client will likely allow firms more time to acquire new clientele, leading to greater overall profits and larger referral pools.¹⁷ Furthermore, as the cost of legal services adjust, it is likely that more clients will look to acquire legal assistance than before because of this increased accessibility, affordability, and retained human interaction.

Issue 2 – Benefits to Lawyers – With Great Power Comes Great Responsibility

Today, almost all legal research is done using online legal databases like WestLaw and Lexis.¹⁸ However, these services are amplified with the integration of AI, by companies like ROSS and now ChatGPT.¹⁹ Able to sift through thousands of legal decisions in minutes, AI can determine what legal precedents have been cited most often to produce a desired result, it can help determine what cases an opponent may cite to, and, perhaps as a result, help guide precedent.²⁰

A commonly used form of AI already exists in Casetext, CoCounsel's AI legal assistant.²¹ Casetext purports to be used by over 10,000 law firms, including firms of all sizes, from solo practitioners to BigLaw firms.²² Among the reviews on their website are lawyers swearing by the technological advancement, their comments praising the ability of CoCounsel to do work that would require several attorneys working countless hours (e.g. reviewing boxes of documents), to the ability to spend this time on better things like developing greater attorney-client relations.²³ This further bolsters the benefits of the hypothetical discussed in Section 1, through the use of AI, lawyers are able to focus on more human-demanding tasks like creating nuanced legal arguments, giving bigger clients more attention, and building their brand.²⁴

Realizing that the use of AI in law needs some guidelines, the ABA initially stated the following:

*[T]he American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law including (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.*²⁵

Essentially, the ABA adopts the usage of AI but makes it clear that "[l]awyers must not only advise clients [of its usage] but also contend with legal, ethical, business, and malpractice risks involved in deploying AI in their practices."²⁶ Furthermore, the ABA recently adopted a new resolution holding individuals and organizations that develop, deploy, and use AI systems and capabilities accountable for the consequences caused by the use of AI systems, unless they have taken reasonable steps to mitigate against that harm or injury.²⁷

This framework has been endorsed by many who currently incorporate AI, including the firm Allen & Overy, with guidance from David Wakeling,²⁸ who witnessed the use of AI blossom to the point that "one in four [of their attorneys] . . . now uses the AI platform every day."²⁹ The policy adopted by that firm is quite

clear, as Mr. Wakeling articulated, “[lawyers] must validate everything coming out of the system. [They] have to check everything,” to avoid any potential issues with its usage.³⁰ Two points become immediately apparent; first, lawyers are necessary to serve as the final barrier that AI-produced work must overcome before it can be sent to clients; and, second, as with all forms of technology, AI will pose its own unique risks.

Section 3 – Risks, Competency and the Unauthorized Practice of Law

One potential risk associated with AI are hallucinations, which in this context, refers to mistakes in AI-generated text that are “semantically or syntactically plausible but are in fact incorrect or nonsensical.”³¹ This concern stems from the underlying premise of AI, in that it is scouring the internet to provide feedback based on a submitted prompt. Two areas of concern are presented in this scenario, first, the submitted prompt, or issue, must be specific and on point, and, second, as we have seen the internet is rife with misinformation that will ultimately influence AI’s ability.³² After all, fundamentally, AI does not know what it does not know, thus, as the aptly named hallucination implies, it is visualizing something that is not actually there.

However, the solution to this problem seems to be trial by users, supervision by lawyers, and a hopeful sentiment that AI will not be corrupted by misinformation like some believe has already happened to social media.³³ Since lawyers who decide to use AI will act as final arbiters, these concerns demand lawyer competency as required by the Model Rules of Professional Conduct, which incorporates AI in its broad “relevant technology” language.³⁴ Summarily, lawyers must maintain the “requisite knowledge and skill,” while remaining current on the benefits and risks associated with AI.³⁵ This new liability may be proactively dealt with by creating and implementing strict guidelines for its usage by firm employees, including a revisionary system that certifies substantive quality.

The use of AI also raises significant privacy concerns, as it necessitates uploading what could be privileged client information to third parties platforms.³⁶ Information may be stored for extended periods of time, increasing the risk of unauthorized access and potential breaches.³⁷ This concern directly implicates the attorney-client privilege, a foundational aspect of legal representation.³⁸ Several countries have begun to address the protection of personal data, from the European Union’s AI Act, to Italy’s Data Protection Agency, and the United States Office of Science and Technology Policy (“WHOSTP”).³⁹ In fact, Italy recently instituted a temporary ban on ChatGPT, demanding additional information regarding personal data collection.⁴⁰ Importantly, this type of governmental guidance has been requested

by AI companies, specifically from OpenAI's (developer of ChatGPT) CEO.⁴¹ Until further oversight is implemented, lawyers are in the perfect position to address this concern with clients, and in doing so, satisfy ABA requirements. To this end, law firms that currently implement AI, do so by not using a client's personal information.⁴² Due diligence further requires firms that utilize AI to implement strong data privacy safeguards, including scrutinizing AI platforms before utilizing their service,⁴³ informing firm personnel of strict guidelines, data encryption, and giving clients the option to decline the use of AI services.⁴⁴ In fact, the latter may be used as a way to gain clients by advocating the non-use of AI platforms for clients who may prefer the lack of any third-party knowledge.

Lastly, to what extent is the use of AI an unauthorized practice of law? Model Rule 5.5(b) explains what the ABA defines as the unauthorized practice of law,⁴⁵ but courts have yet to really establish legal precedent in the area of AI's usage. However, several recent decisions are informative. In the case of *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, the court held that document review was not per se within North Carolina's definition of practicing law.⁴⁶ Specifically, the court explained that practicing law includes exercising "at least a modicum of independent legal judgment."⁴⁷ Furthermore, in *Janson v. LegalZoom.com, Inc.*, the court held that filling out blank forms – like those provided on websites like LegalZoom – is not, "in and of itself the unauthorized practice of law."⁴⁸ However, it is worth noting that this case was ultimately settled after the court denied the defendant's summary judgment motion because LegalZoom did more than simply provide templates, it essentially took control, turning its "self-help kit" into more of a "we'll do it for you" system.⁴⁹

Furthermore, the upcoming ruling in *Gonzalez v. Google LLC* has the potential to impact the use of AI in legal settings, specifically in relation to Section 230 of the Communications Decency Act.⁵⁰ Depending on the Supreme Court's decision, online platforms may become more exposed to legal liability for user-generated content. Alternatively, if the broad interpretation of Section 230 immunity is upheld, it would provide a legal foundation for the continued advancement and implementation of AI-powered systems in legal settings. The core argument of this case is that certain websites (specifically, Google), through algorithms actively partake in the dissemination of information when they recommend content to their users.⁵¹ Surely, if search engines do this now, AI like ChatGPT is even more exposed to liability, thus this decision will play a key role in that future determination.⁵²

Conclusion

AI's proliferation may be scary for lawyers and certainly for law students (as some may fear a shrinking job pool), however there are certain qualities that AI cannot attain – at least not yet. Those qualities are what make humans, human; and, what makes lawyers necessary. Therefore, the lawyers who perform well in creativity, judgment, empathy, and adaptability will remain highly sought after.⁵³ In fact, some firms have recently focused on this notion, and have begun to change the manner in which they select employees.⁵⁴ It is as though they have realized that this integration is the future of the profession, or perhaps they have perceived a competitive advantage. After all, it is easy to imagine a situation where lawyers and clients who utilize AI will be in a better position than lawyers and clients who do not.

Ultimately, the role of AI, much like any other technological advancement, has its own advantages and disadvantages. It is an exciting opportunity for skilled attorneys to utilize technology to enhance their work and better serve clients, thus, if employed with the proper expertise, it can undoubtedly serve as a valuable tool. The legal industry can improve access to justice, increase efficiency, generate greater profits, and better serve clients. However, if implemented carelessly, it may end up doing more harm than good. The key is to recognize the limitations of AI and to use it as a complementary tool to lawyer expertise, rather than a replacement. The tide has already begun shifting, and due to its wide reach, lawyers can now receive CLE credit from attending sessions discussing the implications of AI in the law, with some states even mandating this training.⁵⁵

While this episode of the Twilight Zone is only just beginning, so long as the plaintiffs, defendants, judges and juries are humans, there will always be a need for human lawyers. The assimilation of AI and the legal field will continue the latter's growth, with firms that take advantage of the benefits of AI leading the charge as they are able to offer affordable and better legal services,⁵⁶ which thus far, has led to growth and success of the legal field.⁵⁷

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1. See Eric Scigliano, Zoom Court Is Changing How Justice Is Served, The Atlantic (Apr. 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/> [<https://perma.cc/3RSR-EP4M>] (discussing the willingness of U.S. courts to conduct online hearings and the term "virtual justice"); see also Patrick Davis, A (Very) Brief history of Legal

Technology, Smokeball (Jan. 29, 2020), <https://www.smokeball.com/blog/a-brief-history-of-legal-technology> [<https://perma.cc/CWS3-RL9Y>] (explaining the evolution of the legal profession because of its assimilation with technology – from fax machines, to computers, emails, case management systems, and legal databases); see also Andrew Perlman, The Implications of ChatGPT for Legal Services and Society, *The Practice* (March 2023), <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/> [<https://perma.cc/8ABF-KA6G>] (arguing that over the last 30 years, there have been many moments that reinforced technology’s ability to change how “we access and generate information”).

2. See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *Fordham L. Rev.* 3041, 3042 (2014) (cautioning the legal profession of the new challenges posed by machine intelligence, which will pose a threat for the coming decades); see also Michelle Toh, 300 Million Jobs Could Be Affected by Latest Wave of AI, Says Goldman Sachs, *CNN Business* (Mar. 29, 2023), <https://www.cnn.com/2023/03/29/tech/chatgpt-ai-automation-jobs-impact-intl-hnk/index.html> [<https://perma.cc/HE5D-KH4C>] (“300 million full-time jobs around the world could be automated in some way . . . according to Goldman Sachs economists . . . white-collar workers are seen to be more at risk than manual laborers. Administrative workers and lawyers are expected to be most affected . . .”); see also Steve Lohr, *A.I. Is Coming for Lawyers, Again*, *N.Y. Times* (Apr. 10, 2023), <https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html> [<https://perma.cc/2XBT-MRXF>] (“Goldman Sachs, estimated that 44 percent of legal work could be automated.”).
3. Megan Cerullo, *AI-Powered “Robot” Lawyer Won’t Argue in Court After Jail Threats*, *CBS News* (Jan. 26, 2023), <https://www.cbsnews.com/news/robot-lawyer-wont-argue-court-jail-threats-do-not-pay/> [<https://perma.cc/3FGA-QHN2>] (“‘[R]obot’ lawyer powered by artificial intelligence was set to be the first of its kind to help a defendant fight a traffic ticket in court’ . . . ‘State Bar prosecutors’ threatened the man behind the company that created the chatbot with prison time.”); see Stephanie Pacheco, *ANALYSIS: DoNotPay Lawsuits: A Setback for Justice Initiatives?*, *Bloomberg L.* (Mar. 28, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-donotpay-lawsuits-a-setback-for-justice-initiatives> [<https://perma.cc/A9A4-MXDN>] (describing three separate lawsuits filed against DoNotPay, in different states, arguing theories of the unauthorized practice of law and deceptive practices).

4. Samantha Murphy Kelly, 5 Jaw-Dropping Things GPT-4 Can Do That ChatGPT Couldn't, CNN Business (Mar. 16, 2023), <https://www.cnn.com/2023/03/16/tech/gpt-4-use-cases/index.html> [<https://perma.cc/J4ZV-DGKD>] (discussing the "human-level performance" on several professional exams, including the bar exam, LSAT, GRE, and SAT).
5. See Victor Ordonez, Taylor Dunn & Eric Noll, OpenAI CEO Sam Altman Says AI Will Reshape Society, Acknowledges Risks: 'A Little Bit Scared of This', abc News (Mar. 16, 2023), <https://abcnews.go.com/Technology/openai-ceo-sam-altman-ai-reshape-society-acknowledges/story?id=97897122> [<https://perma.cc/DWK9-HDVQ>] ("Altman was emphatic that OpenAI needs both regulators and society to be as involved as possible with the rollout of ChatGPT – insisting that feedback as will help deter the potential negative consequences that technology could have on humanity. He added that he is in 'regular contact' with government officials."); see also Tom Huddleston Jr., Elon Musk Wants to Pause 'Dangerous' A.I. Development. Bill Gates Disagrees – and He's Not the Only One, CNBC (Apr. 6, 2023), <https://www.cnbc.com/2023/04/06/bill-gates-ai-developers-push-back-against-musk-wozniak-open-letter.html> [<https://perma.cc/8VKZ-V98C>] ("AI developers, prominent A.I. ethicists and even Microsoft co-founder Bill Gates have spent the past week defending their work . . . in response to an open letter published last week by the Future of Life Institute, signed by Tesla CEO Elon Musk and Apple co-founder Steve Wozniak, calling for a six-month halt to work on AI systems that can compete with human-level intelligence . . . express[ing] fear that the 'dangerous race' to develop programs like OpenAI's ChatGPT, Microsoft's Bing AI chatbot and Alphabet's Bard could have negative consequences if left unchecked, from widespread disinformation to the ceding of human jobs to machines."); see also Daniel J. Felz, Kimberly K. Peretti & Alysa Austin, Privacy, Cyber & Data Strategy Advisory: AI Regulation in the U.S.: What's Coming, and What Companies Need to Do in 2023, Alston & Bird (Dec. 9, 2022), <https://www.alston.com/en/insights/publications/2022/12/ai-regulation-in-the-us> [<https://perma.cc/AUV2-HTCJ>] (explaining that the FTC has increased its focus on AI regulation).
6. Demographics, ABA Profile of the Legal Pro. 2022, <https://www.abalegalprofile.com/demographics.php> [<https://perma.cc/HAS8-5EVU>] (detailing the continued growth of the legal profession and estimating the number of active lawyers to be 1,327,010 as of January 1, 2022); Press Release, U.S. Census Bureau, Census Bureau Projects U.S. and World Populations on New Year's Day (Dec. 29, 2022), <https://www.census.gov/newsroom/press-releases/2022/new-years-day->

population.html [<https://perma.cc/H8EW-SCJL>] (estimating the U.S. population at 334,233,854 on January 1, 2023).

7. Priyanka Prakash, Nolo Review: Pros, Cons, and Best Alternatives, Fundera (Oct. 14, 2020), <https://www.fundera.com/blog/nolo-reviews> [<https://perma.cc/YY8M-SNDW>].
8. Priyanka Prakash, LegalZoom Review: Pros, Cons, and Best Alternatives, Fundera (May 6, 2021), <https://www.fundera.com/blog/legalzoom-reviews> [<https://perma.cc/9K55-7MF2>].
9. See Caroline Shipman, Unauthorized Practice of Law Claims Against LegalZoom—Who Do These Lawsuits Protect, and is the Rule Outdated?, 32 Geo. J. Legal Ethics 940, 952 (2019) (discussing the loss of the attorney-client relationship).
10. See Milan Markovic, Rise of Robot Lawyers?, 61 Ariz. L. Rev. 325, 346 (2019) (arguing attorneys serve as gatekeepers, sometimes resorting to “shaming and persuading clients and would-be clients ‘that they are damned fools and should stop.’”); see also Raymond H. Brescia, Walter McCarthy, Ashley McDonald, Kellan Potts & Cassandra Rivais, Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice, 78 Alb. L. Rev. 553, 575 (2015) (suggesting that clients can make the separation between an internet advice and that of a lawyer-client relationship).
11. See Cynthia E. Nance, The Value of a Law Degree, 96 Iowa L. Rev. 1629, 1646 (2011) (arguing the services lawyers provide are more important now than in any other time in American history – the greater the legal issue the greater the need for lawyers); see also Pacheco, *supra* note 3 (characterizing the protectionist nature of the legal profession).
12. See Matt Horwitz, Nolo vs LegalZoom, LLC University (Nov. 15, 2022), <https://www.llcuniversity.com/nolo-vs-legalzoom/> (discussing the price breakdowns of Nolo and LegalZoom, ranging from \$50-\$350 per package for LLC formations).
13. To streamline the legal services process and provide clients with a more user-friendly experience, a law firm may offer a website with intuitive navigation options that allow clients to select and input relevant details for their specific legal needs. A section designated for simple or routine legal services could include a variety of fields of law in which the firm specialized, with corresponding templates that generate necessary legal documents. before finalizing and sending the documents to clients, legal professionals will meticulously review them to ensure their accuracy and effectiveness.
14. See Lohr, *supra* note 2 (“Lawyers at big firms have seen significant time savings for certain jobs and view the technology as a tool to make teams of lawyers and paralegals more productive. Sole practitioners see the

technology more as a partner in practice.”). Bigger law firms may find the competitive advantage, increased efficiency and the opportunity to prioritize working with high-paying clients. As is true for smaller firms and solo practitioners, who may also benefit from investing in a business model that leverages online platforms to grow their pool of potential clients.

15. While LegalZoom now offers clients the ability to speak with attorneys that partner with their platform, it is initially a cheap service that turns pricey with add-ons. Furthermore, their transition to including attorneys speaks further to the desire to speak with human lawyers.
16. Neil Patel, *Foot-In-The-Door Technique: How to Get People to Seamlessly Take Action*, *Forbes* (Oct. 13, 2014), <https://www.forbes.com/sites/neilpatel/2014/10/13/foot-in-the-door-technique-how-to-get-people-to-take-seamlessly-take-action/?sh=2dc47b4b7d9e> [<https://perma.cc/HC7K-BBZA>] (explaining the foot-in-the-door technique as a method of persuasion, by beginning with small requests, a client is more willing to respond to bigger requests). This is essentially the same tactic utilized by LegalZoom with an initially cheap service that turns pricey with add-ons, however, it may be utilized by attorneys to offer simpler services at lower costs, while offering additional services if the client desires.
17. See Nicole Yamane, *Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands*, 33 *Geo. J. Legal Ethics* 877, 882 (2020) (suggesting that the use of artificial intelligence may lead to increased profits for lawyers because of clients will return after receiving quick and reliable service, while firms continue to take on even more clients).
18. See Laura K. Justiss, *A Survey of Electronic Research Alternatives to LexisNexis and Westlaw in Law Firms*, 103 *L. Libr. J.* 71, 71 (2011) (explaining that most students have little knowledge of other electronic services used by practicing attorneys besides LexisNexis and Westlaw). In 2020, LexisNexis launched Lexis+, an AI-backed legal research solution.
19. See Yamane, *supra* note 18, at 880 (discussing the key differences between ROSS and other legal databases). The author summarizes that “[t]he main way ROSS Intelligence differs from older legal research platforms like LexisNexis and Westlaw is in its ability to generate search results from natural language queries. Westlaw and Lexis’ standard functions are only capable of generating search results based on keywords or Boolean searches. Boolean searches are those that combine words and operators like ‘AND,’ ‘OR,’ and ‘NOT’ to limit search results. Thus, when searching for cases on ROSS Intelligence, one would be able to simply enter a phrase or question like they would into Google’s search bar. ROSS Intelligence claims

that natural language processing ('NLP') will improve search results because a "query optimized with the help of NLP will surface the most accurate and relevant decisions because the system was assessed with the prior queries that yielded the best legal search results." Furthermore, ROSS can produce legal memoranda and evaluate already written memoranda. See also ROSS Intelligence: Revolutionizing the Practice of Law, Inv. Ont. (Apr. 23, 2019), <https://www.investontario.ca/spotlights/ross-intelligence-revolutionizing-practice-law#:~:text=Toronto%20and%20Silicon%20Valley%2Dbased,collection%20of%20cases%20needed%20to> [<https://perma.cc/MG82-AJWU>].

20. See Drew Simshaw, Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law, 70 Hastings L. J. 173, 194 (2019) (discussing the ability of machine intelligence to uncover precedent and guide lawyers about the use of precedent).
21. Casetext, <https://casetext.com/> [<https://perma.cc/FW5Y-4425>].
22. Id.
23. Id.
24. See supra Section 1. One of the more likely arguments for what AI will do in the legal field relates to its ability to automate the tedious and repetitive tasks that have traditionally been delegated to non-lawyer staff. By incorporating AI, law firms can free up valuable resources to focus on other important tasks, such as growing their business and enhancing client experiences. As a result, firms can streamline their operations, reduce costs, and increase efficiency without sacrificing quality. Although the integration of AI may lead to a reduction in non-lawyer staff, it also presents a unique opportunity for law firms to invest in a highly skilled workforce that is proficient in both legal practice and technological innovation.
25. Lance Eliot, The No-Nonsense Comprehensive Compelling Case For Why Lawyers Need To Know About AI And The Law, Forbes (Oct. 21, 2022), <https://www.forbes.com/sites/lanceeliot/2022/10/21/the-no-nonsense-comprehensive-compelling-case-for-why-lawyers-need-to-know-about-ai-and-the-law/?sh=5945ba285559> [<https://perma.cc/PLM5-6TST>].
26. Nicolas Economou, Artificial Intelligence and the Law: the ABA's Important and Timely Contribution, ABA (Aug. 26, 2019), https://www.americanbar.org/groups/business_law/publications/committe_e_newsletters/legal_analytics/2019/201908/ai_law/ [<https://perma.cc/9J2M-ACCZ>].
27. Amada Robert, ABA House Adopts 3 Guidelines to Improve Use of Artificial Intelligence, ABA J. (Feb. 6, 2023),

<https://www.abajournal.com/web/article/aba-house-adopts-3-guidelines-to-improve-use-of-artificial-intelligence> [<https://perma.cc/74BB-2N48>] (pointing out that Resolution 604 also calls on organizations that develop AI to ensure their “products, services, systems and capabilities are subject to human authority, oversight and control.”). Therefore, there is a new source of liability that must be proactively addressed, namely lawyers passing off AI-generated work as their own, without proper review but still billing for it. This will expose the firm to liability, so they are encouraged to set clear directives and disciplinary measures for violators as the consequences may be quite damaging.

28. David Wakeling is the head of Allen & Overy’s London office’s Market Innovations Group, a group of lawyers and developers who are focused on the creation of innovative solutions for clients to meet large-scale legal and regulatory challenges. See People, Allen & Overy, <https://www.allenoverly.com/en-gb/global/people/David-Wakeling> [<https://perma.cc/8CBC-SHXD>].
29. Chris Stokel-Walker, Generative AI Is Coming For the Lawyers, WIRED (Feb. 21, 2023), <https://www.wired.com/story/chatgpt-generative-ai-is-coming-for-the-lawyers/> [<https://perma.cc/J79F-L2JQ>].
30. Id.
31. Craig S. Smith, Hallucinations Could Blunt ChatGPT’s Success, IEEE Spectrum (Mar. 13, 2023), <https://spectrum.ieee.org/ai-hallucination> [<https://perma.cc/R7AB-G6S3>] (explaining the concept of AI hallucinations).
32. See Zachary B. Wolf, AI Can Be Racist, Sexist and Creepy. What Should We Do About It?, CNN Politics (Mar. 18, 2023), <https://www.cnn.com/2023/03/18/politics/ai-chatgpt-racist-what-matters/index.html> [<https://perma.cc/WWZ5-KZPV>] (explaining that because AI learns by example, if the examples contain biases and discriminatory tendencies, this will create similar outputs from the AI).
33. See Craig S. Smith, GPT-4 Creator Ilya Sutskever on AI Hallucinations and AI Democracy, Forbes (Mar. 15, 2023), <https://www.forbes.com/sites/craigsmith/2023/03/15/gpt-4-creator-ilya-sutskever-on-ai-hallucinations-and-ai-democracy/?sh=2d3bc4711218> [<https://perma.cc/PBQ4-KNQ6>] (“Now on the point of hallucinations, it has a propensity of making stuff up from time to time, and that’s something that also greatly limits their usefulness. But I’m quite hopeful that by simply improving this subsequent reinforcement learning from human feedback step, we can teach it to not hallucinate. Now you could say is it really going to learn? My answer is, let’s find out.”); see also Bolane Olaniran & Indi Williams, Social Media Effects: Hijacking Democracy and Civility in Civic Engagement, 27 Platforms, Protests, & Challenge of Networked Democracy

77, 77 (2020) (explaining that social media holds us hostage with fake news and propaganda).

34. See Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 2012) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); see also Model Rules of Pro. Conduct r. 1.1 cmt. 8 (Am. Bar Ass'n 2012) ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").
35. Model Rules of Pro. Conduct r. 1.1 cmt. 8, *supra* note 35.
36. See Mark Van Rijmenam, Privacy In The Age of AI: Risks, Challenges And Solutions, *The Digital Speaker* (Feb. 17, 2023), <https://www.thedigitalspeaker.com/privacy-age-ai-risks-challenges-solutions/> [<https://perma.cc/Q6SK-9NDX>] (explaining that AI platforms require vast amounts of data (that can be personal) and it is susceptible to falling into the wrong hands – such that it may be used for identity theft or cyberbullying); see also Peter Karalis, ANALYSIS: As AI Meets Privacy, States' Answers Raise Questions, *Bloomberg L.* (Nov. 13, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-as-ai-meets-privacy-states-answers-raise-questions> [<https://perma.cc/XT2U-TYGS>] ("For privacy regulators, one area of concern lies in the massive pools of personal data that machine learning often requires.").
37. See Tiffany Hsu & Stuart A. Thompson, Disinformation Researchers Raise Alarms About A.I. Chatbots, *N.Y. Times* (Feb. 13, 2023), <https://www.nytimes.com/2023/02/08/technology/ai-chatbots-disinformation.html> [<https://perma.cc/XGP5-HBAS>] ("Check Point Research, a group providing cyber threat intelligence, found that cybercriminals were already experimenting with using ChatGPT to create malware. While hacking typically requires a high level of programming knowledge, ChatGPT was giving novice programmers a leg up, said Mark Ostrowski, the head of engineering for Check Point").
38. Model Rules of Pro. Conduct r. 1.6 (Am. Bar Ass'n 2015) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."); see Jackie Unger, Maintaining the Privilege: A Refresher on Important Aspects of the Attorney-Client Privilege, *ABA* (Oct. 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/1

0/01_unger/ [<https://perma.cc/6S7L-D3NP>] (“The attorney-client privilege is the backbone of the legal profession.”).

39. See Data Privacy, White House, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/data-privacy-2/> [<https://perma.cc/882S-DVN8>] (suggesting that the United States is interested in protecting citizens from abusive data practices and giving users control over how the data is used); see also Marek Swierczynski, AI and the Work of Lawyers in the Light of the Council of Europe Guidelines, in Legal Tech 335, 341 (Dariusz Szostek & Mariusz Załucki eds., 2022) (describing the Council of Europe as an experienced international organization that can act quickly and efficiently in response to disturbing new technologies). The ABA recommends a global certification mark for AI systems that are evaluated and pass some set. guidelines. See Matt Reynolds, Even With AI Certification Initiatives, Lawyers Need More Schooling on Tech, ABA (Mar. 4, 2022), <https://www.americanbar.org/groups/journal/articles/2022/even-with-ai-certification-initiatives-lawyers-need-more-school/> [<https://perma.cc/327A-D5J>].
40. Adam Satariano, ChatGPT Is Banned in Italy Over Privacy Concerns, N.Y. Times (Mar. 31, 2023), <https://www.nytimes.com/2023/03/31/technology/chatgpt-italy-ban.html> [<https://perma.cc/89MU-R42E>] (“ChatGPT was temporarily banned in Italy on Friday, the first known instance of the chatbot being blocked by a government order. Italy’s data protection authority said OpenAI . . . unlawfully collected personal data from users and did not have an age-verification system in place to prevent minors from being exposed to illicit material.”).
41. See Jyoti Mann, Sam Altman Admits OpenAI is ‘A Little Bit Scared’ of ChatGPT and Says It Will ‘Eliminate’ Many Jobs, Yahoo!Sports (Mar. 18, 2023), <https://sports.yahoo.com/sam-altman-admits-openai-little-165000747.html> [<https://perma.cc/6E49-2MJX>] (“Altman expressed support for regulating AI in the tweets and said rules were ‘critical,’ and that society needed time to adjust to ‘something so big.’”); see also Huddleston Jr., *supra* note 5 (discussing a letter seeking a six-month halt to work on AI systems by leaders of the tech industry, which now has more than 13,500 signatures).
42. Stokel-Walker, *supra* note 30 (explaining that firms are being “extremely careful about client data . . . At the moment we’re using it as a non-personal data, non-client data system to save time on research or drafting, or preparing a plan for slides—that kind of stuff.”).

43. Firms should be asking about the business connections of those AI platforms (specifically marketing partners), about their data storage, what safeguards they have in place, and about corporate owners.
44. Firms should present this option when a client signs a retainer agreement, giving them the option to opt out of AI benefits due to their strong privacy concerns, and alternatively allow clients to consent to this, while still utilizing anonymous methods of AI implementation.
45. See Model Rules of Pro. Conduct r. 5.5 (Am. Bar Ass'n 2019) ("A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.").
46. *Lola v. Skadden*, 620 F. App'x 37, 37 (2d Cir. 2015). This case concerned a lawyer, Lola, who performed document review for the law firm Skadden on an hourly basis. The plaintiff lawyer resided in North Carolina and under the law of that state he was not engaged in the practice of law for Skadden. This was central to the plaintiff's claim because he sought overtime wages under the Fair Labor Standards Act, which lawyers are exempt from, thus in accordance with the Act, the firm had to pay him one and one-half times the regular rate in excess of forty hours a week.
47. *Id.* at 44 ("The ethics opinion strongly suggests that inherent in the definition of "practice of law" in North Carolina is the exercise of at least a modicum of independent legal judgment.").
48. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064 (W. Dist. Mo. 2010) ("While stating that it is not a 'law firm' (yet 'provide[s] self-help services'), LegalZoom reassures consumers that 'we'll prepare your legal documents,' and that 'LegalZoom takes over' once customers 'answer a few simple online questions.'").
49. *Id.* ("It is the second function of LegalZoom's website that goes beyond mere general instruction. LegalZoom's internet portal is not like the 'do-it-yourself' divorce kit in *Thompson*. Rather, LegalZoom's internet portal service is based on the opposite notion: we'll do it for you.").
50. See Brian Fung & Tierney Sneed, Supreme Court Hears Gonzalez v. Google Case Against Big Tech, CNN Business (Feb. 21, 2023), <https://www.cnn.com/business/live-news/supreme-court-gonzalez-v-google-2-21-23/index.html> [<https://perma.cc/Y58F-MUPV>].
51. *Id.*
52. Such a holding would place liability on the internet companies, including AI companies in the future, when they actively try to recommend content.

Some have said that there will be nonstop lawsuits if Section 230 is restricted. See Fung & Sneed, *supra* note 47.

53. See Anthony E. Davis, *The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence*, ABA (Oct. 2, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/the-future-law-firms-and-lawyers-the-age-artificial-intelligence/ [<https://perma.cc/U466-QNWB>]. (“To take a simple example: suppose a predictive analytics tool tells the user that in a certain case before an identified judge in a particular jurisdiction, the likelihood of a successful outcome is 60%. That prediction does not actually tell the lawyer or client what the client should actually do—that is, whether the client should proceed or not. That takes a lawyer using his own judgment to advise the client, using the lawyer’s understanding of the client’s needs (empathy), on which path to choose.”).
54. *Id.* (“Notably, the London-based global firm Linklaters recently announced the creation of a special Legal Ops “track” for lawyers skilled in precisely this way.¹² Further, O’Melveny & Myers recently announced that in order to be considered for a summer associate position (the usual initial track for prospective associates at the firm), applicants would have to participate in an AI-based online computer game designed, in essence, to test their teambuilding (i.e., empathy) skills.”).
55. See *Artificial Intelligence Law 2023*, PLI, <https://www.pli.edu/programs/A/artificial-intelligence-law> [<https://perma.cc/5FN2-BAVX>]. See also Victor Li, *Florida Supreme Court Approves Mandatory Tech CLE Classes for Lawyers*, *ABA Journal* (Sept. 30, 2016), https://www.abajournal.com/news/article/florida_supreme_court_approves_mandatory_tech_cles_for_lawyers [<https://perma.cc/HT5H-4JZB>]. Several other states have likewise adopted mandatory CLE curriculum, including New York, which now mandates CLE’s in cybersecurity, privacy and data protection. See Bob Ambrogi, *New York Becomes First State to Mandate CLE in Cybersecurity, Privacy and Data Protection*, *Law Next* (Aug. 4, 2022), <https://www.lawnext.com/2022/08/new-york-becomes-first-state-to-mandate-cle-in-cybersecurity-privacy-and-data-protection.html> [<https://perma.cc/52TQ-G4KG>].
56. See Sara Kugel, *AI Experts on Whether You Should Be ‘Terrified’ of ChatGPT*, *Wtop News* (Jan. 22, 2023), <https://wtop.com/tech/2023/01/ai-experts-on-whether-you-should-be-terrified-of-chatgpt/> [<https://perma.cc/M9JP-NTJ6>] (quoting Erik Brynjolfsson, director of Stanford University’s Digital Economy Lab, “I wouldn’t be surprised 50 years from now, people looked back and say, wow, that was a really seminal set

of inventions that happened in the early 2020s. Most of the U.S. economy is knowledge and information work, and that's who's going to be most squarely affected by this," he said. "I would put people like lawyers right at the top of the list. Obviously, a lot of copywriters, screenwriters. But I like to use the word 'affected,' not 'replaced,' because I think if done right, it's not going to be AI replacing lawyers; it's going to be lawyers working with AI replacing lawyers who don't work with AI.").

57. Esther Ajao, How ChatGPT can Advance AI in the Law Industry, Tech Target (Feb. 24, 2023),

<https://www.techtarget.com/searchenterpriseai/news/365531776/How-ChatGPT-can-advance-AI-in-the-law-industry> [<https://perma.cc/6RTT-CS29>].